

European Commission

EU Competition Law

Rules Applicable to State Aid

Situation as at 29 November 2011*

COMPETITION HANDBOOKS

Brussels, 2011

EU Competition law

Rules applicable to State Aid

Situation as at 29 November 2011

* Please note that for the examination of unlawful aid it may be necessary to apply old frameworks or guidelines, since the Commission should apply the compatibility rules in force at the moment the aid was granted.

This collection contains the legislation applicable to manufacturing industry and services. It does not contain the specific rules applicable to agriculture¹ and fisheries².

The online version of this handbook is available on the Competition website
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¹ http://ec.europa.eu/agriculture/stateaid/leg/index_en.htm

² http://ec.europa.eu/fisheries/legislation/state_aid_en.htm

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A. TREATY PROVISIONS ON STATE AID

A. TREATY PROVISIONS ON STATE AID

Table of changes to the numbering of articles following the entry into force of the Treaty of Lisbon on 1 December 2009: <http://ec.europa.eu/competition/information/treaty.html>

Core provisions of the Treaty on the Functioning of the European Union (TFEU)

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.

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.

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.

Other provisions

Article 3 Treaty of the European Union

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 3 TFEU

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;
 - (c) economic, social and territorial cohesion;
 - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
 - (e) environment;
 - (f) consumer protection;
 - (g) transport;
 - (h) trans-European networks;
 - (i) energy;
 - (j) area of freedom, security and justice;
 - (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5 TFEU

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6 TFEU

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.

Article 14 TFEU
(ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 42 TFEU
(ex Article 36 TEC)

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council, on a proposal from the Commission, may authorise the granting of aid:

- (a) for the protection of enterprises handicapped by structural or natural conditions;
- (b) within the framework of economic development programmes.

Article 50 TFEU
(ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(...)

- (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 93 TFEU
(ex Article 73 TEC)

Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 106 TFEU
(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Article 119 TFEU
(ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.
2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.
3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Article 346 TFEU
(ex Article 296 TEC)

1. The provisions of the Treaties shall not preclude the application of the following rules:
 - (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
 - (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

Annexes

PROTOCOL (No 26)

ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,

WISHING to emphasise the importance of services of general interest,

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

PROTOCOL (No 27)

ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

B. GENERAL PROCEDURAL RULES

I

(Acts whose publication is obligatory)

**COUNCIL REGULATION (EC) No 659/1999
of 22 March 1999**

laying down detailed rules for the application of Article 93 of the EC Treaty

THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

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

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

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

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

(4) Whereas, in order to ensure legal certainty, it is appropriate to define the circumstances under which aid is to be considered as existing aid; whereas the

completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; whereas, following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid;

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

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

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

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

⁽¹⁾ OJ C 116, 16. 4. 1998, p. 13.

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

⁽³⁾ 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

Amendment of Article 1(b)(i) of Council Regulation no 659/99 by Act of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L 236, 23.09.2003, p. 345

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

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

Amendment of Article 1(b)(i) of Council Regulation no 659/99 by Council Regulation (EC) No 1791/2006 of 20 November 2006, by reason of the accession of Bulgaria and Romania, OJ L 363, 20.12.2006, p. 27

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

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

**COMMISSION REGULATION (EC) No 794/2004****of 21 april 2004****implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

After consulting the Advisory Committee on State Aid,

Whereas:

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

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

▼B

tervailing measures and under Article XVI of GATT 1994, adopted on 21 July 1995 is not covered by this Regulation.

- (7) The information required in the annual reports is intended to enable the Commission to monitor overall aid levels and to form a general view of the effects of different types of aid on competition. To this end, the Commission may also request Member States to provide, on an ad hoc basis, additional data for selected topics. The choice of subject matter should be discussed in advance with Member States.
- (8) The annual reporting exercise does not cover the information, which may be necessary in order to verify that particular aid measures respect Community law. The Commission should therefore retain the right to seek undertakings from Member States, or to attach to decisions conditions requiring the provision of additional information.
- (9) It should be specified that time-limits for the purposes of Regulation (EC) No 659/1999 should be calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits ⁽¹⁾, as supplemented by the specific rules set out in this Regulation. In particular, it is necessary to identify the events, which determine the starting point for time-limits applicable in State aid procedures. The rules set out in this Regulation should apply to pre-existing time-limits which will continue to run after the entry into force of this Regulation.
- (10) The purpose of recovery is to re-establish the situation existing before aid was unlawfully granted. To ensure equal treatment, the advantage should be measured objectively from the moment when the aid is available to the beneficiary undertaking, independently of the outcome of any commercial decisions subsequently made by that undertaking.
- (11) In accordance with general financial practice it is appropriate to fix the recovery interest rate as an annual percentage rate.
- (12) The volume and frequency of transactions between banks results in an interest rate that is consistently measurable and statistically significant, and should therefore form the basis of the recovery interest rate. The inter-bank swap rate should, however, be adjusted in order to reflect general levels of increased commercial risk outside the banking sector. On the basis of the information on inter-bank swap rates the Commission should establish a single recovery interest rate for each Member State. In the interest of legal certainty and equal treatment, it is appropriate to fix the precise method by which the interest rate should be calculated, and to provide for the publication of the recovery interest rate applicable at any given moment, as well as relevant previously applicable rates.
- (13) A State aid grant may be deemed to reduce a beneficiary undertaking's medium-term financing requirements. For these purposes, and in line with general financial practice, the medium-term may be defined as five years. The recovery interest rate should therefore correspond to an annual percentage rate fixed for five years.
- (14) Given the objective of restoring the situation existing before the aid was unlawfully granted, and in accordance with general financial practice, the recovery interest rate to be fixed by the Commission should be annually compounded. For the same reasons, the recovery interest rate applicable in the first year of the recovery period should be applied for the first five years of

⁽¹⁾ OJ L 124, 8.6.1971, p. 1.

▼B

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

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

HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND SCOPE*Article 1***Subject matter and scope**

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

CHAPTER II

NOTIFICATIONS*Article 2***Notification forms**

Without prejudice to Member States' obligations to notify state aids in the coal sector under Commission Decision 2002/871/CE ⁽¹⁾, notifications of new aid pursuant to Article 2(1) of Regulation (EC) No 659/1999, other than those referred to in Article 4(2), shall be made on the notification form set out in Part I of Annex I to this Regulation.

Supplementary information needed for the assessment of the measure in accordance with regulations, guidelines, frameworks and other texts applicable to State aid shall be provided on the supplementary information sheets set out in Part III of Annex I.

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

▼M3*Article 3***Transmission of notifications**

1. The notification shall be transmitted to the Commission by means of the electronic validation carried out by the person designated by the Member State. Such validated notification shall be considered as sent by the Permanent Representative.
2. The Commission shall address its correspondence to the Permanent Representative of the Member State concerned, or to any other address designated by that Member State.
3. As from 1 July 2008, notifications shall be transmitted electronically via the web application State Aid Notification Interactive (SANI).

⁽¹⁾ OJ L 300, 5.11.2002, p. 42.

▼M3

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

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

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

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

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

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

▼B*Article 4***Simplified notification procedure for certain alterations to existing aid**

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

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

- (a) increases in the budget of an authorised aid scheme exceeding 20 %;
- (b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;
- (c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses;

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

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



CHAPTER III ANNUAL REPORTS

Article 5

Form and content of annual reports

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

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

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

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

Article 6

Transmission and publication of annual reports

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

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

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

Article 7

Status of annual reports

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

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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.

▼M3

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.

▼B

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

▼M3

Article 9

Method for fixing the interest rate

1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88(3) of the Treaty shall be an annual percentage rate which is fixed by the Commission in advance of each calendar year.
2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absence thereof, the yield on State bonds will be used.
3. In the absence of reliable money market or yield on stock bonds or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.

▼M3

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.

▼B*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.

▼M3

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.

▼B

CHAPTER VI

FINAL PROVISIONS*Article 12***Review**

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

*Article 13***Entry into force**

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

Chapter II shall apply only to those notifications transmitted to the Commission more than five months after the entry into force of this Regulation.

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Chapter III shall apply to annual reports covering aid granted from 1 January 2003 onwards.

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

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

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

COMMISSION REGULATION (EC) No 1125/2009**of 23 November 2009****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, as regards Part III.2, Part III.3 and Part III.7 of its Annex I**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Whereas:

(1) 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 ⁽²⁾ established compulsory comprehensive State aid notification forms.

(2) Following the adoption by the Commission of the Communication on criteria for the compatibility analysis of training State aid cases subject to individual notification ⁽³⁾ and the Communication from the Commission on criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification ⁽⁴⁾ it is necessary to modify part of the notification forms annexed to Regulation (EC) No 794/2004.

(3) Following the existence of an error it is necessary to modify a part of the notification form annexed to Regulation (EC) No 794/2004.

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

HAS ADOPTED THIS REGULATION:

Article 1

Part III.2 of Annex I to Regulation (EC) No 794/2004 is replaced by Annex I to this Regulation.

Article 2

Part III.3 of Annex I to Regulation (EC) No 794/2004 is replaced by Annex II to this Regulation.

Article 3

Part III.7a question 2.3 and Part III.7b question 2.3 of Annex I to Regulation (EC) No 794/2004 are amended in accordance with Annex III to this Regulation.

Article 4

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

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

Done at Brussels, 23 November 2009.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ L 140, 30.4.2004, p. 1.

⁽³⁾ OJ C 188, 11.8.2009, p. 1.

⁽⁴⁾ OJ C 188, 11.8.2009, p. 6.

ANNEX I

'PART III.2

SUPPLEMENTARY INFORMATION SHEET ON STATE AID FOR TRAINING

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(g) of Commission Regulation (EC) No 800/2008 ⁽¹⁾ and covered by the Criteria for the compatibility analysis of training State aid cases subject to individual notification (hereinafter "Criteria for the compatibility analysis") ⁽²⁾. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT

Aid for training may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid for training do not distort competition to an extent contrary to the common interest, but rather contribute to the common interest. This happens when the benefits of State aid in terms of positive knowledge spill-over outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

Characteristics of the notified measure

1. Please provide a brief description of the measure specifying objective(s) of the measure, aid instrument, structure/organisation of the training, beneficiaries, budget, aid amount, payment schedule, aid intensity, and eligible costs.

2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?

yes no

3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?

yes no

4. Is the aid foreseen for the maritime transport sector?

yes no

If yes, please answer the following questions:

(a) Is the trainee not an active member of the crew but a supernumerary on board?

yes no

(b) Shall the training be carried out on board of ships entered into Community registers?

yes no

5. Does the notified measure relate to:

Specific training ⁽³⁾:

yes no

⁽¹⁾ 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) (OJ L 214, 9.8.2008, p. 3).

⁽²⁾ OJ C 188, 11.8.2009, p. 1.

⁽³⁾ As defined in Article 38 of Regulation (EC) No 800/2008.

General training ⁽³⁾:

yes no

A combination of general and specific training:

yes no

Training aid given to disabled or disadvantaged workers ⁽⁴⁾:

yes no

6. Please provide a detailed description of the training project including programme, skills to be acquired, timing, number of hours, participants, organisers, budget, etc.
7. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, annual turnover, number of employees and business activities.
8. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
9. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

Objective of the aid

10. Please give a detailed description of the objectives of common interest pursued by the notified measure.

Existence of positive externalities ⁽⁵⁾

11. Please demonstrate that the training will generate positive externalities and provide the supporting documents.

The following elements may be used for the purposes of demonstrating positive externalities. Please specify those relevant for the notified measure, and provide supporting documents:

- Nature of the training
- Transferability of the skills acquired during the training
- Participants to the training

Appropriate instrument ⁽⁶⁾

12. Please explain to what extent the notified measure represents an appropriate instrument to increase training activities and provide the supporting documents.

Incentive effect and necessity of the aid ⁽⁷⁾

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State in order to prove that without the aid, i.e. in the counterfactual situation, the quantity or quality of the training activities would be smaller.

13. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary.

14. If no, specify the relevant dates:

The training project will start on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

⁽³⁾ As defined in Article 38 of Regulation (EC) No 800/2008.

⁽⁴⁾ As defined in Article 2 of Regulation (EC) No 800/2008.

⁽⁵⁾ Cf. Criteria for the compatibility analysis, Section 2.1.

⁽⁶⁾ Cf. Criteria for the compatibility analysis, Section 2.2.

⁽⁷⁾ Cf. Criteria for the compatibility analysis, Section 2.3.

15. Please provide the beneficiary's internal documents on training costs, participants, content and scheduling for two scenarios: training project with aid and training project without aid. Please explain, on the basis of this information, how State aid increases the quantity and/or quality of the planned training activities.
16. Please confirm that there is no legal obligation for the employers to provide the training type covered by the notified measure.
17. Please provide with the beneficiary's training budgets for previous years.
18. Please explain the relationship between the training programme and business activities of the aid beneficiary.

Proportionality of the aid ⁽⁸⁾

Eligible costs

Eligible costs must be calculated following Article 39 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve an increase of training activities.

19. Please specify the eligible costs foreseen for the measure
- trainers' personnel costs
 - trainers' and trainees' travel expenses, including accommodation costs
 - other current expenses such as materials and supplies directly related to the project
 - depreciation of tools and equipment, to the extent that they are used exclusively for the training project
 - cost of guidance and counselling services with regard to the training project
 - indirect costs (administrative, rent, overheads), transport and tuition costs for participants) up to the amount of the total of the other eligible costs referred to above
 - trainees' personnel costs ⁽⁹⁾.
20. Please provide a detailed calculation of the eligible costs of the notified measure ensuring that the eligible costs are limited to the part of **extra costs** necessary to achieve an increase of quality or quantity of training activities.
21. Please provide evidence that the aid is limited to the minimum, i.e. to the part of the extra costs of the training that the company cannot recover by benefiting directly from the skills acquired by its employees during the training.

Aid intensities for general training

22. Please specify the aid intensity applicable to the notified measure.
23. Is the general training under the notified measure given to disabled or disadvantaged workers?
- yes no

24. Nature of the beneficiary:

- | | | | | |
|-------------------------|--------------------------|-----|--------------------------|----|
| Large enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Medium-sized enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Small enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |

Aid intensities for specific training

25. Please specify the aid intensity applicable to the notified measure.
26. Is the specific training under the notified measure given to disabled or disadvantaged workers?
- yes no

⁽⁸⁾ Cf. Criteria for the compatibility analysis, Section 2.4.

⁽⁹⁾ 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.

27. Nature of the beneficiary

Large enterprise yes no

Medium-sized enterprise yes no

Small enterprise yes no

Analysis of the distortion of competition and trade ⁽¹⁰⁾

28. Please specify whether the beneficiary received training aid in the past and provide details on the previous aid (dates, amount of aid, and duration of training projects).

29. Please specify the annual training costs of the beneficiary (total training budget for the last three years, proportion of training costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of annual training costs and total costs covered by the aid, etc.).

30. Please specify the relevant product and geographic markets on which the beneficiary is active and on which the aid is likely to have an impact.

31. For each of these markets please provide:

— market concentration ratio,

— market share of the beneficiary,

— market shares of the other companies present in these markets.

32. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).

33. Please describe the features of the sector where the beneficiary is active (e.g. importance of the trained workforce for the business, existence of overcapacity, financing strategies of training for competitors, etc.).

34. If relevant, please provide information on the effects on trade (shift of trade flows).

CUMULATION

35. Is the aid granted under the notified measure combined with other aid?

yes no

If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

OTHER INFORMATION

36. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.

⁽¹⁰⁾ This section does not apply to measures of less than EUR 2 provided the question 10.3 in Part I of this Annex is duly completed.

ANNEX II

PART III.3

SUPPLEMENTARY INFORMATION SHEET ON STATE AID TO DISADVANTAGED AND DISABLED WORKERS

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(h) to (i) of Regulation (EC) No 800/2008 and covered by the Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification (hereinafter "Criteria for the compatibility analysis")⁽¹⁾. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT

Aid to disadvantaged and disabled workers may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid to disadvantaged and disabled workers do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of the increased net employment of targeted disabled and disadvantaged workers outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

Characteristics of the notified measure

1. Please provide a brief description of the notified measure specifying objective of the aid, aid instrument, beneficiaries, categories of workers concerned, aid amount, payment schedule, duration, aid intensity, and eligible costs.
2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?

yes no
3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?

yes no
4. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, turnover, number of employees and business activities.
5. Does the notified measure relate to:

Recruitment of disadvantaged workers⁽²⁾:

yes no

Recruitment of severely disadvantaged workers⁽³⁾:

yes no

Recruitment of disabled workers⁽⁴⁾:

yes no

⁽¹⁾ OJ C 188, 11.8.2009, p. 6.

⁽²⁾ As defined in Article 2(18) of Regulation (EC) No 800/2008.

⁽³⁾ As defined in Article 2(19) of Regulation (EC) No 800/2008.

⁽⁴⁾ As defined in Article 2(20) of Regulation (EC) No 800/2008.

6. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
7. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

Objective of the aid

8. Please give a detailed description of the objectives of common interest pursued by the notified measure.
- Equity objective of common interest ⁽⁵⁾
9. Please demonstrate that the notified measure will lead to a net increase of employment of the targeted disabled and disadvantaged workers and quantify the increase.
10. The following elements may be used for the purposes to demonstrate that the notified measure contributes to an equity objective of common interest. Please specify those relevant for the notified measure, and provide supporting documents:
- Number and categories of workers concerned by the measure
 - Employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking(s) concerned
 - Unemployment rates for the categories of workers concerned by the measure on the national and/or regional level.

Appropriate instrument ⁽⁶⁾

11. Please explain to what extent the notified measure represents an appropriate instrument to increase the employment of disadvantaged and/or disabled workers and provide the supporting documents.

Incentive effect and necessity of the aid ⁽⁷⁾

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State proving that the wage subsidy is only paid for a disadvantaged or disabled worker in a firm, where the recruitment would have not occurred without the aid.

12. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?
- yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary to increase a net employment of disabled or disadvantaged workers.

13. If no, specify the relevant dates:

The employment commenced on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

14. Does the recruitment lead to an increase, by comparison to a situation without aid, of number of disadvantaged or disabled workers in the undertaking(s) concerned?
- yes no
15. If not, have the post or posts 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?
- yes no

⁽⁵⁾ Cf. Criteria for the compatibility analysis, Section 2.1.

⁽⁶⁾ Cf. Criteria for the compatibility analysis, Section 2.2.

⁽⁷⁾ Cf. Criteria for the compatibility analysis, Section 2.3.

16. Please describe any existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies.

Proportionality of the aid ⁽⁸⁾

Eligible costs

Eligible costs must be calculated following Articles 40 and 41 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve a net increase of disadvantaged or disabled workers employed.

17. Which are the eligible costs foreseen under the notified measure?

- gross wage, before tax
- compulsory contributions, such as social security charges
- child care and parent care costs.

18. Please provide a detailed calculation of the eligible costs and the period covered ⁽⁹⁾ by the notified measure ensuring that the eligible costs are limited to the costs necessary to achieve a net increase of employment of the targeted categories of disadvantaged or disabled workers.

19. Please provide evidence that the aid is limited to the minimum, i.e. the aid amount does not exceed the net additional costs of employing the targeted categories of disadvantaged or disabled workers compared to the costs of employing workers who are not disadvantaged/disabled.

Aid intensities for disadvantaged workers

20. Please specify the aid intensity applicable to the notified measure.

Aid intensities for disabled workers

21. Please specify the aid intensity applicable to the notified measure.

Analysis of the distortion of competition and trade ⁽¹⁰⁾

22. Please provide information on the aid amount, payment schedule and aid instrument.

23. Please specify whether the beneficiary received aid for disadvantaged or disabled workers in the past and provide details on the previous aid measures (dates, amount of aid, categories and number of workers concerned, and duration of wage subsidies).

24. Please specify the employment costs of the beneficiary (total employment costs, employment costs of targeted disabled and disadvantaged workers, proportion of employment costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of employment costs and total costs covered by the aid).

25. Please specify the relevant product and geographic markets on which the beneficiary is active and the aid is likely to have an impact.

26. For each of these markets please provide:

- market concentration ratio,
- market share of the beneficiary,
- market shares of the other companies present in these markets.

27. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).

⁽⁸⁾ Cf. Criteria for the compatibility analysis, Section 2.4.

⁽⁹⁾ For employment of disadvantaged workers eligible costs shall be the wage costs over a maximum period of 12 months (or 24 months for severely disadvantaged worker) following recruitment. For employment of disabled workers eligible costs shall be the wage costs over any given duration during which the disabled worker is being employed.

⁽¹⁰⁾ This section does not apply to measures of less than EUR 5 million for the employment of disadvantaged workers and of less than EUR 10 million for the employment of disabled workers provided the question 10.3 in Part I of this Annex is duly completed.

28. Please describe the features of the sector where the beneficiary is present (e.g. importance of the labour costs for the sector, existence of overcapacity, etc.).
29. Please describe the situation on the national/regional labour market (e.g. unemployment and employment rates, wage levels, labour law, etc.).
30. If relevant, please provide information on the effects on trade (shift of trade flows).

CUMULATION

31. Is the aid granted under the notified measure combined with other aid?

yes no

32. If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

OTHER INFORMATION

33. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.'

ANNEX III

1. Question 2.3 of Part III.7a of Annex I to Regulation (EC) No 794/2004 is replaced by the following:
- '2.3. Will the aid under the scheme be linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm?'
2. Question 2.3 of Part III.7b of Annex I to Regulation (EC) No 794/2004 is replaced by the following:
- '2.3. Is the aid linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm?'

▼ M3

PART I

GENERAL INFORMATION

STATUS OF THE NOTIFICATION

Does the information transmitted on this form concern:

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

a possible unlawful aid ⁽¹⁾?

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

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

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

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

- no transfer of public resources (For example, if you consider the measure is not imputable to the State or where you consider that regulatory measures without transfer of public resources will be put in place),
- no advantage (For example, where the private market investor principle is respected),
- no selectivity/specificity (For example, where the measure is available to all enterprises, in all sectors of the economy and without any territorial limitation and without discretion),
- no distortion of competition/no affectation of intra-community trade (For example, where the activity is not of an economic nature or where the economic activity is purely local).

1. Identification of the aid grantor

1.1. Member State concerned:

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

1.3. Responsible contact person:

Name:

Address:

Telephone:

Fax:

E-mail:

1.4. Responsible contact person at the Permanent Representation:

Name:

Telephone:

Fax:

E-mail:

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

Name:

Address:

.....

.....

⁽¹⁾ According to Article 1(f) 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) (hereinafter 'Procedural Regulation'), unlawful aid shall mean new aid put into effect in contravention of Article 88(3) of the EC-Treaty.

▼ **M3**

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

.....

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

.....

.....

.....

.....

2. Identification of the aid

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

.....

2.2. Brief description of the objective of the aid.

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

	Primary objective	Secondary objective ⁽²⁾
	<i>(please tick one only)</i>	
Regional development	<input type="checkbox"/>	<input type="checkbox"/>
Research and development	<input type="checkbox"/>	<input type="checkbox"/>
Innovation	<input type="checkbox"/>	<input type="checkbox"/>
Environmental protection	<input type="checkbox"/>	<input type="checkbox"/>
Energy saving	<input type="checkbox"/>	<input type="checkbox"/>
Rescuing firms in difficulty	<input type="checkbox"/>	<input type="checkbox"/>
Restructuring firms in difficulty	<input type="checkbox"/>	<input type="checkbox"/>
Closure aid	<input type="checkbox"/>	<input type="checkbox"/>
SMEs	<input type="checkbox"/>	<input type="checkbox"/>
Employment	<input type="checkbox"/>	<input type="checkbox"/>
Training	<input type="checkbox"/>	<input type="checkbox"/>
Risk capital	<input type="checkbox"/>	<input type="checkbox"/>
Promotion of export and internationalisation	<input type="checkbox"/>	<input type="checkbox"/>
Services of general economic interest	<input type="checkbox"/>	<input type="checkbox"/>
Sectoral development ⁽³⁾	<input type="checkbox"/>	<input type="checkbox"/>
Social support to individual consumers	<input type="checkbox"/>	<input type="checkbox"/>
Compensation of damage caused by natural disasters or exceptional occurrences	<input type="checkbox"/>	<input type="checkbox"/>
Execution of an important project of common European interest	<input type="checkbox"/>	<input type="checkbox"/>
Remedy for a serious disturbance in the economy	<input type="checkbox"/>	<input type="checkbox"/>
Heritage conservation	<input type="checkbox"/>	<input type="checkbox"/>
Culture	<input type="checkbox"/>	<input type="checkbox"/>

⁽²⁾ A secondary objective is one for which, in addition to the primary objective, the aid will be exclusively earmarked. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. The secondary objective may also be sectoral, in the case for example of a research and development scheme in the steel sector.

⁽³⁾ Please specify sector in point 4.2.

▼ **M3**2.3. Scheme — Individual aid ⁽⁴⁾

2.3.1. Does the notification relate to an aid scheme?

yes no

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

yes no

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

yes no

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

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

yes no

— If yes, please specify:

Aid number:

Date of Commission approval (reference of the letter of the Commission (SG(..)D/...):

.../.../...

Duration of the original scheme:

.....

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

.....

2.3.2. Does the notification relate to individual aid?

yes no

— If yes, please tick the following appropriate box:

aid based on a scheme which should be individually notified

Reference of the authorised scheme:

Title:

Aid number:

Letter of Commission approval:

individual aid not based on a scheme

2.3.3. Does the notification relate to an individual aid or scheme notified pursuant to an exemption regulation?

If yes, please tick the following appropriate box:

Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 EC Treaty to State aid to small and medium-sized enterprises ⁽⁵⁾. Please use the supplementary information sheet under part III, 1

Commission Regulation No 68/2001 on the application of Articles 87 and 88 EC Treaty to training aid ⁽⁶⁾. Please use the supplementary information sheet under part III, 2

⁽⁴⁾ According to Article 1(e) 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), individual aid shall mean aid that is not awarded on the basis of an aid scheme and notifiable award of aid on the basis of a scheme.

⁽⁵⁾ 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, as amended by Commission Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22), Commission Regulation (EC) No 1857/2006 (OJ L 358, 16.12.2006, p. 3), and Commission Regulation (EC) No 1976/2006(OJ L 368, 23.12.2006, p. 85).

⁽⁶⁾ Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to training aid (OJ L 10, 13.1.2001, p. 20) as amended by Commission Regulation (EC) No 363/2004 (OJ L 63, 28.2.2004, p. 20) and Commission Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

▼ **M3**

- Commission Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 EC Treaty to State aid for employment ⁽⁷⁾. Please use the supplementary information sheet under part III, 3
- Commission Regulation (EC) No 1628/2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid ⁽⁸⁾.
- Commission Regulation (EC) No 1857/2006 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 ⁽⁹⁾

3. National legal basis

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

Title:

.....

.....

.....

Reference (where applicable):

.....

.....

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

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

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

yes no

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

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

yes

Please provide the Internet address:

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

yes

4. Beneficiaries

- 4.1. Location of the beneficiary(ies):

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

⁽⁷⁾ 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 OJ L 349, 24.12.2002, p. 126) as amended by Commission Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

⁽⁸⁾ 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).

⁽⁹⁾ 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).

▼ **M3**

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

- Not sector specific
- Sector specific, please specify according to NACE rev. 2 classification ⁽¹⁰⁾:

4.3. In case of an individual aid:

Name of the beneficiary:

Type of beneficiary:

- SME

Number of employees:

Annual turnover:

Annual balance-sheet:

Independence:

(please attach a solemn declaration in line with the Commission Recommendation on SME ⁽¹¹⁾ or provide any other evidence to demonstrate the above criteria):

- large enterprise
- firm in difficulties ⁽¹²⁾

4.4. In case of an aid scheme:

Type of beneficiaries:

- all firms (large firms and small and medium-sized enterprises)
- only large enterprises
- small and medium-sized enterprises ⁽¹³⁾
- medium-sized enterprises
- small enterprises
- micro enterprises
- the following beneficiaries:

Estimated number of beneficiaries:

- under 10
- from 11 to 50
- from 51 to 100
- from 101 to 500
- from 501 to 1 000
- over 1 000

⁽¹⁰⁾ NACE is the Statistical Classification of Economic Activities in the European Community. See Regulation (EC) No 1893/2006 of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 (OJ L 393, 30.12.2006, p. 1). NACE Revision 2 comes into force on 1 January 2008.

⁽¹¹⁾ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and Commission Regulation (EC) No 364/2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent legislation replacing it.

⁽¹²⁾ As defined in Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

⁽¹³⁾ As defined by Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and Commission Regulation (EC) No 364/2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent legislation replacing it.

▼ M3

5. Amount of aid/Annual expenditure ⁽¹⁴⁾

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

.....

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

.....

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

.....

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

.....

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

.....

6. Form of the aid and means of funding

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

- Direct grant
- Reimbursable grant
- Soft loan (including details of how the loan is secured)
- Interest subsidy
- Tax advantage. Please specify:
 - Tax allowance
 - Tax base reduction
 - Tax rate reduction
 - Tax deferment
 - Other:
- Reduction of social security contributions
- Provision of risk capital
- Other forms of equity intervention. Please specify:
- Debt write-off
- Guarantee (including amongst others information on the loan or other financial transaction covered by the guarantee, the security required and the premium to be paid)
- Other. Please specify:

For each instrument of aid, please give a precise description of its rules and conditions of application, including in particular the rate of award, its tax treatment and whether the aid is accorded automatically once certain objective criteria are fulfilled (if so, please mention the criteria) or whether there is an element of discretion by the awarding authorities.

.....

⁽¹⁴⁾ All data should be provided in national currency.

▼ M3

Specify the financing of the aid: if the aid is not financed through the general budget of the State/region/municipality, please explain its way of financing:

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

.....

Accumulated reserves

Public enterprises

Other (please specify):

7. Duration**7.1. In the case of an individual aid:**

Indicate the planned date to put into effect the aid. If the aid will be granted in *tranches*, indicate the planned date of each *tranche*:

.....

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

.....

7.2. In the case of a scheme:

Indicate the planned date from which the aid may be granted:

.....

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

.....

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

.....

8. Cumulation of different types of aid

Can the aid be cumulated with aid received from other local, regional, national or Community schemes to cover the same eligible costs?

yes

no

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

.....

9. Professional confidentiality

Does the notification contain confidential information which should not be disclosed to third parties?

yes

no

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

.....

.....

.....

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

yes

no

If yes, the Commission may publish this version without further asking the Member State to confirm its content.

▼ **M3****10. Compatibility of the aid**

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

- SME aid
 - Notification of an individual aid pursuant to Article 6 of Regulation (EC) No 70/2001, as amended by Regulation (EC) No 364/2004
 - Notification of an individual aid or an aid scheme pursuant to Article 6a of Regulation (EC) No 70/2001, as amended by Regulation (EC) No 364/2004
 - Notification for legal certainty
 - Aid for SMEs in the agricultural sector
- Training aid
 - Notification of an individual aid pursuant to Article 5 of Regulation (EC) No 68/2001, as amended by Regulation (EC) No 363/2004
 - Notification for legal certainty
- Employment aid
 - Notification of an individual aid pursuant to Article 9 of Regulation (EC) No 2204/2002
 - Notification of a scheme pursuant to Article 9 of Regulation (EC) No 2204/2002
 - Notification for legal certainty
- Regional aid
 - Notification of aid pursuant to Guidelines on national regional aid for 2007-2013 ⁽¹⁵⁾
 - Notification of aid pursuant to point 64 of Guidelines on national regional aid for 2007-2013 (large investment projects)
 - Notification of aid pursuant to Article 7 of Regulation (EC) No 1628/2006
 - Notification for legal certainty
- Research and development and innovation aid
- Aid for rescuing firms in difficulty
- Aid for restructuring firms in difficulty
- Aid for audiovisual production
- Environmental protection aid
- Risk capital aid
- Aid in the agricultural sector
- Aid in the fisheries sector
- Aid in the transport sector
- Shipbuilding aid

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

⁽¹⁵⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

▼ M3

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

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

10.3.1. *For individual aid:*

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

.....

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

.....

10.3.2. *For aid schemes:*

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

.....

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

.....

11. Outstanding recovery orders

11.1. In the case of individual aid:

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

yes no

11.2. In the case of aid schemes:

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

yes no

12. Other information

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

13. Attachments

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

14. Declaration

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

Date and place of signature:

Signature:

Name and position of person signing:

▼ B**SUPPLEMENTARY INFORMATION SHEETS**

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

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

▼ **M3***ANNEX II***SIMPLIFIED NOTIFICATION FORM**

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

1. Prior approved aid scheme ⁽²⁾.

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

2. Instrument subject to notification

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

3. Validity of commitments

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

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

⁽¹⁾ 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, 20.4.2004, p. 1). Regulation as last amended by Regulation No 1935/2006 (OJ L 407, 30.12.2006, p. 1).

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



ANNEX III A

STANDARDISED REPORTING FORMAT FOR EXISTING STATE AID

(This format covers all sectors except agriculture)

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

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

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

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

1. Title
2. Aid number
3. All previous aid numbers (e.g., following the renewal of a scheme)
4. Expiry

Member States should indicate those schemes which have expired or for which all payments have stopped.

5. Co financing

Although Community funding itself is excluded, total State aid for each Member State shall include aid measures that are co financed by Community funding. In order to identify which schemes are co financed and estimate how much such aid represents in relation to overall State aid, Member States are required to indicate whether or not the scheme is co financed and if so the percentage of aid that is co financed. If this is not possible, an estimate of the total amount of aid that is co financed shall be provided.

6. Sector

The sectoral classification shall be based largely on NACE ⁽²⁾ at the [three digit level].

7. Primary objective
8. Secondary objective

A secondary objective is one for which, in addition to the primary objective, the aid (or a distinct part of it) was exclusively earmarked at the time the aid was approved. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. Another scheme for which the primary objective is SMEs may have as secondary objectives training and employment if, at the time the aid was approved, the aid is earmarked for *x*% training and *y*% employment.

⁽¹⁾ *t* is the year in which the data are requested.

⁽²⁾ NACE Rev.1.1 is the Statistical classification of economic activities in the European Community.

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9. Region(s)

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

10. Category of aid instrument(s)

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

11. Description of aid instrument in national language

12. Type of aid

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

13. Expenditure

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

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



ANNEX III C

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

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

1. Title of aid scheme, Commission aid number and reference of the Commission decision
2. Expenditure. The figures have to be expressed in euros or, if applicable, national currency. In the case of tax expenditure, annual tax losses have to be reported. If precise figures are not available, such losses may be estimated. For the year under review indicate separately for each aid instrument within the scheme (e.g. grant, soft loan, guarantee, etc.):
 - 2.1. amounts committed, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new assisted projects. In the case of guarantee schemes, the total amount of new guarantees handed out should be provided;
 - 2.2. actual payments, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new and current projects. In the case of guarantee schemes, the following should be provided: total amount of outstanding guarantees, premium income, recoveries, indemnities paid out, operating result of the scheme under the year under review;
 - 2.3. number of assisted projects and/or enterprises;
 - 2.4. estimated overall amount of:
 - aid granted for the permanent withdrawal of fishing vessels through their transfer to third countries;
 - aid granted for the temporary cessation of fishing activities;
 - aid granted for the renewal of fishing vessels;
 - aid granted for modernisation of fishing vessels;
 - aid granted for the purchase of used vessels;
 - aid granted for socio economic measures;
 - aid granted to make good damage caused by natural disasters or exceptional occurrences;
 - aid granted to outermost regions;
 - aid granted through parafiscal charges;
 - 2.5. regional breakdown of amounts under point 2.1. by regions defined as Objective 1 regions and other areas;
3. Other information and remarks.

Notice from the Commission on a simplified procedure for treatment of certain types of State Aid**(Text with EEA relevance)**

(2009/C 136/03)

1. INTRODUCTION

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

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

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

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

⁽¹⁾ See, in particular, the Community framework for State aid for research and development and innovation, OJ C 323, 30.12.2006, p. 1, hereinafter referred to as the 'Framework for Research and Development and Innovation'; the Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises, OJ C 194, 18.8.2006, p. 2, hereinafter the 'Risk Capital Guidelines'; the Community Guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1, hereinafter the 'Environmental Aid Guidelines'; the Guidelines on national regional aid for 2007-2013, OJ C 54, 4.3.2006, p. 13, hereinafter the 'Regional Aid Guidelines'; the Commission communication concerning the prolongation of the Framework on State aid to shipbuilding, OJ C 260, 28.10.2006, p. 7, hereinafter the 'Shipbuilding Framework'; the Commission Communication concerning the prolongation of the application of the Communication on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 134, 16.6.2007, p. 5, hereinafter the 'Cinema Communication'; 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), OJ L 214, 9.8.2008, p. 3.

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

⁽³⁾ See page 13 of this Official Journal.

⁽⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁵⁾ COM(2005) 107 final.

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

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

Eligible categories of State aid

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

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

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

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

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

⁽¹⁾ Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment COM(2005) 535 final.

⁽²⁾ Such as Section 5 of the Framework for Research and Development and Innovation or Section 3 of the Environmental Aid Guidelines, and Section 4 of the Risk Capital Guidelines.

⁽³⁾ Regional Aid Guidelines; Section 3.1.2 of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2, hereinafter the 'Rescue and Restructuring Guidelines'.

⁽⁴⁾ The Commission will revert to the normal procedure where the notified aid measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market (so-called *Deggendorf* issue). See Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

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

- (i) risk capital measures taking a form other than a participation into a private equity investment fund and meeting all other conditions of Section 4 of the Risk Capital Guidelines ⁽¹⁾;
- (ii) environmental investment aid meeting the conditions of Section 3 of the Environmental Aid Guidelines:
 - the eligible cost basis of which is determined on the basis of a full cost calculation methodology in line with point 82 of the Environmental Aid Guidelines ⁽²⁾, or
 - including an eco-innovation bonus demonstrated to be in line with point 78 of the Environmental Aid Guidelines ⁽³⁾;
- (iii) aid for young innovative enterprises granted in accordance with Section 5.4 of the Framework for Research and Development and Innovation and the innovative character of which is determined on the basis of Section 5.4(b)(i) of the Framework ⁽⁴⁾;
- (iv) aid for innovation clusters granted in accordance with Sections 5.8 and 7.1 of the Framework for Research and Development and Innovation;
- (v) aid for process and organisational innovation in services granted in accordance with Section 5.5 of the Framework for Research and Development and Innovation;
- (vi) ad hoc regional aid which is below the individual notification threshold laid down in point 64 of the Regional Aid Guidelines ⁽⁵⁾;
- (vii) rescue aid in the manufacturing and services sectors (except in the financial sector) meeting all substantive conditions of Sections 3.1.1 and 3.1.2 of the Rescue and Restructuring Guidelines ⁽⁶⁾;
- (viii) rescue and restructuring schemes for small enterprises meeting all conditions of Section 4 of the Rescue and Restructuring Guidelines ⁽⁷⁾;
- (ix) ad hoc restructuring aid for small and medium enterprises, provided it meets all the conditions laid down in Section 3 of the Rescue and Restructuring Guidelines ⁽⁸⁾;

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

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

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

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

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

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

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

⁽⁸⁾ See for example the Commission's Decisions in cases N 92/2008 (Austria, Restructuring aid for Der Bäcker Legat) and N 289/2007 (Italy, Restructuring aid to Fiem SRL).

- (x) export credits in the shipbuilding sector meeting all the conditions of Section 3.3.4 of the Shipbuilding Framework ⁽¹⁾;
- (xi) audiovisual support schemes meeting all the conditions set out in Section 2.3 of the Cinema Communication as regards the development, production, distribution and promotion of audiovisual works ⁽²⁾.

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

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

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

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

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

- (i) aid measures for the preservation of national cultural heritage related to activities linked to historic, ancient sites or national monuments, provided that the aid is limited to 'heritage conservation' within the meaning of Article 87(3)(d) of the Treaty ⁽³⁾;
- (ii) aid schemes for theatre, dance and music activities ⁽⁴⁾;

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

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

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

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

- (iii) aid schemes for the promotion of minority languages ⁽¹⁾;
- (iv) aid measures in favour of the publishing industry ⁽²⁾;
- (v) aid measures in favour of broadband connectivity in rural areas ⁽³⁾;
- (vi) guarantee schemes for shipbuilding finance ⁽⁴⁾;
- (vii) aid measures fulfilling all other applicable provisions of the General block exemption Regulation, but excluded from its application merely because:
 - the measures constitute ‘ad hoc aid’ ⁽⁵⁾,
 - the measures are provided in an untransparent form (Article 5 of the General block exemption Regulation), but their gross grant equivalent is calculated on the basis of a methodology approved by the Commission in three individual decisions adopted after 1 January 2007;
- (viii) measures supporting the development of local infrastructure not constituting State aid within the meaning of Article 87(1) of the Treaty in view of the fact that, having regard to the specificities of the case, the measure in question will not have any effect on intra-Community trade ⁽⁶⁾;
- (ix) the prolongation and/or modification of existing schemes outside the scope of the simplified procedure foreseen in Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁷⁾ (see category 3 below), for example as regards the adaptation of existing schemes to new horizontal guidelines ⁽⁸⁾.

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

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

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

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

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

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

⁽⁷⁾ OJ L 140, 30.4.2004, p. 1.

⁽⁸⁾ See for example the Commission’s Decisions in cases N 585/2007 (United Kingdom, Prolongation of Yorkshire R&D scheme), N 275/2007 (Germany, Prolongation of rescue and restructuring scheme for small and medium-sized enterprises in Bremen), N 496/2007 (Italy (Lombardia) Guarantee Fund for the development of risk capital) and N 625/2007 (Latvia, Aid to risk capital to small and medium-sized enterprises).

This list is illustrative, since the exact scope of this category may evolve in line with Commission decision-making practice. The Commission may review this illustrative list from time to time to keep it in line with evolving practice.

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

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

- (a) increases in the budget of an authorised aid scheme exceeding 20 %;
- (b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;
- (c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses'.

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

Safeguards and exclusions

6. Since the simplified procedure applies only to aid notified on the basis of Article 88(3) of the Treaty, unlawful aids are excluded. Moreover, due to the specificities of the sectors concerned the simplified procedure will not apply to aid favouring activities in the fishery and aquaculture sectors, activities in the primary production of agricultural products or activities in the processing or marketing of agricultural products. In addition, the simplified procedure will not be applied retroactively to measures pre-notified before 1 September 2009.
7. In assessing whether a notified aid measure falls into one of the eligible categories set out in point 5, the Commission will ensure that the applicable frameworks or guidelines and/or established Commission decision-making practice on the basis of which the notified aid measure is to be assessed, as well as all relevant factual circumstances, are established with sufficient clarity. Given that the completeness of the notification constitutes a key element for determining whether the simplified procedure is to be applied, the notifying Member State is invited to provide all relevant information, including the precedent decisions relied upon, if appropriate, at the outset of the pre-notification phase (see point 14).
8. Where the notification form is not complete or contains misleading or incorrect information, the Commission will not apply the simplified procedure. In addition, to the extent that the notification involves novel legal issues of a general interest, the Commission will not normally apply the simplified procedure.
9. While it can normally be assumed that aid measures falling into the categories set out in point 5 will not raise doubts as to their compatibility with the common market, there may nonetheless be special circumstances which require a closer investigation. In such cases, the Commission may revert to the normal procedure at any time.

10. Such special circumstances may include in particular: certain forms of aid as yet untested in the Commission's decision-making practice, precedent decisions which the Commission may be in the course of reassessing in the light of recent case-law or developments of the common market, novel technical issues, or concerns as regards the measure's compatibility with other provisions of the Treaty (for example, non-discrimination, the four freedoms, etc.).
11. The Commission will revert to the normal procedure where the notified aid measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market (so-called *Deggendorf* issue).
12. Finally, if a third party expresses substantiated concerns about the notified aid measure within the time-limit laid down in point 21 of this Notice, the Commission will revert to the normal procedure⁽¹⁾ and will inform the Member State to that effect.

3. PROCEDURAL PROVISIONS

Pre-notification contacts

13. The Commission has found pre-notification contacts with the notifying Member State beneficial even in seemingly unproblematic cases. Such contacts allow the Commission and the Member States, in particular, to determine at an early stage the relevant Commission instruments or precedent decisions, the degree of complexity which the Commission's assessment is likely to involve and the scope and depth of the information required for the Commission to make a full assessment of the case.
14. In view of the time constraints of the simplified procedure, the assessment of a State support measure under the simplified procedure is conditional upon the Member State holding pre-notification contacts with the Commission. In this context, the Member State is invited to submit a draft notification form with the necessary supplementary information sheets provided for in Article 2 of Regulation (EC) No 794/2004, and the relevant precedent decisions if appropriate, via the Commission's established IT application. The Member State may also request, at this stage, that the Commission waive the completion of certain parts of the notification form. The Member State and the Commission may also agree, in the context of the pre-notification contact, that the Member State does not need to provide a draft notification form and accompanying information in the pre-notification phase. Such an agreement may be appropriate, for instance, due to the repetitive nature of certain aid measures (for instance the category of aid set out in point 5(c) of this Notice). In this context, the Member State may be invited to proceed directly with the notification where detailed discussion about the envisaged aid measures is not considered necessary by the Commission.
15. Within two weeks from the receipt of the draft notification form, the Commission services will organise a first pre-notification contact. The Commission will promote the holding of contacts via email or conference calls or, at the specific request of the Member State concerned, organise meetings. Within 5 working days after the last pre-notification contact, the Commission services will inform the Member State concerned whether it considers that the case qualifies *prima facie* for treatment under the simplified procedure, which information still needs to be provided for the measure to qualify for treatment under that procedure, or whether the case will remain subject to the normal procedure.
16. The indication by the Commission services that the case concerned can be treated under the simplified procedure implies that the Member State and the Commission services agree *prima facie* that the information provided in the pre-notification context would, if submitted as a formal notification, constitute a complete notification. The Commission would thus, in principle, be in a position to approve the measure, once formally notified on the basis of a notification form embodying the result of the pre-notification contacts, without a further request for information.

⁽¹⁾ This does not imply any increase of third parties' rights in view of the case law of the Community Courts. See Case T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio v Commission* [2006] ECR II-4739, paragraph 139 and Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867, paragraph 45.

Notification

17. The Member State must notify the aid measure(s) concerned no later than 2 months after it is informed by the Commission services that the measure qualifies *prima facie* for treatment under the simplified procedure. If the notification includes any changes as compared to the information presented in the pre-notification documents, such changes must be highlighted prominently in the context of the notification form.
18. The submission of the notification by the Member State concerned triggers the start of the period referred to in point 2.
19. The simplified procedure does not provide for a specific simplified notification form. Except as regards cases which fall within the category of aid set out in point 5(c) of this Notice, the notification is to be carried out on the basis of the standard notification forms in Regulation (EC) No 794/2004.

Publication of a summary of the notification

20. The Commission will publish on its website a summary of the notification, based on the information provided by the Member State, in the standard form set out in the Annex to this Notice. The standard form contains an indication that, on the basis of the information provided by the Member State, the aid measure may qualify for the application of a simplified procedure. By requesting the Commission to treat a notified measure under this Notice, the Member State concerned will be considered to agree that the information provided in its notification, which is to be published on the website in the form set out in the Annex to this Notice, is non-confidential in nature. Furthermore, Member States are invited to clearly indicate whether the notification contains any business secrets.
21. Interested parties will then have 10 working days to submit observations (including a non-confidential version), in particular on circumstances which might require a more thorough investigation. In cases where substantiated competition concerns are raised by interested parties with respect to the notified measure, the Commission will revert to the normal procedure and inform the Member State and the interested party or parties concerned to that effect. The Member State concerned will also be informed of any substantiated concerns and will be given the opportunity to comment on them.

Short-form decision

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

Publication of the short-form decision

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

4. FINAL PROVISIONS

24. Upon request of the Member State concerned, the Commission will apply the principles set out in this Notice to measures notified pursuant to point 17 as from 1 September 2009.
 25. The Commission may review this Notice on the basis of important competition policy considerations or in order to take account of the evolution of State aid law and decision-making practice. The Commission intends to carry out a first review of this Notice at the latest four years after its publication. In this context, the Commission will examine the extent to which specific simplified notification forms should be developed in order to facilitate the implementation of this Notice.
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ANNEX

Summary of Notification: Invitation to third parties to submit comments**Notification of a State Aid measure**

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

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

The main features of the aid measure are the following:

Reference number of the aid: N ...

Member State:

Member State reference number:

Region:

Granting authority:

Title of the aid measure:

National legal basis:

Proposed Community basis for assessment: ... guidelines or established Commission practice as highlighted in Commission Decision (1, 2 and 3).

Type of measure: Aid scheme/Ad hoc aid

Amendment of an existing aid measure:

Duration (scheme):

Date of granting:

Economic sector(s) concerned:

Type of beneficiary (SMEs/large enterprises):

Budget:

Aid instrument (grant, interest rate subsidy, ...):

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

European Commission
Directorate-General for Competition
State Aid Registry
1049 Bruxelles/Brussels
BELGIQUE/BELGIË
Fax +32 22961242
Email: stateaidgreffe@ec.europa.eu

Code of Best Practice for the conduct of State aid control procedures

(2009/C 136/04)

1. SCOPE AND PURPOSE OF THIS CODE

1. In 2005, the Commission adopted the State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009 ('the SAAP') ⁽¹⁾ to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the Treaty establishing the European Community. Based on the principle of less and better targeted State aid, the central objective of the SAAP is to encourage Member States to reduce their overall aid levels, whilst redirecting State resources to horizontal common interest objectives. To support this objective, the SAAP also calls for more effective, simple and predictable procedures in the State aid field.
2. The Commission wishes to reaffirm that commitment by issuing this Code of Best Practice to make procedures as productive and efficient as possible for all parties concerned. This Code is built on the experience acquired in the application of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and on internal Commission studies on the duration of the different steps of the State aid procedure, the treatment of complaints and information gathering tools. The principal aim of this Code is to provide guidance on the day-to-day conduct of State aid procedures, thereby fostering a spirit of better co-operation and mutual understanding between the Commission services, Member State authorities and the legal and business community.
3. A successful improvement of State aid procedures requires discipline on both sides and a mutual commitment from the Commission and the Member States. While the Commission cannot be held responsible for the consequences of a lack of cooperation from Member States and interested parties, it will work to improve the conduct of its investigations and its internal decision-making process, in order to ensure greater transparency, predictability and efficiency of State aid procedures.
4. In line with modern State aids architecture, this Code is the final part of a simplification package comprising the Notice from the Commission on a simplified procedure for treatment of certain types of State aid ⁽³⁾ and the Commission Notice on the enforcement of State aid law by national courts ⁽⁴⁾ which contributes to more predictable and transparent procedures.
5. The specific features of an individual case may however require an adaptation of, or deviation from, this Code ⁽⁵⁾.
6. The specificities of the fishery and aquaculture sectors and of the activities in the primary production, marketing or processing of agricultural products may also justify a deviation from this Code.

2. RELATIONSHIP TO COMMUNITY LAW

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

⁽¹⁾ COM(2005) 107 final.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ See page 3 of this Official Journal.

⁽⁴⁾ OJ C 85, 9.4.2009, p. 1.

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

8. This Code therefore does not create or alter any rights or obligations as set out in the EC Treaty, Regulation (EC) No 659/1999 and Commission Regulation (EC) No 794/2004 of 21 April 2004 ⁽¹⁾, which implements Regulation (EC) No 659/1999, as interpreted by the case-law of the Community Courts.
9. This Code sets out day-to-day Best Practices to contribute to speedier, more transparent and more predictable State aid procedures at each step of the investigation of a notified or non-notified case or a complaint.

3. PRE-NOTIFICATION CONTACTS

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

3.1. Content

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

3.2. Scope and timing

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

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁾ This time limit cannot be respected where the Commission's services have to issue several requests for information due to incomplete notifications.

⁽³⁾ See Notice from the Commission on a simplified procedure for treatment of certain types of State aid.

14. As a general rule, pre-notification contacts should not last longer than 2 months and should be followed by a complete notification. Should pre-notification contacts not bring the desired results, the Commission services may declare the pre-notification phase closed. However, since the timing and format of pre-notification contacts depend on the complexity of the individual case, pre-notification contacts may last several months. The Commission therefore recommends that, in cases which are particularly complex (for example, rescue aid, large research and development aid, large individual aid or particularly large or complex aid schemes), Member States launch pre-notification contacts as early as possible to allow for meaningful discussions.
15. In the Commission's experience, involving the aid beneficiary in the pre-notification contacts is very useful, particularly for cases with major technical, financial and project-related implications. The Commission therefore recommends that beneficiaries of individual aid be involved in the pre-notification contacts.
16. Except in particularly novel or complex cases, the Commission services will endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. That non-binding assessment will not be an official position of the Commission, but informal guidance from the Commission services on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the common market. In particularly complex cases, the Commission services may also provide written guidance, at the Member State's request, on the information still to be provided.
17. Pre-notification contacts are held in strict confidence. The discussions take place on a voluntary basis and remain without prejudice to the handling and investigation of the case following formal notification.
18. In order to enhance the quality of notifications, the Commission services will endeavour to meet requests for training sessions by Member States. The Commission will also maintain regular contacts with Member States to discuss further improvements of the State aid procedure, in particular as regards the scope and content of the applicable notification forms.

4. MUTUALLY AGREED PLANNING

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

4.1. Content

20. Mutually agreed planning is a form of structured cooperation between the Member State and the Commission services, based on a joint planning and understanding of the likely course of the investigation and its expected time frame.
21. In this context, the Commission services and the notifying Member State could in particular agree on:
 - the priority treatment of the case concerned, in return for the Member State formally accepting the suspension of the examination ⁽¹⁾ of other notified cases originating from the same Member State, should this be necessary for planning or resource purposes ⁽²⁾,

⁽¹⁾ See Article 4(5) of Regulation (EC) No 659/1999.

⁽²⁾ For instance, in cases where the financial institutions of the European Union act as holding fund.

- the information to be provided by the Member State and/or the beneficiary concerned, including studies or external expertise, or unilateral information-gathering by the Commission services, and
 - the likely form and duration of the assessment of the case by the Commission services, once notified.
22. In return for the Member State's efforts in providing all the necessary information in a timely manner and as agreed in the context of mutually agreed planning, the Commission services will endeavour to respect the mutually agreed time frame for the further investigation of the case, unless the information provided by the Member State or interested parties raises unexpected issues.

4.2. Scope and timing

23. Mutually agreed planning will in principle be reserved for cases which are so novel, technically complex or otherwise sensitive that a clear preliminary assessment of the case by the Commission services proves impossible at the end of the pre-notification phase. In such cases, mutually agreed planning will take place at the end of the pre-notification phase, and be followed by the formal notification.
24. However, the Commission services and the Member State concerned may also agree, at the latter's request, on mutually agreed planning for the further treatment of the case at the outset of the formal investigation procedure.

5. THE PRELIMINARY EXAMINATION OF NOTIFIED MEASURES

5.1. Requests for information

25. In order to streamline the course of the investigation, the Commission services will endeavour to group requests for information during the preliminary examination phase. In principle, there will therefore only be one comprehensive information request, normally to be sent within 4-6 weeks after the date of notification. Unless otherwise agreed in mutually agreed planning, pre-notification should enable Member States to submit a complete notification thereby reducing the need for additional information. However, the Commission may subsequently raise questions most notably on points that have been raised by the Member States' answers, although this does not necessarily indicate that the Commission is experiencing serious difficulties in assessing the case.
26. Should the Member State fail to provide the requested information within the prescribed period, Article 5(3) of Regulation (EC) No 659/1999 will, after one reminder, normally be applied, and the Member State will be informed that the notification is deemed to have been withdrawn. The formal investigation procedure will normally be initiated whenever the necessary conditions are met, and generally after two rounds of questions at most.

5.2. Agreed suspension of the preliminary examination

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

5.3. State of play contacts

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

6. THE FORMAL INVESTIGATION PROCEDURE

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

6.1. Publication of the decision and meaningful summary

30. Where the Member State concerned does not request the removal of confidential information, the Commission will endeavour to publish its decision to open the formal investigation procedure, including the meaningful summaries, within two months from the date of adoption of that decision.
31. Where there is disagreement concerning confidentiality issues, the Commission will apply the principles of its Communication of 1 December 2003 on professional secrecy in State aid decisions ⁽¹⁾ and use its best endeavours to proceed with publication of the decision within the shortest possible time frame following its adoption. The same will apply to the publication of all final decisions.
32. To improve the transparency of the procedure, the Member State, the beneficiary and other stakeholders (in particular potential complainants) will be informed of all delays triggered by disagreements concerning confidentiality issues.

6.2. Comments from interested parties

33. According to Article 6 of Regulation (EC) No 659/1999, interested parties must submit comments within a prescribed period which must normally not exceed one month following the publication of the decision to initiate the formal investigation procedure. That time limit will not normally be extended, and the Commission services will thus usually not accept any belated submission of information from interested parties, including the beneficiary of the aid ⁽²⁾. Extensions may be granted only in exceptional duly justified cases, such as the provision of particularly voluminous factual information or following contact between the Commission services and the interested party concerned.
34. In order to improve the factual basis of the investigation of particularly complex cases, the Commission services may send a copy of the decision to initiate the formal investigation procedure to identified interested parties including trade or business associations, and invite them to comment on specific aspects of the case ⁽³⁾. Interested parties' cooperation in this context is purely voluntary, but if an interested party chooses to provide comments, it is in its interest to submit those comments in a timely manner so that the Commission will be able to take them into account. Therefore, the Commission will invite interested parties to react within one month from the date on which the copy of the decision is sent to them. The Commission will not wait any further for those comments to be submitted. In order to ensure equal treatment between interested parties the Commission will send the same invitation to comment to the aid beneficiary. In order to respect the Member State's right of defence, it will forward to the Member State a non-confidential version of any comments received from interested parties and invite the Member State to reply within one month.

⁽¹⁾ OJ C 297, 9.12.2003, p. 6.

⁽²⁾ Without prejudice to Article 10(1) of Regulation (EC) No 659/1999.

⁽³⁾ According to settled case-law, the Commission is entitled to send the decision to open the formal investigation to identified third parties; see for example, Case T-198/01 *Technische Glaswerke Ilmenau v. Commission* (2004) ECR II-2717, paragraph 195; T-198/01R *Technische Glaswerke Ilmenau v. Commission* (2002) ECR II-2153; Joined Cases C-74/00 P and C-75/00 P *Falck Spa and others v. Commission* (2002) ECR I-7869, paragraph 83.

35. In order to ensure transmission of all comments from interested parties to the Member State concerned in the most expedient manner, Member States will, as far as possible, be invited to accept transmission of those comments in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.
36. Member States will also be informed of the absence of any comments from interested parties.

6.3. Member States' comments

37. To ensure timely completion of the formal investigation procedure, the Commission will rigorously enforce all time limits applicable to this phase under Regulation (EC) No 659/1999. If a Member State fails to submit its comments on the Commission's decision to initiate the formal investigation procedure and on interested parties' comments within the one-month time limit set in Article 6(1) of Regulation (EC) No 659/1999, the Commission services will immediately send a reminder granting the Member State concerned an additional period of one month and informing the Member State that no further extension will be granted, save in exceptional circumstances. In the absence of a meaningful reply by the Member State concerned, the Commission will take a decision on the basis of the information available to it, in accordance with Article 7(7) and Article 13(1) of Regulation (EC) No 659/1999.
38. In the case of unlawful aid, and in the absence of comments from the Member State on the decision to initiate the formal investigation procedure, the Commission will, pursuant to Article 10 of Regulation (EC) No 659/1999, issue an information injunction. Should the Member State fail to reply to that injunction within the time limit set therein, the Commission will take a decision on the basis of the information available to it.

6.4. Request for additional information

39. It cannot be excluded that, in particularly complex cases, the information submitted by the Member State in response to the decision to initiate the formal investigation procedure may require the Commission services to send a further request for information. A time limit of one month will be set for the Member State to reply.
40. Should the Member State not reply within the time limit, the Commission services will immediately send a reminder setting a final deadline of 15 working days and informing the Member State concerned that the Commission will thereafter take a decision on the basis of the information available to it, or issue an information injunction in the case of unlawful aid.

6.5. Justified suspension of the formal investigation

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

6.6. Adoption of the final decision and justified extension of the formal investigation

43. In accordance with Article 7(6) of Regulation (EC) No 659/1999, the Commission will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. That time limit may be extended by common agreement between the Commission and the Member State concerned. An extension of the duration of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues.
44. In order to ensure effective implementation of Article 7(6) of Regulation (EC) No 659/1999, the Commission will endeavour to adopt the final decision no later than 4 months after the submission of the last information by the Member State, or the expiry of the last time limit without information having been received.

7. COMPLAINTS

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

7.1. The complaint form

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

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

47. The Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint.
48. The Commission is entitled to give different degrees of priority to the complaints brought before it ⁽¹⁾, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations ⁽²⁾, it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to:
- (a) adopt a decision for priority cases pursuant to Article 4 of Regulation (EC) No 659/1999, with a copy addressed to the complainant;
 - (b) send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. The administrative letter is not an official position of the Commission, but only a preliminary view of the Commission services, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of the letter. If further comments are not provided within the prescribed period, the complaint will be deemed to be withdrawn.

⁽¹⁾ Case C-119/97 *Ufex and Others v Commission* (1999) ECR I-1341, paragraph 88.

⁽²⁾ Case T-475/04 *Bouygues SA v Commission* (2007) ECR II-2097, paragraphs 158 and 159.

49. As a matter of transparency, the Commission services will use their best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint. In the case of unsubstantiated complaints, the Commission services will inform the complainant within two months from receipt of the complaint that there are insufficient grounds for taking a view on the case, and that the complaint will be deemed to be withdrawn if further substantive comments are not provided within one month. As regards complaints which refer to approved aid, the Commission services will also endeavour to reply to the complainant within 2 months from receipt of the complaint.
50. In the case of unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid ⁽¹⁾.
51. When necessary, the non-confidential version of a complaint will be transmitted to the Member State concerned for comments. Member States and the complainants will systematically be kept informed of the closure or other processing of a complaint. In return, Member States will be invited to respect the time limits for commenting and providing information on complaints transmitted to them. They will also be invited to accept, as far as possible, transmission of complaints in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.

8. INTERNAL DECISION MAKING PROCEDURES

52. The Commission is committed to streamlining and further improving its internal decision-making process, in order to contribute to an overall shortening of State aid procedures.
53. To this effect, internal decision-making procedures will be applied as efficiently as possible. The Commission will also review its current internal legal framework to optimise its decision-making procedures.
54. The Commission services will keep their internal decision-making practice under constant review and adapt it if necessary.

9. FUTURE REVIEW

55. Procedural Best Practices can only be effective if they are based on a shared commitment by the Commission and Member States to diligently pursue State aid investigations, respect applicable time limits and thereby ensure the necessary transparency and predictability of procedures. This Code and the Best Practices enshrined therein are a first contribution to this joint commitment.
56. The Commission will apply this Code to measures which have been notified to the Commission or otherwise brought to the Commission's attention as from 1 September 2009.
57. This Code may be revised to reflect changes to legislative, interpretative and administrative measures or the case-law of the European Courts, which govern State Aid procedure or any experience gained in its application. The Commission further intends to engage, on a regular basis, in a dialogue with the Member States and other stakeholders on the experience gained in the application of Regulation (EC) No 659/1999 in general, and this Code of Best Practice in particular.

⁽¹⁾ See Commission Notice on the enforcement of State aid law by national courts.

NOTICE FROM THE COMMISSION**Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid**

(2007/C 272/05)

1. INTRODUCTION

1. In 2005, the Commission presented its road map for State aid reform in its State Aid Action Plan ⁽¹⁾. The programme of reform will improve the effectiveness, transparency and credibility of the EU State aid regime. At the heart of the Action Plan is the principle of 'less and better targeted State aid'. The central objective is to encourage Member States to reduce their overall aid levels, whilst redirecting State aid resources at objectives having a clear Community interest. To achieve this, the Commission is committed to continue taking a strict approach towards the most 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 ⁽²⁾ (the Procedural Regulation), it has systematically ordered Member States to recover any unlawful aid found to be incompatible with the common market, unless it considered that this would be contrary to a principle of Community law. Since 2000, it has adopted 110 such recovery decisions.
3. It is essential for the integrity of the State aid regime that these Commission decisions ordering Member States to recover unlawful State aid (hereafter 'recovery decisions') are enforced in an effective and immediate manner. The information collected by the Commission in recent years shows that there is cause for real concern in this respect. Experience shows that there is practically not a single case in which recovery was completed within the deadline set out in the recovery decision. Recent editions of the State aid Scoreboard also show that 45 % of all recovery decisions adopted in 2000 2001 had still not been implemented by June 2006.
4. In 2004, the Commission ordered a comparative study on the enforcement of EU State aid policy in different Member States ⁽³⁾ (hereinafter referred to as the 'Enforcement Study'). One of the objectives of the study was to assess the effectiveness of recovery procedures and practices in a number of Member States. The authors of the Study found that the 'excessive length of recovery proceedings is a recurring theme in all country reports'. They recognised that the implementation of recovery decisions had some what 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

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

⁽²⁾ 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).

⁽³⁾ Study on the enforcement of State aid law at national level, Competition studies 6, Luxembourg, Office for Official Publications of the European Communities:
http://ec.europa.eu/comm/competition/state_aid/overview/studies.html

with the rules and principles as established by the body of European law and, in particular, the case law of the Community Courts. To this end, the notice will first recall the purpose of recovery and the basic principles underlying the implementation of recovery decisions. It will then present the practical implications of these basic principles for each of the actors involved in the recovery process.

2. THE PRINCIPLES OF RECOVERY POLICY

2.1. A short history of recovery policy

7. Article 88(3) EC states that ‘the Commission shall be informed in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’
8. In cases where Member States do not notify the Commission of its plans to grant or alter aid prior to such aid being put into effect, the aid is unlawful in relation to Community law from the time that it is granted.
9. In its ‘Kohlegesetz’ judgment ⁽⁴⁾ of 1973, the European Court of Justice (ECJ) confirmed for the first time that the Commission had the power to order the recovery of unlawful and incompatible State aid. The Court held that the Commission was competent to decide that a Member State must alter or abolish a State aid that was incompatible with the common market. It should therefore also be entitled to require repayment of this aid. On the basis of this judgment and subsequent case law ⁽⁵⁾, the Commission informed the Member States in a Communication published in 1983 that it had decided to use all measures at its disposal to ensure that Member States’ obligations under Article 88(3) EC are fulfilled, including the requirement, that Member States recover incompatible aid granted unlawfully from the recipient ⁽⁶⁾.
10. In the second half of the 1980s and in the 1990s, the Commission started to order the recovery of unlawful and incompatible aid more systematically. In 1999, basic rules on recovery were included in the Procedural Regulation. Further implementing provisions on recovery were included in Commission Regulation (EC) No 794/2004 ⁽⁷⁾ (‘the Implementing Regulation’).
11. **Article 14(1)** of the Procedural Regulation confirms the constant case law of the Community Courts ⁽⁸⁾ and establishes an obligation on the Commission to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. This Article also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. **Article 14(2)** establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. The Implementing Regulation elaborates the methods to be used for the calculation of recovery interest. Finally, **Article 14(3)** of the Procedural Regulation states, that ‘recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision’.
12. In a number of recent judgments, the ECJ further clarified the scope and interpretation of Article 14(3) of the Procedural Regulation, thereby emphasising the need for an immediate and effective execution of recovery decisions ⁽⁹⁾. In addition, the Commission has also started to apply Deggendorf case law ⁽¹⁰⁾ in

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

⁽⁵⁾ 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.

⁽⁶⁾ OJ C 318, 24.11.1983, p. 3.

⁽⁷⁾ 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).

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

⁽⁹⁾ 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.

⁽¹⁰⁾ Case C 188/92, *TWD Textilwerke Deggendorf GmbH v Germany*, (‘Deggendorf’) ECR [1994], I 00833.

a more systematic manner. This case law enables the Commission, if certain conditions have been satisfied, to order Member States to suspend the payment of a new compatible aid to a company until that company has reimbursed old unlawful and incompatible aid that is subject to a recovery decision.

2.2. Purpose and principles of recovery policy

2.2.1. Purpose of recovery

13. The ECJ has held on several occasions that the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. This is necessary to ensure that the level playing field in the internal market is maintained, in accordance with Article 3(g) of the EC Treaty. In this context, the ECJ underlined that the recovery of unlawful and incompatible aid is not a penalty ⁽¹¹⁾, but the logical consequence of the finding that it is unlawful ⁽¹²⁾. It can therefore not be regarded as disproportionate to the objectives of the Treaty with regards to State Aid ⁽¹³⁾.
14. According to the ECJ, the 're-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored' ⁽¹⁴⁾. In order to eliminate any financial advantages incidental to unlawful aid, interest is to be recovered on the sums unlawfully granted. Such interest must be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period ⁽¹⁵⁾.
15. Furthermore, the ECJ has insisted that in order for a Commission recovery decision to be fully executed, the actions undertaken by a Member State must produce concrete effects as regards recovery ⁽¹⁶⁾ and that recovery must be immediate ⁽¹⁷⁾. For recovery to reach its objective, it is indeed essential that the repayment of the aid takes place without delay.

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

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

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

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

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

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

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

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

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

⁽¹⁸⁾ 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.

⁽¹⁹⁾ 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.

⁽²⁰⁾ 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 ⁽²¹⁾. The ECJ has recognised only one exception to this obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that would make it **absolutely impossible** for the Member State to execute the decision properly ⁽²²⁾.
19. According to the Community Courts, absolute impossibility can however not be merely supposed. The Member State must demonstrate that it attempted, in good faith, to recover unlawful aid and it must cooperate with the Commission in accordance with Article 10 of the EC Treaty, with a view to overcoming the difficulties encountered ⁽²³⁾.
20. A review of the jurisprudence shows that the Community Courts have interpreted the concept of 'absolute impossibility' in a very restrictive manner. The Courts have confirmed on several occasions that a Member State may not plead requirements of its national law, such as national prescription rules ⁽²⁴⁾ or the absence of a recovery title under national law ⁽²⁵⁾, in order to justify its failure to comply with a recovery decision ⁽²⁶⁾. In the same way, the ECJ held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. It clarified that a company in financial difficulties does not constitute proof that recovery was impossible ⁽²⁷⁾. In such circumstances, the court pointed out that the absence of any recoverable assets is the only way for a Member State to show the absolute impossibility of recovering the aid ⁽²⁸⁾. In a number of cases, the Member State argued that they had not been able to execute the recovery decision, because of the administrative or technical difficulties involved (e.g. the very high number of beneficiaries involved). The Court consistently refused to accept that such difficulties constitute an absolute impossibility to recover ⁽²⁹⁾. Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law ⁽³⁰⁾.

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

21. Article 14(3) of the Procedural Regulation specifies that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.'
22. If Member States are free to choose, according to their national law, the means by which they implement recovery decisions, the measures chosen should give full effect to the recovery decision. It is therefore necessary that the national measures taken by Member States lead to an **effective and immediate** execution of the Commission decision.
23. In its Olympic Airways judgment ⁽³¹⁾, the ECJ underlined that the implementation measures taken by the Member State must be **effective** and produce a concrete outcome in terms of recovery. The actions undertaken by the Member State must result in the actual recovery of the sums owed by the beneficiary. In its recent Scott judgment ⁽³²⁾, the ECJ confirmed that line and emphasised that national procedures which do not fulfil the conditions laid down in Article 14(3) of the Procedural Regulation should be left unapplied. It refuted, in particular, the Member State's argument that it had taken all steps available in its national system and insisted that these steps should also lead to a concrete outcome in terms of recovery, and this within the deadline set by the Commission.

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

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

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

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

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

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

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

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

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

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

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

⁽³²⁾ 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⁽³³⁾. 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⁽³⁴⁾. 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⁽³⁵⁾.
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⁽³⁶⁾.

3. IMPLEMENTING RECOVERY POLICY

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

3.1. **The role of the Commission**

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

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

⁽³⁴⁾ Case C 94/87, *Commission v Germany*, [1989] ECR 175, paragraph 9, Case C 348/93, *Commission v Italy*, cited above footnote 14, paragraph 17.

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

⁽³⁶⁾ Case 94/87, *Commission v Germany* cited above footnote 34, paragraph 10.

Identification of the undertakings from whom the aid must be recovered

32. The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it ⁽³⁷⁾. The Commission will continue its present practice of identifying in its recovery decisions, where possible, the identity of the undertaking(s) from whom the aid must be recovered. If, at the stage of the implementation, it appears that the aid was transferred to other entities, the Member State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.
33. The Community Courts have given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. According to the ECJ, a transfer of the undue advantage may occur when the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value sometimes to a successor company set up in order to circumvent the recovery order. If the Commission can prove that assets have been sold at a price that is lower than their market value, especially to a successor company set up to circumvent the recovery order, the ECJ considers that the recovery order can be extended to that third party ⁽³⁸⁾. Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order ⁽³⁹⁾.
34. As regards transfer of shares of a company that has to reimburse an illegal and incompatible aid (share deals), the ECJ held ⁽⁴⁰⁾ that the sale of shares in such a company to a third party does not affect the obligation of the beneficiary to reimburse such aid ⁽⁴¹⁾. When it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a State Aid ⁽⁴²⁾.
35. When it adopts a recovery decision regarding aid schemes, the Commission is normally not in a position to identify, in the decision itself, all the undertakings that have received unlawful and incompatible aid. This will have to be done at the start of the implementation process by the Member State concerned, who will have to look at the individual situation of each undertaking concerned ⁽⁴³⁾.

Determination of the amount to be recovered

36. The purpose of recovery is achieved 'once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored' ⁽⁴⁴⁾.
37. As it has done in the past, the Commission will clearly identify the unlawful and incompatible aid measures that are subject to recovery in its recovery decisions. When it has the necessary data at its disposal, the Commission will also endeavour to quantify the precise amount of aid to be recovered. It is clear, though, that the Commission cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for the Commission's decision to include information enabling the Member State to determine the amount, without too much difficulty ⁽⁴⁵⁾.

⁽³⁷⁾ 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.

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

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

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

⁽⁴¹⁾ In the event of a privatisation of a company that received State aid declared compatible by the Commission, the Member State can introduce a liability clause in the privatisation agreement to protect the buyer of the company against the risk that the initial Commission decision approving the aid would be overturned by the Community Courts and replaced by a Commission decision ordering the recovery of that aid from the beneficiary. Such a clause could provide for an adjustment of the price paid by the buyer for the privatised company to take due account of the new recovery liability.

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

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

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

⁽⁴⁵⁾ 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 ⁽⁴⁶⁾. The Implementing Regulation establishes that the interest rate shall be applied on a compound basis until the date of the recovery of the aid.

Timetable for the implementation of the decision

40. In the past, the Commission's recovery decisions specified a single time limit of two months, within which the Member State concerned was required to communicate to the Commission, the measures it had taken to comply with a given decision. The Court acknowledged that this deadline is to be regarded as the deadline for the execution of the Commission decision itself ⁽⁴⁷⁾.
41. The Court further concluded that contacts and negotiations between the Commission and the Member State, in the context of the execution of the Commission decision, could not relieve the Member State from the duty to take all necessary measures to execute the decision within the prescribed time limit ⁽⁴⁸⁾.
42. The Commission recognizes that the two months deadline for the execution of the Commission decisions is too short in the majority of cases. Therefore, it decided to prolong to four months the deadline for the execution of the recovery decisions. From now on, the Commission will specify two time limits in its decisions:
- a first time limit of two months following the entry into force of the decision, within which the Member State must *inform* the Commission of the measures planned or taken,
 - a second time limit of four months following the entry into force of the decision, within which the Commission decision must have been *executed*.
43. If a Member State encounters serious difficulties preventing it from respecting either one of these deadlines, it must inform the Commission of these difficulties, providing an appropriate justification. The Commission may then prolong the deadline in accordance with the principle of loyal cooperation ⁽⁴⁹⁾.

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

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

44. The Member State is responsible for the implementation of the recovery decision. Article 14(1) of the Procedural Regulation provides that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary.
45. In this context, it is important to keep in mind that the ECJ has recalled on several occasions that a Commission decision addressed to a Member State is binding on all the organs of that State, including the Courts of that State ⁽⁵⁰⁾. This implies that each organ of the Member State involved in the implementation of a recovery decision must take all necessary measures to secure the immediate and effective application of such a decision.

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

⁽⁴⁷⁾ 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.

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

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

⁽⁵⁰⁾ 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 ⁽⁵¹⁾'. They also point out that some Member States have charged one central body with the task to control and oversee the recovery process. This body normally has ongoing contact with the Commission. The authors of the Enforcement Study conclude that the existence of such a central body appears to contribute to a more efficient implementation of recovery decisions.

3.2.2. Implementation of the recovery obligation

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

Identification of the aid beneficiary and the amount to be recovered

48. The recovery decision will not always contain complete information on the identity of the beneficiaries, nor on the amounts of aid to be recovered. In such cases, the Member State must identify without any delay the undertakings concerned by the decision and quantify the precise amount of aid to be recovered from each of them.
49. In the case of an unlawful and incompatible aid scheme, the Member State will be required to carry out a detailed analysis of each individual aid granted on the basis of the scheme in question. To quantify the precise amount of aid to be recovered from each individual beneficiary under the scheme, it will need to determine the extent to which the aid has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Commission. In such cases, the Member State may also apply the substantive De Minimis criteria applicable at the time of the granting of the unlawful and incompatible aid that is subject to the recovery decision.
50. National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary ⁽⁵²⁾. The Commission considers that in such cases, the national authorities will need to ensure that the beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.

The applicable recovery procedure

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

⁽⁵¹⁾ See page 521 of the Study.

⁽⁵²⁾ 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.

⁽⁵³⁾ See pages 522 and following of the Study.

52. Community law does not prescribe which procedure the Member State should apply to execute a recovery decision. However, Member States should be aware that the choice and application of a national procedure is subject to the condition that such procedure allows for the immediate and effective execution of the Commission's decision. This implies that the authorities responsible should carefully consider the full range of recovery instruments available under national law and select the procedure most likely to secure the immediate execution of the decision⁽⁵⁴⁾. They should use fast track procedures where possible under national law. According to the principle of equivalence and effectiveness, these procedures must not be less favourable than those governing similar domestic actions, and that they should not render practically impossible or excessively difficult the exercise of rights conferred by Community law⁽⁵⁵⁾.
53. More generally, Member States should not be able to place any obstacles in the way of carrying out a Commission recovery decision⁽⁵⁶⁾. Consequently, Member State authorities are under an obligation to set aside any provisions of national law, which might impede the immediate execution of the Commission decision⁽⁵⁷⁾.

The notification and enforcement of recovery orders

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

3.2.3 Litigation before national courts

55. The implementation of recovery decisions can give rise to litigation in national courts. Although there are very significant differences in the judicial traditions and systems of Member States, two main categories of recovery related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order.
56. The analysis carried out in the context of the Enforcement Study provides evidence that the execution of a recovery decision can be delayed for many years when the national measures taken for the implementation of a recovery decision are challenged in court. This is even more the case when the recovery decision is itself challenged before Community courts and when national judges are asked to suspend the implementation of national measures until the Community Courts have ruled on the validity of the recovery decision.
57. The ECJ has ruled that the beneficiary of an aid who could without any doubt have challenged a Commission recovery decision under Article 230 EC before a European Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful⁽⁵⁸⁾. It derives from this that the beneficiary of an aid who could have asked for interim relief before the Community Courts in accordance with Articles 242 and 243 EC and has failed to do so cannot ask for a suspension of the measures taken by the national authorities for implementing that decision on grounds linked to the validity of the decision. This question is reserved for the Community Courts⁽⁵⁹⁾.

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

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

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

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

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

⁽⁵⁹⁾ As reaffirmed in the Case C 232/05, *Commission v France*, cited above footnote 9.

58. On the other hand, in cases where it is not self evident that an action for annulment brought against the contested decision by the beneficiary of the aid would have been admissible, an adequate legal protection must be offered to the aid beneficiary. In the event that the aid beneficiary challenges the implementation of the decision in proceedings before the national court on the ground that such recovery decision was unlawful, the national judge must make a request for a preliminary ruling on the validity of such decision to the ECJ in accordance with Article 234 EC ⁽⁶⁰⁾.
59. In case the beneficiary also asks for interim relief of the national measures adopted to implement the recovery decision because of an alleged illegality of the Commission's recovery decision, the national judge has to assess whether the case at hand fulfils the conditions established by the ECJ in the cases *Zuckerfabrik* ⁽⁶¹⁾ and *Atlanta* ⁽⁶²⁾. According to settled case law, interim relief can be ordered by the national court only if:
1. that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
 2. there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
 3. the court takes due account of the Community interest; and
 4. in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level ⁽⁶³⁾.

3.2.4. *The specific case of insolvent beneficiaries*

60. As a preliminary observation, it is important to recall that the ECJ has consistently held that the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid ⁽⁶⁴⁾.
61. In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interests), as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re establish the ex ante situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases ⁽⁶⁵⁾. The Commission is therefore of the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when the company is liquidated and its assets are sold under market conditions.
62. When implementing recovery decisions concerning insolvent beneficiaries, Member State authorities should ensure that due account is taken throughout the insolvency proceedings of the Community interest, and more in particular of the need to end immediately the distortion of competition caused by the granting of unlawful and incompatible aid.

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

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

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

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

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

⁽⁶⁵⁾ 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 ⁽⁶⁶⁾ According to the ECJ case law, recovery will be done according to national bankruptcy rules ⁽⁶⁷⁾. The recovery debt will thus be refunded by virtue of the status given to it by national law.
65. In the past, there have been cases in which the insolvency administrator refused to register a recovery claim in the bankruptcy proceedings, and this because of the form of the illegal and incompatible aid granted (for example when the aid had been granted in the form of a capital injection). The Commission considers that this situation is problematic, especially if such a refusal would deprive the authorities responsible for the execution of the recovery decision of any means to ensure that due account is taken of the Community interest in the course of the insolvency proceedings. Therefore the Commission considers that the Member State should dispute the refusal by the insolvency administrator to register its claims ⁽⁶⁸⁾.
66. To ensure the immediate and effective implementation of the Commission's recovery decision, the Commission is of the view that the authorities responsible for the execution of the recovery decision should also appeal any decision by the insolvency administrator or the insolvency court to allow a continuation of the insolvent beneficiary's activity beyond the time limits set in the recovery decision. Likewise, national courts, when faced with such a request, should take the Community interest fully into account, and more in particular the need to ensure that the execution of the Commission's decision is immediate and that the distortion of competition caused by the unlawful and incompatible aid is ended as soon as possible. The Commission considers that they should therefore not allow for a continuation of an insolvent beneficiary's activity in the absence of full recovery.
67. In the case where a continuation plan is proposed to the creditors' committee implying a continuation of the activity of the beneficiary, the national authorities responsible for the execution of the recovery decision can only support this plan if it ensures that the aid is repaid in full within the time limits foreseen in the Commission's recovery decision. In particular, the Member State cannot waive part of its recovery claim, nor can it accept any other solution that would not result in the immediate ending of the activity of the beneficiary. In the absence of a full and immediate repayment of the unlawful and incompatible aid, the authorities responsible for the execution of the recovery decision should take all measures available to oppose the adoption of a continuation plan and should insist on the ending of the activity of the beneficiary within the time limit set in the recovery decision.
68. In the case of liquidation, and as long as the aid has not been fully recovered, the Member State should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision. To achieve a 'correct transfer of assets', the Member State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets. This may be the case if the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. In such a case, the recovery order needs to be extended to that third party ⁽⁶⁹⁾.

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

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

⁽⁶⁸⁾ Please see in that context, the judgement of the Commercial Chamber of the Amberg Court of 23 July 2001 in relation to the aid granted by Germany to 'Neue Maxhütte Stahlwerke GmbH' (Commission Decision 96/178/ECSC (OJ L 53, 2.3.1996, p. 41). In that case, the German court overruled the refusal of the insolvency administrator to register a recovery claim resulting from an illegal and incompatible aid granted in the form of a capital injection, as this would render the execution of the recovery decision impossible.

⁽⁶⁹⁾ Case C 277/00, *Germany v Commission*, cited above footnote 37.

4. CONSEQUENCES OF THE FAILURE TO IMPLEMENT THE COMMISSION RECOVERY DECISIONS

69. A Member State is deemed to comply with the recovery decision when the aid has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions.
70. The Commission may also accept, in duly justified cases, a provisional implementation of the decision when it is subject to litigation before the national or the Community Courts (e.g. the payment of the full amount of unlawful and incompatible aid into a blocked account ⁽⁷⁰⁾). The Member State must ensure that the advantage linked to the unlawful and incompatible aid leaves the company ⁽⁷¹⁾. The Member State should submit, for approval by the Commission, a justification for the adoption of such provisional measures and a full description of the provisional measure envisaged.
71. Where the Member State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Commission may initiate infringement proceedings. In addition, if certain conditions are satisfied, it may require the Member State concerned to suspend the payment of a new compatible aid to the beneficiary or beneficiaries concerned in application of the Deggendorf principle.

4.1. Infringement proceedings

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

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

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

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

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

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

⁽⁷²⁾ 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.

⁽⁷³⁾ 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' ⁽⁷⁴⁾. In application of this judgment, and to avoid a distortion of competition contrary to the common interest, the Commission may order a Member State to suspend the payment of a new compatible aid to an undertaking that has at its disposal an unlawful and incompatible aid subject to an earlier recovery decision, and this until the Member State has reassured itself that the undertaking concerned has reimbursed the old unlawful and incompatible aid.
76. The Commission has been applying the so called Deggendorf principle in a more systematic manner for a few years now. In practice, in the course of the preliminary investigation of a new aid measure, the Commission will request a commitment from the Member State to suspend the payment of new aid to any beneficiary that still needs to reimburse an unlawful and incompatible aid subject to an earlier recovery decision. If the Member State does not give this commitment and/or in the absence of clear data on the aid measures involved ⁽⁷⁵⁾ preventing the Commission to assess the global impact of the old and the new aid on competition, the Commission will take a final conditional decision on the basis of Article 7(4) of the Procedural Regulation, requiring the Member State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.
77. The Deggendorf principle has meanwhile been integrated in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽⁷⁶⁾ and in recent Block Exemption Regulations ⁽⁷⁷⁾. The Commission intends to integrate this principle into all forthcoming State aid rules and decisions.
78. Finally, the Commission welcomes the initiative of Italy to insert a specific 'Deggendorf' provision in its 'Legge Finanziaria 2007', which provides that beneficiaries of new State aid measures should declare that they do not have at their disposal any illegal or incompatible State aid ⁽⁷⁸⁾.

5. CONCLUSION

79. The maintenance of a system of free and undistorted competition is one of the cornerstones of the European Community. As part of the European competition policy, State aid discipline is essential to ensure that the internal market remains a level playing field in all economic sectors in Europe. In this key task, the Commission and the Member States have the joint responsibility to ensure a proper enforcement of State aid discipline and in particular of recovery decisions.
80. By issuing this communication, the Commission is willing to increase the awareness of the principles of recovery policy as defined by the Community Courts and to clarify the Commission practice as regards its recovery policy. The Commission commits itself to abide by these recalled principles and invites Member States to ask for advice when facing difficulties in implementing recovery decisions. The services of the Commission remain at the disposal of the Member States to provide further guidance and assistance if required.

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

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

⁽⁷⁶⁾ OJ C 244, 1.10.2004, p. 2, paragraph 23.

⁽⁷⁷⁾ 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).

⁽⁷⁸⁾ *Legge 27 dicembre 2006, n. 296, art. 1223*.

81. In return, the Commission expects Member States to abide to the principles of recovery policy. It is only through a joint effort of both Commission and Member States that State aid discipline will be ensured and produce its desired objective, i.e. the maintenance of undistorted competition within the internal market.
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Commission notice on the determination of the applicable rules for the assessment of unlawful State aid

(notified under document number C(2002) 458)

(2002/C 119/12)

(Text with EEA relevance)

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

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

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

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

⁽¹⁾ OJ C 37, 3.2.2001, p. 3.

⁽²⁾ OJ C 70, 19.3.2002, p. 8.

⁽³⁾ OJ C 288, 9.10.1999, p. 2.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission notice on the enforcement of State aid law by national courts

(2009/C 85/01)

1. INTRODUCTION

1. In 2005, the Commission adopted a road map for State aid reform, the State Aid Action Plan ⁽¹⁾ ('the SAAP'), to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the EC Treaty. Based on the principle of 'less and better targeted State aid', the central objective of the SAAP is to encourage Member States to reduce their overall aid, whilst redirecting State aid resources to horizontal common interest objectives. In this context, the Commission has reaffirmed its commitment to a strict approach towards unlawful and incompatible aid. The SAAP highlighted the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid ⁽²⁾.
2. Prior to the adoption of the SAAP, the Commission had already addressed the role of national courts in the Notice on cooperation between national courts and the Commission in the State aid field, published in 1995 ⁽³⁾ ('the 1995 Cooperation Notice'). The 1995 Cooperation Notice introduced mechanisms for cooperation and exchange of information between the Commission and national courts.
3. In 2006, the Commission commissioned a study on the enforcement of State aid law at national level ⁽⁴⁾ ('the Enforcement Study'). This study was aimed at providing a detailed analysis of private State aid enforcement in different Member States. The Enforcement Study concluded that, in the period between 1999 and 2006, State aid litigation at Member State level had increased significantly ⁽⁵⁾.
4. However, the Enforcement Study also revealed that a large number of the legal proceedings at Member State level were not aimed at reducing the anticompetitive effect of the underlying State aid measures. This was because almost two thirds of the judgments analysed concerned actions brought by taxpayers who sought relief from the allegedly discriminatory imposition of a (tax) burden ⁽⁶⁾ and actions

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

⁽²⁾ SAAP, paragraphs 55 and 56.

⁽³⁾ OJ C 312, 23.11.1995, p. 8.

⁽⁴⁾ Available at http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.cfm The study only covered EU-15.

⁽⁵⁾ A total increase from 116 cases to 357 cases.

⁽⁶⁾ 51 % of all judgments.

brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid ⁽⁷⁾. The number of legal challenges aimed at enforcing compliance with the State aid rules was relatively small: actions by competitors against a Member State authority for damages, recovery and/or injunctive measures based on Article 88(3) of the Treaty accounted for only 19 % of the judgments analysed, whilst direct actions by competitors against beneficiaries accounted for only 6 % of the judgments.

5. In spite of the fact that, as highlighted in the Enforcement Study, genuine private enforcement before national courts has played a relatively limited role in State aid to date, the Commission considers that private enforcement actions can offer considerable benefits for State aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level. In addition, based on the jurisprudence of the Court of Justice of the European Communities ('ECJ'), national courts can offer claimants very effective remedies in the event of a breach of the State aid rules. This can in turn contribute to stronger overall State aid discipline.
6. Accordingly, the main purpose of this Notice is to inform national courts and third parties about the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those rules. In addition, the Commission seeks to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.
7. This Notice replaces the 1995 Cooperation Notice and is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Community courts. Additional information aimed at national courts will be made available on the Commission's website.

2. ROLE OF NATIONAL COURTS IN STATE AID ENFORCEMENT

2.1. General issues

2.1.1. Identifying State aid

8. The first issue facing national courts and potential claimants when applying Articles 87 and 88 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.
9. Article 87(1) of the Treaty covers '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States*'.
10. The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid ⁽⁸⁾.
11. The notion of State aid is not limited to subsidies ⁽⁹⁾. It also comprises, *inter alia*, tax concessions and investments from public funds made in circumstances where a private investor would have withheld

⁽⁷⁾ 12 % of all judgments.

⁽⁸⁾ 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.

⁽⁹⁾ 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⁽¹⁰⁾. 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⁽¹¹⁾. 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⁽¹²⁾. In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States⁽¹³⁾.

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

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

⁽¹⁰⁾ 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'.

⁽¹¹⁾ 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.

⁽¹²⁾ 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.

⁽¹³⁾ 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.

⁽¹⁴⁾ 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.

⁽¹⁵⁾ 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).

⁽¹⁶⁾ 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.

⁽¹⁷⁾ 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).

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

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

⁽²⁰⁾ 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).

⁽²¹⁾ 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).

⁽²²⁾ 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).

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

⁽²⁴⁾ 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 ⁽³¹⁾.
17. If the national court needs to determine whether the measure falls under an approved aid scheme, it can only verify whether all conditions of the approval decision are met. Where the issues raised at national level concern the validity of a Commission decision, the national court has no jurisdiction to declare acts of Community institutions invalid ⁽³²⁾. Where the issue of validity arises, the national court may, or in some cases must, refer the matter to the ECJ for a preliminary ruling ⁽³³⁾. Based on the principle of legal certainty as interpreted by the ECJ, even the possibility of questioning the validity of the underlying Commission decision by way of a preliminary ruling is no longer available where the claimant could undoubtedly have challenged the Commission decision before the Community courts under Article 230 of the Treaty, but failed to do so ⁽³⁴⁾.
18. The national court may ask the Commission for an opinion under section 3 of the present Notice if it has doubts concerning the applicability of a Block Exemption Regulation or an existing or approved aid scheme.

2.1.3. Respective roles of the Commission and national courts

19. The ECJ has repeatedly confirmed that both national courts and the Commission play essential, but distinct roles in the context of State aid enforcement ⁽³⁵⁾.
20. The Commission's main role is to examine the compatibility of proposed aid measures with the common market, based on the criteria laid down in Article 87(2) and (3) of the Treaty. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. According to settled ECJ jurisprudence, national courts do not have the power to declare a State aid measure compatible with Article 87(2) or (3) of the Treaty ⁽³⁶⁾.
21. The role of the national court depends on the aid measure at issue and whether that measure has been duly notified and approved by the Commission:
- (a) National courts are often asked to intervene in cases where a Member State authority ⁽³⁷⁾ has granted aid without respecting the standstill obligation. This situation arises either because the aid was not notified at all, or because the authority implemented it before getting the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid ⁽³⁸⁾.

⁽³¹⁾ See paragraph 20.

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

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

⁽³⁴⁾ 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.

⁽³⁵⁾ 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.

⁽³⁶⁾ 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.

⁽³⁷⁾ This includes authorities at national, regional and local level.

⁽³⁸⁾ 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⁽³⁹⁾ ('the Procedural Regulation'), where the Commission's assessment concludes that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities. However, depending on national procedural law, other types of legal action may be possible (such as actions by Member State authorities against the beneficiary aimed at the full implementation of a Commission recovery decision).

22. When preserving the interests of individuals, national courts must take full account of the effectiveness and direct effect⁽⁴⁰⁾ of Article 88(3) of the Treaty and the interests of the Community⁽⁴¹⁾.

23. The role of national courts in such settings is set out in more detail under sections 2.2 and 2.3.

2.2. Role of national courts in enforcing Article 88(3) of the EC Treaty - Unlawful State Aid

24. Like Articles 81 and 82 EC, the standstill obligation laid down in Article 88(3) of the Treaty gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting Member State. Dealing with such legal actions and thus protecting competitor's rights under Article 88(3) of the Treaty is one of the most important roles of national courts in the State aid field.

25. The essential role played by national courts in this context also stems from the fact that the Commission's own powers to protect competitors and other third parties against unlawful aid are limited. Most importantly, as the ECJ held in its 'Boussac'⁽⁴²⁾ and 'Tubemeuse'⁽⁴³⁾ judgments, the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 88(3) of the Treaty. The Commission must therefore conduct a full compatibility assessment, regardless of whether the standstill obligation has been respected or not⁽⁴⁴⁾. This assessment can be time-consuming and the Commission's powers to issue preliminary recovery injunctions are subject to very strict legal requirements⁽⁴⁵⁾.

26. As a result, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful State aid. Remedies available before national courts include:

⁽³⁹⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁴⁰⁾ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraphs 11 and 12; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 39 and 40.

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

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

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

⁽⁴⁴⁾ Case C-301/87, *France v Commission*, ('Boussac'), cited above footnote 42, paragraphs 17 to 23; Case C-142/87, *Belgium v Commission*, ('Tubemeuse'), cited above footnote 43, paragraphs 15 to 19; Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 14; and Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraph 38.

⁽⁴⁵⁾ Cf. Article 11(2) of the Procedural Regulation, which requires that there are no doubts about the aid character of the measure concerned, that there is an urgency to act and that there is a serious risk of substantial and irreparable damage to a competitor.

- (a) preventing the payment of unlawful aid;
- (b) recovery of unlawful aid (regardless of compatibility);
- (c) recovery of illegality interest;
- (d) damages for competitors and other third parties; and
- (e) interim measures against unlawful aid.

27. Each of these remedies is set out in more detail in sections 2.2.1 to 2.2.6.

2.2.1. Preventing the payment of unlawful aid

28. National courts are obliged to protect the rights of individuals affected by violations of the standstill obligation. National courts must therefore draw all appropriate legal consequences, in accordance with national law, where an infringement of Article 88(3) of the Treaty has occurred⁽⁴⁶⁾. However, the national courts' obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. As part of their duties under Article 88(3) of the Treaty, national courts must safeguard the rights of individuals against possible disregard of those rights⁽⁴⁷⁾. Where unlawful aid is about to be disbursed, the national court is therefore obliged to prevent this payment from taking place.
29. The national courts' obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on different types of actions available under national law. Very often, the claimant will seek to challenge the validity of the national act granting the unlawful State aid. In such cases, preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid as a result of the Member State's breach of Article 88(3) of the Treaty⁽⁴⁸⁾.

2.2.2. Recovery of unlawful aid

30. Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary⁽⁴⁹⁾. Ordering the full recovery of unlawful aid is part of the national court's obligation to protect the individual rights of the claimant (such as the competitor) under Article 88(3) of the Treaty. The recovery obligation of the national court is thus not dependent on the compatibility of the aid measure with Article 87(2) or (3) of the Treaty.

⁽⁴⁶⁾ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 12; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 40; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 47; and Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraph 41.

⁽⁴⁷⁾ See references cited in footnote 38.

⁽⁴⁸⁾ On the invalidity of the granting act in cases where the Member State has violated Article 88(3) EC, see Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 12; see also, as an illustration, German Federal Court of Justice ('Bundesgerichtshof'), judgment of 4 April 2003, V ZR 314/02, VIZ 2003, 340, and judgment of 20 January 2004, XI ZR 53/03, NVwZ 2004, 636.

⁽⁴⁹⁾ Case C-71/04, *Xunta de Galicia*, [2005] ECR I-7419, paragraph 49; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 40 and 68; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 12.

31. Since national courts must order the full recovery of unlawful aid regardless of its compatibility, recovery can be swifter before a national court than through a complaint with the Commission. Indeed, unlike the Commission⁽⁵⁰⁾, the national court can and must limit itself to determining whether the measure constitutes State aid and whether the standstill obligation applies to it.
32. However, the national courts' recovery obligation is not absolute. According to the 'SFEI' jurisprudence⁽⁵¹⁾, there can be exceptional circumstances in which the recovery of unlawful State aid would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Articles 14 and 15 of the Procedural Regulation⁽⁵²⁾. In other words, circumstances which would not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery under Article 88(3) of the Treaty. The standard which the Community courts apply in this respect is very strict⁽⁵³⁾. In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order⁽⁵⁴⁾. This is because a diligent businessman would have been able to verify whether the aid he received was notified or not⁽⁵⁵⁾.
33. To justify the national court not ordering recovery under Article 88(3) of the Treaty, a specific and concrete fact must therefore have generated legitimate expectation on the beneficiary's part⁽⁵⁶⁾. This can be the case if the Commission itself has given precise assurances that the measure in question does not constitute State aid, or that it is not covered by the standstill obligation⁽⁵⁷⁾.
34. In its 'CELF' judgment⁽⁵⁸⁾, the ECJ clarified that the national court's obligation to order full recovery of unlawful State aid ceases if, by the time the national court renders its judgment, the Commission has already decided that the aid is compatible with the common market. Since the purpose of the standstill obligation is to ensure that only compatible aid can be implemented, this purpose can no longer be frustrated where the Commission has already confirmed compatibility⁽⁵⁹⁾. Therefore, the national court's obligation to protect individual rights under Article 88(3) of the Treaty remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not⁽⁶⁰⁾.

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

⁽⁵¹⁾ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 70 and 71, referring to Advocate General Jacobs' Opinion in this case, paragraphs 73 to 75; see also Case 223/85, *RSV v Commission*, [1987] ECR 4617, paragraph 17; and Case C-5/89, *Commission v Germany*, [1990] ECR I-3437, paragraph 16.

⁽⁵²⁾ On the standard applied in this respect, see Advocate General Jacobs' Opinion in Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75.

⁽⁵³⁾ Article 14 only provides for an exemption from the Commission's recovery obligation where a recovery would contravene general principles of Community law. The only case in which a Member State can refrain from implementing a recovery decision by the Commission is where such recovery would be objectively impossible, cf. Case C-177/06, *Commission v Spain*, [2007] ECR I-7689, paragraph 46. Also see paragraph 17 of the Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4).

⁽⁵⁴⁾ 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.

⁽⁵⁵⁾ Case C-5/89, *Commission v Germany*, cited above footnote 51, paragraph 14; Case C-24/95, *Alcan Deutschland*, [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, cited above footnote 34, paragraph 64.

⁽⁵⁶⁾ 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.

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

⁽⁵⁸⁾ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 45, 46 and 55; and Case C-384/07, *Wienstrom*, judgment of 11 December 2008, not yet published, paragraph 28.

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

⁽⁶⁰⁾ The judgment explicitly confirms the recovery obligation imposed by the ECJ in its previous jurisprudence, cf. Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraph 41.

35. While after a positive Commission decision the national court is no longer under a *Community law* obligation to order full recovery, the ECJ also explicitly recognises that a recovery obligation may exist under *national law* ⁽⁶¹⁾. However, where such a recovery obligation exists, this is without prejudice to the Member State's right to re-implement the aid subsequently.
36. Once the national court has decided that unlawful aid has been disbursed in violation of Article 88(3) of the Treaty, it must quantify the aid in order to determine the amount to be recovered. The case law of the Community courts on the application of Article 87(1) of the Treaty and the Commission's guidance and decision making practice should assist the court in this respect. Should the national court encounter difficulties in calculating the aid amount, it may request the Commission's support, as further set out in section 3 of this Notice.
- 2.2.3. *Recovery of interest*
37. The economic advantage of unlawful aid is not limited to its nominal amount. In addition, the beneficiary obtains a financial advantage resulting from the premature implementation of the aid. This is due to the fact that, had the aid been notified to the Commission, payment would (if at all) have taken place later. This would have obliged the beneficiary to borrow the relevant funds on the capital markets, including interest at market rates.
38. This undue time advantage is the reason why, if recovery is ordered by the Commission, Article 14(2) of the Procedural Regulation requires not only recovery of the nominal aid amount, but also recovery of interest from the day the unlawful aid was put at the disposal of the beneficiary to the day when it is effectively recovered. The interest rate to be applied in this context is defined in Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [93] of the Treaty ('the Implementing Regulation') ⁽⁶²⁾.
39. In its 'CELF' judgment, the ECJ clarified that the need to recover the financial advantage resulting from premature implementation of the aid (hereinafter referred to as 'illegality interest') is part of the national courts' obligation under Article 88(3) of the Treaty. This is because the premature implementation of unlawful aid will at least cause competitors to suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage ⁽⁶³⁾.
40. The national court's obligation to order the recovery of illegality interest can arise in two different settings:
- (a) The national court must normally order full recovery of unlawful aid under Article 88(3) of the Treaty. Where this is the case, illegality interest needs to be added to the original aid amount when determining the total recovery amount.

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

⁽⁶²⁾ 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').

⁽⁶³⁾ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 50 to 52 and 55.

- (b) However, the national court must also order the recovery of illegality interest in circumstances in which, exceptionally, there is no obligation to order full recovery. As confirmed in 'CELF', the national court's obligation to order recovery of illegality interest therefore remains in place even after a positive Commission decision⁽⁶⁴⁾. This can be of central importance to potential claimants, since it also offers a successful remedy in cases where the Commission has already declared the aid compatible with the common market.

41. In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

- (a) The starting point is the nominal aid amount⁽⁶⁵⁾.
- (b) When determining the applicable interest rate and calculation method, national courts should take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Commission's interest recovery under Article 14 of the Procedural Regulation. In addition, claims for the recovery of illegality interest are Community law claims based directly on Article 88(3) of the Treaty⁽⁶⁶⁾. The principles of equivalence and effectiveness described under section 2.4.1 of this Notice therefore apply to these claims.
- (c) In order to ensure consistency with Article 14 of the Procedural Regulation and to comply with the effectiveness requirement, the Commission considers that the method of interest calculation used by the national court may not be less strict than that foreseen in the Implementing Regulation⁽⁶⁷⁾. Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate⁽⁶⁸⁾.
- (d) Moreover, in the Commission's view, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Implementing Regulation, the national court will have to apply the stricter national rules also to claims based on Article 88(3) of the Treaty.
- (e) The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. If, as was the case in 'CELF', the Commission has already approved the aid, the end date is the date of the Commission decision. Otherwise, illegality interest accumulates for the whole period of unlawfulness until the date of actual repayment of the aid by the beneficiary. As was confirmed in 'CELF', illegality interest also needs to be applied for the period between the adoption of a positive Commission decision and the subsequent annulment of this decision by the Community courts⁽⁶⁹⁾.

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

⁽⁶⁵⁾ See paragraph 36. Taxes paid on the nominal aid amount can be deducted for the purposes of recovery, see Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 83.

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

⁽⁶⁷⁾ See chapter V of the Implementing Regulation.

⁽⁶⁸⁾ See footnote 62.

⁽⁶⁹⁾ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraph 69.

42. In case of doubt, the national court may ask the Commission for support under section 3 of this Notice.

2.2.4. Damages claims

43. As part of their role under Article 88(3) of the Treaty, national courts may also be required to uphold claims for compensation for damage caused to competitors of the beneficiary and to other third parties by the unlawful State aid⁽⁷⁰⁾. Such damages actions are usually directed at the State aid granting authority. They can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss.
44. The ECJ has repeatedly held that affected third parties can bring such damages actions under *national law*⁽⁷¹⁾. Such challenges are obviously dependent on national legal rules. Therefore, the legal bases on which claimants have relied in the past vary significantly across the Community.
45. Irrespective of the possibility to claim damages under national law, breaches of the standstill obligation have direct and binding consequences under *Community law*. This is because the standstill obligation under Article 88(3) of the Treaty is a directly applicable rule of Community law which is binding on all Member State authorities⁽⁷²⁾. Breaches of the standstill obligation can therefore, in principle, give rise to damages claims based on the 'Francovich'⁽⁷³⁾ and 'Brasserie du Pêcheur'⁽⁷⁴⁾ jurisprudence of the ECJ⁽⁷⁵⁾. This jurisprudence confirms that Member States are required to compensate for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible⁽⁷⁶⁾. Such liability exists where: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the Member State's obligation and the damage suffered by the injured parties⁽⁷⁷⁾.
46. The first requirement (Community law obligation aimed at protecting individual rights) is met in relation to violations of Article 88(3) of the Treaty. The ECJ has not only repeatedly confirmed the existence of individual rights under Article 88(3) of the Treaty but has also clarified that the protection of these individual rights is the genuine role of national courts⁽⁷⁸⁾.

⁽⁷⁰⁾ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 53 and 55; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 56; and Case C-334/07 P, *Commission v Freistaat Sachsen*, judgment of 11 December 2008, not yet published, paragraph 54.

⁽⁷¹⁾ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 53 and 55; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 56; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75.

⁽⁷²⁾ Case 6/64, *Costa v E.N.E.L.*, [1964] ECR 1141; Case 120/73, *Lorenz GmbH v Bundesrepublik Deutschland and Others*, [1973] ECR 1471, paragraph 8; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 11.

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

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

⁽⁷⁵⁾ The fact that violations of the State aid rules can give rise to Member State liability directly on the basis of Community law has been confirmed in Case C-173/03 *Traghetti del Mediterraneo v Italy*, [2006] ECR I-5177, paragraph 41.

⁽⁷⁶⁾ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, cited above footnote 73, paragraphs 31 to 37; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 74, paragraph 31.

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

⁽⁷⁸⁾ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraphs 12 to 14; Joined Cases C-261/01 and C-262/01, *Van Calster and 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 ⁽⁷⁹⁾. Where the authority in question has no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ⁽⁸⁰⁾. However, with regard to Article 88(3) of the Treaty, Member State authorities have no discretion not to notify State aid measures. They are, in principle, under an absolute obligation to notify all such measures prior to their implementation. Although the ECJ sometimes takes the excusability of the relevant breach of Community law into account ⁽⁸¹⁾, in the presence of State aid, Member State authorities cannot normally argue that they were not aware of the standstill obligation. This is because there is a large body of case law and Commission guidance on the application of Articles 87(1) and 88(3) of the Treaty. In case of doubt, Member States can always notify the measure to the Commission for reasons of legal certainty ⁽⁸²⁾.
48. The third requirement that the breach of Community law must have caused an actual and certain financial damage to the claimant can be met in various ways.
49. The claimant will often argue that the aid was directly responsible for a loss of profit. When confronted with such a claim, the national court should take account of the following considerations:
- (a) By virtue of the Community law requirements of equivalence and effectiveness ⁽⁸³⁾, national rules may not exclude a Member State's liability for loss of profit ⁽⁸⁴⁾. Damage under Community law can exist regardless of whether the breach caused the claimant to lose an asset or whether it prevented the claimant from improving his asset position. Should national law contain such an exclusion, the national court would need to leave the provision unapplied as regards damages claims under Article 88(3) of the Treaty.
 - (b) Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. The national court can then calculate the revenue which the claimant was likely to generate under this contract. In cases where the contract has already been fulfilled by the beneficiary, the national court would also take account of the actual profit generated.
 - (c) More complicated damage assessments are necessary where the aid merely leads to an overall loss of market share. One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted.
 - (d) There may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could, for example, be the case where, as a consequence of the unlawful aid, the claimant is forced out of business (through insolvency for example).

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

⁽⁸⁰⁾ 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.

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

⁽⁸²⁾ Although breaches of Article 88(3) EC must therefore generally be regarded as sufficiently serious, there can be exceptional circumstances which stand in the way of a damages claim. In such circumstances, the requirement of a sufficiently serious breach may not be met. See paragraphs 32 and 33.

⁽⁸³⁾ See section 2.4.1.

⁽⁸⁴⁾ 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⁽⁸⁵⁾. Since the claimant may be able to demonstrate that he suffered loss due to the premature implementation of the aid, and, more specifically, as a result of the beneficiary's illegal time advantage, successful damages claims are also not ruled out where the Commission has already approved the aid by the time the national court decides⁽⁸⁶⁾.
51. National procedural rules will sometimes allow the national court to rely on reasonable estimates for the purpose of determining the actual amount of damages to be granted to the claimant. Where that is the case, and provided the principle of effectiveness⁽⁸⁷⁾ is respected, the use of such estimates would also be possible in relation to damages claims arising under Article 88(3) of the Treaty. This can be a useful tool for national courts which face difficulties in relation to the calculation of damages.
52. The legal prerequisites for damages claims under Community law and issues of damages calculation can also form the basis of requests for Commission assistance under section 3 of the present Notice.

2.2.5. Damages claims against the beneficiary

53. Potential claimants are entitled to bring damages claims against the State aid granting authority. However, there may be circumstances in which the claimant prefers to claim damages directly from the beneficiary.
54. In the 'SFEI' judgment, the ECJ explicitly addressed the question whether direct damages actions can be brought against the beneficiary under Community law. It concluded that, because Article 88(3) of the Treaty does not impose any direct obligations on the beneficiary, there is no sufficient *Community law* basis for such claims⁽⁸⁸⁾.
55. However, this does not in any way prejudice the possibility of a successful damages action against the beneficiary on the basis of substantive *national law*. In that context, the ECJ specifically referred to the possibility for potential claimants to rely on national rules governing non-contractual liability⁽⁸⁹⁾.

2.2.6. Interim measures

56. The duty of national courts to draw the necessary legal consequences from violations of the standstill obligation is not limited to their final judgments. As part of their role under Article 88(3) of the Treaty, national courts are also required to take interim measures where this is appropriate to safeguard the rights of individuals⁽⁹⁰⁾ and the effectiveness of Article 88(3) of the Treaty.

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

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

⁽⁸⁷⁾ See Section 2.4.1.

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

⁽⁸⁹⁾ 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).

⁽⁹⁰⁾ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 12; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 52; and Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 46.

57. The power of national courts to adopt interim measures can be of central importance to interested parties where fast relief is required. Because of their ability to act swiftly against unlawful aid, their proximity and the variety of measures available to them, national courts are very well placed to take interim measures where unlawful aid has already been paid or is about to be paid.
58. The most straightforward cases are those where unlawful aid has not yet been disbursed, but where there is a risk that such payments will be made during the course of national court proceedings. In such cases, the national court's obligation to prevent violations of Article 88(3) of the Treaty⁽⁹¹⁾ can require it to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved.
59. Where the illegal payment has already been made, the role of national courts under Article 88(3) of the Treaty usually requires them to order full recovery (including illegality interest). Because of the principle of effectiveness⁽⁹²⁾, the national court may not postpone this by unduly delaying proceedings. Such delays would not only affect the individual rights which Article 88(3) of the Treaty protects, but also directly increase the competitive harm which stems from the unlawfulness of the aid.
60. However, in spite of this general obligation, there may nevertheless be circumstances in which the final judgment for the national court is delayed. In such cases, the obligation to protect the individual rights under Article 88(3) of the Treaty requires the national court to use all interim measures available to it under the applicable national procedural framework to at least terminate the anti-competitive effects of the aid on a provisional basis ('interim recovery')⁽⁹³⁾. The application of national procedural rules in this context is subject to the requirements of equivalence and effectiveness⁽⁹⁴⁾.
61. Where, based on the case law of the Community courts and the practice of the Commission, the national judge has reached a reasonable *prima facie* conviction that the measure at stake involves unlawful State aid, the most expedient remedy will, in the Commission's view and subject to national procedural law, be to order the unlawful aid *and* the illegality interest to be put on a blocked account until the substance of the matter is resolved. In its final judgment, the national court would then either order the funds on the blocked account to be returned to the State aid granting authority, if the unlawfulness is confirmed, or order the funds to be released to the beneficiary.
62. Interim recovery can also be a very effective instrument in cases where national court proceedings run parallel to a Commission investigation⁽⁹⁵⁾. An ongoing Commission investigation does not release the national court from its obligation to protect individual rights under Article 88(3) of the Treaty⁽⁹⁶⁾. The national court may therefore not simply suspend its own proceedings until the Commission has decided and leave the rights of the claimant under Article 88(3) of the Treaty unprotected in the meantime. Where the national court wishes to await the outcome of the Commission's compatibility assessment before adopting a final and irreversible recovery order, it should therefore adopt appropriate interim measures. Here again, ordering the placement of the funds on a blocked account would seem an appropriate remedy. In cases where:

⁽⁹¹⁾ See section 2.2.1.

⁽⁹²⁾ See section 2.4.1.

⁽⁹³⁾ See also Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 52; and Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 46.

⁽⁹⁴⁾ See section 2.4.1.

⁽⁹⁵⁾ See section 2.3.1 for guidance on interim measures in recovery cases.

⁽⁹⁶⁾ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 44.

- (a) the Commission declares the aid incompatible, the national court would order the funds on the blocked account to be returned to the State aid granting authority (aid plus illegality interest);
- (b) the Commission declares the aid compatible, this would release the national court from its Community law obligation to order full recovery⁽⁹⁷⁾. The court may therefore, subject to national law⁽⁹⁸⁾, order the actual aid amount to be released to the beneficiary. However, as described in section 2.2.3, the national court remains under a Community law obligation to order the recovery of illegality interest⁽⁹⁹⁾. This illegality interest will therefore have to be paid to the State aid granting authority.

2.3. Role of national courts in the implementation of negative Commission decisions ordering recovery

63. National courts can also face State aid issues in cases where the Commission has already ordered recovery. Although most cases will be actions for the annulment of a national recovery order, third parties can also claim damages from national authorities for failure to implement a Commission recovery decision.

2.3.1. Challenging the validity of a national recovery order

64. According to Article 14(3) of the Procedural Regulation, Member States must implement recovery decisions without delay. Recovery takes place according to the procedures available under national law, provided they allow for immediate and effective execution of the recovery decision. Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied⁽¹⁰⁰⁾.
65. The validity of recovery orders issued by national authorities to implement a Commission recovery decision is sometimes challenged before a national court. The rules governing such actions are set out in detail in the Commission's 2007 Recovery Notice⁽¹⁰¹⁾, the main principles of which are summarised in this section.
66. In particular, national court actions cannot challenge the validity of the underlying Commission decision where the claimant could have challenged this decision directly before the Community courts⁽¹⁰²⁾. This also means that, where a challenge under Article 230 of the Treaty would have been possible, the national court may not suspend the execution of the recovery decision on grounds linked to the validity of the Commission decision⁽¹⁰³⁾.
67. Where it is not clear that the claimant can bring an annulment action under Article 230 of the Treaty (for example where the measure was an aid scheme with a wide coverage for which the claimant may not be able to demonstrate an individual concern), the national court must, in principle, offer legal protection. However, even in those circumstances, the national judge must request a preliminary ruling under Article 234 of the Treaty where the legal action concerns the validity and lawfulness of the Commission decision⁽¹⁰⁴⁾.

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

⁽⁹⁸⁾ See paragraph 35.

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

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

⁽¹⁰¹⁾ Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid, cited above footnote 53, paragraphs 55 to 59.

⁽¹⁰²⁾ See references cited in footnote 34.

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

⁽¹⁰⁴⁾ See Case C-119/05 *Lucchini*, cited above footnote 32, paragraph 53.

68. Granting interim relief in such circumstances is subject to the very strict legal requirements defined in the 'Zuckerfabrik' ⁽¹⁰⁵⁾ and 'Atlanta' ⁽¹⁰⁶⁾ jurisprudence: a national court may only suspend recovery orders under the following conditions (i) the court has serious doubts as regards the validity of the Community act. If the validity of the contested act is not already in issue before the ECJ, it must itself refer the question to the ECJ; (ii) there must be urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief; and (iii) the court has to take due account of the Community interest. In its assessment of all those conditions, the national court must respect any ruling by the Community courts on the lawfulness of the Commission decision or on an application for interim relief at Community level ⁽¹⁰⁷⁾.

2.3.2. Damages for failure to implement a recovery decision

69. Like violations of the standstill obligation, failure by the Member State authorities to comply with a Commission recovery decision under Article 14 of the Procedural Regulation can give rise to damages claims under the 'Francovich' and 'Brasserie du Pêcheur' jurisprudence ⁽¹⁰⁸⁾. In the Commission's view, the treatment of such damages claims mirrors the principles as regards violations of the standstill obligation ⁽¹⁰⁹⁾. This is because, (i) the Member State's recovery obligation is aimed at protecting the same individual rights as the standstill obligation, and (ii) the Commission's recovery decisions do not leave national authorities any discretion; breaches of the recovery obligation are thus, in principle, to be regarded as sufficiently serious. Consequently, the success of a damages claim for non-implementation of a Commission recovery decision will again depend on whether the claimant can demonstrate that he suffered loss directly as a result of the delayed recovery ⁽¹¹⁰⁾.

2.4. Procedural rules and legal standing before national courts

2.4.1. General principles

70. National courts are obliged to enforce the standstill obligation and protect the rights of individuals against unlawful State aid. In principle, national procedural rules apply to such proceedings ⁽¹¹¹⁾. However, based on general principles of Community law, the application of national law in these circumstances is subject to two essential conditions:

(a) national procedural rules applying to claims under Article 88(3) of the Treaty may not be less favourable than those governing claims under domestic law (principle of equivalence) ⁽¹¹²⁾; and

(b) national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by Community law (principle of effectiveness) ⁽¹¹³⁾.

⁽¹⁰⁵⁾ 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.

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

⁽¹⁰⁷⁾ For further guidance, cf. 2007 Recovery Notice, paragraph 59.

⁽¹⁰⁸⁾ See references cited in footnote 77.

⁽¹⁰⁹⁾ See section 2.2.4.

⁽¹¹⁰⁾ See paragraphs 48 to 51.

⁽¹¹¹⁾ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; and Case C-526/04, *Laboratoires Boiron*, [2006] ECR I-7529, paragraph 51.

⁽¹¹²⁾ 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.

⁽¹¹³⁾ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; Case C-174/02, *Streekgewest*, [2005] ECR I-85, paragraph 18; and Case 33/76, *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⁽¹¹⁴⁾.

2.4.2. Legal standing

72. The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article 88(3) of the Treaty. In this respect, Community law requires that national rules on legal standing do not undermine the right to effective judicial protection⁽¹¹⁵⁾. National rules cannot therefore limit legal standing only to the competitors of the beneficiary⁽¹¹⁶⁾. Third parties who are not affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest of a different character (as has been recognised in tax cases) in bringing proceedings before a national court⁽¹¹⁷⁾.

2.4.3. Standing issues in tax cases

73. The jurisprudence cited in paragraph 72 is particularly relevant for State aid granted in the form of exemptions from taxes and other financial liabilities. In such cases, it is not uncommon for persons who do not benefit from the same exemption to challenge their own tax burden based on Article 88(3) of the Treaty⁽¹¹⁸⁾.

74. However, based on the jurisprudence of the Community courts, third party tax payers may only rely on the standstill obligation where their own tax payment forms an integral part of the unlawful State aid measure⁽¹¹⁹⁾. This is the case where, under the relevant national rules, the tax revenue is reserved exclusively for funding the unlawful State aid and has a direct impact on the amount of State aid granted in violation of Article 88(3) of the Treaty⁽¹²⁰⁾.

75. If exemptions have been granted from general taxes, these criteria are usually not met. An undertaking liable to pay such taxes therefore cannot generally claim that someone else's tax exemption is unlawful under Article 88(3) of the Treaty⁽¹²¹⁾. It also results from settled case law that extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article 88(3) of the Treaty. Such a measure would not eliminate the anticompetitive effects of unlawful aid, but on the contrary, strengthen them⁽¹²²⁾.

2.4.4. Gathering evidence

76. The principle of effectiveness can also influence the process of gathering evidence. For example, where the burden of proof as regards a particular claim makes it impossible or excessively difficult for a claimant to substantiate its claim (for example where the necessary documentary evidence is not in its possession), the national court is required to use all means available under national procedural law to give the claimant access to this evidence. This can include, where provided for under national law, the obligation for the national court to order the defendant or a third party to make the necessary documents available to the claimant⁽¹²³⁾.

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

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

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

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

⁽¹¹⁸⁾ See statistics in paragraph 3. The imposition of an exceptional tax burden on specific sectors or producers can also amount to State aid in favour of other companies, see Case C-487/06 *P British Aggregates Association v Commission*, judgment of 22 December 2008, not yet published, paragraphs 81 to 86.

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

⁽¹²⁰⁾ 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.

⁽¹²¹⁾ 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.

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

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

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 ⁽¹²⁴⁾. Conversely, national courts may be obliged to assist the Commission in the fulfilment of its tasks ⁽¹²⁵⁾.
78. Given the key role which national courts play in the enforcement of the State aid rules, the Commission is committed to helping national courts where the latter find such assistance necessary for their decision on a pending case. Whilst the 1995 Cooperation Notice already offered national courts the possibility to ask the Commission for assistance, this possibility has not been used regularly by national courts. The Commission therefore wishes to make a fresh attempt at establishing closer cooperation with national courts by providing more practical and user-friendly support mechanisms. In doing so, it draws inspiration from the Antitrust Cooperation Notice ⁽¹²⁶⁾.
79. Commission support to national courts can take two different forms:
- (a) The national court may ask the Commission to transmit to it relevant information in its possession (see section 3.1).
 - (b) The national court may ask the Commission for an opinion concerning the application of the State aid rules (see section 3.2).
80. When supporting national courts, the Commission must respect its duty of professional secrecy and safeguard its own functioning and independence ⁽¹²⁷⁾. In fulfilling its duty under Article 10 of the Treaty towards national courts, the Commission is therefore committed to remaining neutral and objective. Since the Commission's assistance to national courts is part of its duty to defend the public interest, the Commission has no intention to serve the private interests of the parties involved in the case pending before the national court. The Commission will therefore not hear any of the parties involved in the national proceedings about its assistance to the national court.
81. The support offered to national courts under this Notice is voluntary and without prejudice to the possibility or obligation ⁽¹²⁸⁾ for the national court to ask the ECJ for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 of the Treaty.

3.1. Transmission of information to national courts

82. The Commission's duty to assist national courts in the application of State aid rules comprises the obligation to transmit relevant information in its possession to national courts ⁽¹²⁹⁾.

⁽¹²⁴⁾ 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.

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

⁽¹²⁶⁾ 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.

⁽¹²⁷⁾ 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.

⁽¹²⁸⁾ 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.

⁽¹²⁹⁾ 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⁽¹³⁰⁾. 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⁽¹³¹⁾, 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⁽¹³²⁾. 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⁽¹³³⁾. 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⁽¹³⁴⁾. Where, on the other hand, the national court has offered such a guarantee, the Commission will transmit the information requested.

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

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

⁽¹³²⁾ 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.

⁽¹³³⁾ Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraph 64; and Order of 13 July 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 124, paragraphs 16 to 22.

⁽¹³⁴⁾ 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⁽¹³⁵⁾ (for example, information concerning the Commission's internal decision making process).

3.2. Opinions on questions concerning the application of State aid rules

89. When called upon to apply State aid rules to a case pending before it, a national court must respect any relevant Community rules in the area of State aid and the existing case law of the Community courts. In addition, a national court may seek guidance in the Commission's decision-making practice and in the notices and guidelines concerning the application of the State aid rules issued by the Commission. However, there may be circumstances in which these tools do not offer the national court sufficient guidance on the issues at stake. In the light of its obligations under Article 10 of the Treaty and given the important and complex role which national courts play in State aid enforcement, the Commission therefore gives national courts the opportunity to request the Commission's opinion on relevant issues concerning the application of the State aid rules⁽¹³⁶⁾.

90. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings⁽¹³⁷⁾. Matters concerning the interpretation of Community law can obviously also lead the national court to ask for a preliminary ruling of the ECJ under Article 234 of the Treaty. Where no further judicial remedy exists against the court's decision under national law, the use of this preliminary reference procedure is, in principle, mandatory⁽¹³⁸⁾.

91. Possible subject matters for Commission opinions include, *inter alia*:

(a) Whether a certain measure qualifies as State aid within the meaning of Article 87 of the Treaty and, if so, how the exact aid amount is to be calculated. Such opinions can relate to each of the criteria under Article 87 of the Treaty (namely, the existence of an advantage, granted by a Member State or through State resources, possible distortion of competition and effect on trade between Member States).

(b) Whether a certain aid measure meets a certain requirement of a Block Exemption Regulation so that no individual notification is necessary and the standstill obligation under Article 88(3) of the Treaty does not apply.

(c) Whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Commission or otherwise qualifies as existing aid. Also in such cases, the standstill obligation under Article 88(3) of the Treaty does not apply.

⁽¹³⁵⁾ 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.

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

⁽¹³⁷⁾ However, please note paragraph 92.

⁽¹³⁸⁾ Where the interpretation of EC law may be clearly deduced from existing case-law or where it leaves no scope for reasonable doubt, a court against whose decisions there is no judicial remedy under national law is not required to refer the case for a preliminary ruling by the Court of Justice, although it is free to do so. See Case 283/81 *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⁽¹³⁹⁾) exist which would prevent the national court from ordering full recovery under Community law.
- (e) Where the national court is required to order the recovery of interest, it can ask the Commission for assistance as regards the interest calculation and the interest rate to be applied.
- (f) The legal prerequisites for damages claims under Community law and issues concerning the calculation of the damage incurred.
92. As stated in paragraph 20, the assessment of the compatibility of an aid measure with the common market pursuant to Article 87(2) and 87(3) of the Treaty falls within the exclusive competence of the Commission. National courts are not competent to assess the compatibility of an aid measure. Whilst the Commission cannot, therefore, provide opinions on compatibility, this does not prevent the national court from requesting procedural information as to whether the Commission is already assessing the compatibility of a certain aid measure (or intends to do so) and, if so, when its decision is likely to be adopted⁽¹⁴⁰⁾.
93. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.
94. In the interest of making its cooperation with national courts as effective as possible, requests for Commission opinions will be processed as quickly as possible. The Commission will endeavour to provide the national court with the requested opinion within four months from the date of the request. Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.
95. In this context, it should be noted, however, that the general obligation of national courts to protect individual rights under Article 88(3) of the Treaty also applies during the period in which the Commission prepares the requested opinion. This is because, as set out in paragraph 62, the national court's obligation to protect individual rights under Article 88(3) of the Treaty applies irrespective of whether a statement from the Commission is still awaited or not⁽¹⁴¹⁾.
96. As already indicated in paragraph 80, the Commission will not hear the parties before providing its opinion to the national court. The introduction of the Commission's opinion to the national proceeding is subject to the relevant national procedural rules, which have to respect the general principles of Community law.

⁽¹³⁹⁾ See references cited in footnote 51.

⁽¹⁴⁰⁾ See paragraph 83.

⁽¹⁴¹⁾ This can include interim measures as outlined in section 2.2.6.

3.3. Practical issues

97. In order to further contribute to more effective cooperation and communication between the Commission and national courts, the Commission has decided to establish a single contact point, to which national courts can address all requests for support under sections 3.1 and 3.2, and any other written or oral questions about State aid policy that may arise in their daily work.

European Commission
Secretariat General
B-1049 Brussels
Belgium
Telephone 0032 2 29 76271
Fax 0032 2 29 98330
Email ec-amicus-state-aid@ec.europa.eu

98. The Commission will publish a summary concerning its cooperation with national courts pursuant to this Notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

4. FINAL PROVISIONS

99. This Notice is issued in order to assist national courts in the application of the State aid rules. It does not bind the national courts or affect their independence. The Notice also does not affect the rights and obligations of Member States and natural or legal persons under Community law.

100. This Notice replaces the 1995 Cooperation Notice.

101. The Commission intends to carry out a review of this Notice five years after its adoption.

Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions

(2003/C 297/03)

1. INTRODUCTION

- (1) This Communication sets out how the Commission intends to deal with requests by Member States, as addressees of State aid decisions, to consider parts of such decisions as covered by the obligation of professional secrecy and thus not to be disclosed when the decision is published.
- (2) This involves two aspects, namely:
 - (a) the identification of the information which might be covered by the obligation of professional secrecy; and
 - (b) the procedure to be followed for dealing with such requests.

2. LEGAL FRAMEWORK

- (3) Article 287 of the Treaty states that: 'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.
- (4) This is also reflected in Articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾.
- (5) Article 253 of the Treaty states: 'Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty'.
- (6) Article 6(1), first sentence of Regulation (EC) No 659/1999 further stipulates with regard to decisions to initiate the formal investigation procedures: 'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market [..]'

3. IDENTIFICATION OF INFORMATION WHICH CAN BE COVERED BY PROFESSIONAL SECRECY

- (7) The Court of Justice has established that although Article 287 of the Treaty primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to other confidential information ⁽²⁾.
- (8) It follows that professional secrecy covers both business secrets and other confidential information.
- (9) There is no reason why the notions of business secret and other confidential information should be interpreted differently from the meaning given to these terms in the context of antitrust and merger procedures. The fact that in antitrust and merger procedures the addressees of the Commission decision are undertakings, while in State aid procedures the addressees are Member States, does not constitute an obstacle to a uniform approach as to the identification of what can constitute business secrets or other confidential information.

3.1. Business secrets

- (10) Business secrets can only concern information relating to a business which has actual or potential economic value, the disclosure or use of which could result in economic benefits for other companies. Typical examples are methods of assessing manufacturing and distribution costs, production secrets (that is to say, a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort) and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organisation of the undertaking.
- (11) It would appear that in principle business secrets can only relate to the beneficiary of the aid (or other third party) and can only concern information submitted by the Member State (or third party). Hence, statements from the Commission itself (for example, expressing doubts about feasibility of a restructuring plan) cannot be covered by the obligation of professional secrecy.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ Case 145/83 Adams v Commission [1985] ECR 3539, paragraph 34, and Case T-353/94 Postbank v Commission [1996] ECR II-921, paragraph 86.

(12) The simple fact that disclosure of information might cause harm to the company is not of itself sufficient grounds to consider that such information should be considered as business secret. For example, a Commission decision to initiate the formal investigation procedure in the case of a restructuring aid may cast doubt on certain aspects of the restructuring plan in the light of information the Commission has received. Such a decision could (further) affect the credit-position of that company. However, that would not necessarily lead to the conclusion that the information on which that decision was based must be considered as business secrets.

(13) In general, the Commission will apply the following non-exhaustive list of criteria to determine whether information can be deemed to constitute business secrets:

- (a) the extent to which the information is known outside the company;
- (b) the extent to which measures have been taken to protect the information within the company, for example, through non compete clauses or non-disclosure agreements imposed on employees or agents, etc;
- (c) the value of the information for the company and its competitors;
- (d) the effort or investment which the undertaking had to undertake to acquire the information;
- (e) the effort which others would need to undertake to acquire or copy the information;
- (f) the degree of protection offered to such information under the legislation of the Member State concerned.

(14) In principle, the Commission considers that the following information would not normally be covered by the obligation of professional secrecy:

- (a) information which is publicly available, including information available only upon payment through specialised information services or information which is common knowledge among specialists in the field (for example common knowledge among engineers or medical doctors). Likewise, turnover is not normally considered as a business secret, as it is a figure published in the annual accounts or otherwise known to the market. Reasons must be given for requests for confidentiality concerning turnover figures which are not in the public domain and the requests must be evaluated on a case-by-case basis. The fact that information is not publicly available does not necessarily mean that the information can be regarded as a business secret;

(b) historical information, in particular information at least five years old;

(c) statistical or aggregate information;

(d) names of aid recipients, sector of activity, purpose and amount of the aid, etc.

(15) Detailed reasons must be given for any request to derogate from these principles in exceptional cases.

3.2. Other confidential information

(16) In antitrust and merger cases, confidential information includes certain types of information communicated to the Commission on condition that confidentiality is observed (for example a market study commissioned by an undertaking which is party to the procedure and forming part of its property). It seems that a similar approach could be retained for State aid decisions.

(17) In the field of State aid, there may, however, be some forms of confidential information, which would not necessarily be present in antitrust and merger procedures, referring specifically to secrets of the State or other confidential information relating to its organisational activity. Generally, in view of the Commission's obligation to state the reasons for its decisions and the transparency requirement, such information can only in very exceptional circumstances be covered by the obligation of professional secrecy. For example, information regarding the organisation and costs of public services will not normally be considered 'other confidential information' (although it may constitute a business secret, if the criteria laid down in section 3.1 are met).

4. APPLICABLE PROCEDURE

4.1. General principles

(18) The Commission's main task is to reconcile two opposing obligations, namely the requirement to state the reasons for its decisions under Article 253 of the Treaty and therefore ensure that its decisions contain all the essential elements on which they are based, and that of safeguarding the obligation of professional secrecy.

(19) Besides the basic obligation to state the reasons for its decisions, the Commission has to take into account the need for effective application of the State aid rules (*inter alia*, by giving Member States, beneficiaries and interested parties the possibility to comment on or challenge its decisions) and for transparency of its policy. There is therefore an overriding interest in making public the full substance of its decisions. As a general principle, requests for confidential treatment can only be granted where strictly necessary to protect business secrets or other confidential information meriting similar protection.

- (20) Business secrets and other confidential information do not enjoy an absolute protection: this means for example that they could be divulged when they are essential for the Commission's statement of the reasons for its decisions. This means that information necessary for the identification of an aid measure and its beneficiary cannot normally be covered by the obligation of professional secrecy. Similarly, information necessary to demonstrate that the conditions of Article 87(1) of the Treaty are met, cannot normally be covered by the obligation of professional secrecy. However, the Commission will have to consider carefully whether the need for publication is more important, given the specific circumstances of a case, than the prejudice that might be generated for that Member State or undertaking involved.
- (21) The public version of a Commission decision can only feature deletions from the adopted version for reasons of professional secrecy. Paragraphs cannot be moved, and no sentence can be added or altered. Where the Commission considers that certain information cannot be disclosed, a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size, if useful to assure the comprehensibility and coherence of the decision.
- (22) Requests not to disclose the full text of a decision or substantial parts of it which would undermine the understanding of the Commission's statement of reasons cannot be accepted.
- (23) If there is a complainant involved, the Commission will take into account the complainant's interest in ascertaining the reasons why the Commission adopted a certain decision, without the need to have recourse to Court proceedings⁽¹⁾. Hence, requests by Member States for parts of the decision which address concerns of complainants to be covered by the obligation of professional secrecy will need to be particularly well reasoned and persuasive. On the other hand, the Commission will not normally be inclined to disclose information alleged to be of the kind covered by the obligation of professional secrecy where there is a suspicion that the complaint has been lodged primarily to obtain access to the information.
- (24) Member States cannot invoke professional secrecy to refuse to provide information to the Commission which the Commission considers necessary for the examination of aid measures. In this respect, reference is made to the procedure set out in Regulation (EC) No 659/1999 (in particular Articles 2(2), 5, 10 and 16).
- considers to be covered by the obligation of professional secrecy. This time period may be extended by agreement between the Commission and the Member State concerned.
- (26) Where the Member State concerned does not indicate which information it considers to be covered by the obligation of professional secrecy within the period prescribed by the Commission, the decision will normally be disclosed in full.
- (27) Where the Member State concerned wishes certain information to be covered by the obligation of professional secrecy, it must indicate the parts it considers to be covered and provide a justification in respect of each part for which non-disclosure is requested.
- (28) The Commission will then examine the request from the Member State without delay. If the Commission does not accept that certain parts of the decision are covered by the obligation of professional secrecy, it will state the reasons why in its view those parts cannot be left out of the public version of the decision. In the absence of an acceptable justification by the Member State for its request (i.e. reasoning which is not manifestly irrelevant or manifestly wrong), the Commission need not further specify the reasons why those parts cannot be left out of the public version of the decision other than by referring to the absence of justification.
- (29) If the Commission decides to accept that certain parts are covered by the obligation of professional secrecy without agreeing in full with the Member State's request, it will notify its decision with a new draft to the Member State indicating the parts which have been omitted. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published pursuant to Article 26 of Regulation (EC) No 659/1999, with the omission of the parts covered by the obligation of professional secrecy. Such omissions will be indicated in the text⁽²⁾.
- (30) The Member State will have 15 working days following receipt of the Commission's decision stating the reasons for its refusal to accept the non-disclosure of certain parts, to react and provide additional elements to justify its request.

4.2. Procedure

- (25) The Commission currently notifies its decisions to the Member State concerned without delay and gives the latter the opportunity to indicate, normally within a time period of 15 working days, which information it
- (31) If the Member State concerned does not react further within the period prescribed by the Commission, the Commission will normally publish the decision as indicated in its reply to the original request made by the Member State.

⁽¹⁾ Case C-367/95 P *Commission v Sytraval* [ECR] 1998 I-1719, paragraph 64.

⁽²⁾ Using square brackets [...] and indicating in a footnote 'covered by the obligation of professional secrecy'.

- (32) If the Member State concerned does submit any additional elements within the prescribed period, those elements will be examined by the Commission without delay. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published as set out in paragraph (29).
- (33) In the event that it is not possible to reach agreement, the Commission will proceed with the publication of its decision to initiate the formal investigation procedure forthwith. Such decisions must summarise the relevant issues of fact and law, include a preliminary assessment of the aid character of the proposed measure and set out the doubts as to its compatibility with the common market. Clearly certain essential information must be included in order to enable third parties and the other Member States to comment usefully. The duty of the Commission to provide such essential information will normally prevail over any claim to the protection of business secrets or other confidential information. Furthermore, it is in the interest of the beneficiary as well as interested parties to have access to such a decision as quickly as possible. Permitting any delay in this respect would jeopardise the process of State aid control.
- (34) In the event that it is not possible to reach agreement on requests for certain information in decisions not to raise objections and decisions to close the formal investigation procedure to be covered by the obligation of professional secrecy, the Commission will notify its final decision to the Member State together with the text it intends to publish, giving the Member State another 15 working days to react. In the absence of an answer which the Commission considers pertinent, the Commission will normally proceed with the publication of the text.
- (35) The Commission is currently reviewing its State aid notification forms. In order to avoid unnecessary correspondence with Member States and delay in the publication of decisions, it intends, in the future, to include in the form a question asking whether the notification contains information which should not be published, and the reasons for non-publication. Only if that question is answered in the affirmative will the

Commission enter into correspondence with the Member State in respect of specific cases. Similarly, if additional information is required by the Commission, the Member State will have to indicate at the moment it provides the information requested whether such information should not be published, and the reasons for non-publication. If the Commission uses the information thus identified by the Member State in its decision, it will communicate the adopted decision to the Member State, stating the reasons why in its view these parts cannot be left out from the public version of the decision as laid down in paragraph (28).

- (36) Once the Commission has decided what text it will publish and notified the Member State of its final decision, it is for the Member State to decide whether or not to make use of any judicial procedures available to it, including any interim measures, within the time limits provided for in Article 230 of the EC Treaty.

4.3. Third parties

- (37) Where third parties other than the Member State concerned (for example, complainants, other Member States or the beneficiary) submit information in the context of State aid procedures, these guidelines will be applied *mutatis mutandis*.

4.4. Application in time

- (38) These guidelines cannot establish binding legal rules and do not purport to do so. They merely set out in advance, in the interests of sound administration, the manner in which the Commission intends to address the issue of confidentiality in State aid procedures. As a rule, if agreement cannot be reached, the Commission's decision to publish may be the subject of specific judicial review proceedings. As these guidelines merely pertain to procedural matters (and to a large extent set out existing practice), they will be applied with immediate effect, including for decisions not to raise objections⁽¹⁾ adopted before the entry into force of Regulation (EC) No 659/1999 to which third parties seek access.

⁽¹⁾ Decisions to initiate the formal investigation procedure and final decisions adopted before that date were already published in full in the *Official Journal of the European Communities*. Prior to publication, Member States could indicate whether any information was covered by the obligation of professional secrecy.

I

(Information)

COMMISSION

Commission communication concerning the obsolescence of certain State aid policy documents

(2004/C 115/01)

(Text with EEA relevance)

Over the years, the Commission has adopted a number of texts concerning procedural issues in the field of State aid. Some of these texts have taken the form of Commission Communications to the Member States and have been published in the *Official Journal of the European Union*. Other texts have been published in volume IIA of the Competition Law in the European Communities series, Rules applicable to State aid, situation at 30 June 1998 (ISBN 92-828-4008-5).

Following the adoption by the Commission of Commission Regulation (EC) No 794/2004 ⁽¹⁾ implementing Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾, a number of these texts have become obsolete. These texts concern the notification obligation, notification procedures, including accelerated notifications, annual reporting, timelimits and recovery of unlawful aid.

Accordingly the Commission wishes to inform Member States and interested parties that from the date of publication of this communication in the *Official Journal of the European Union*, the Commission no longer intends to apply, in relation to any matter, the following documents, irrespective of their legal status:

1. Commission communication on the notification of State aid to the Commission pursuant to Article 93(3) of the EEC Treaty: the failure of Member States to respect their obligations ⁽³⁾;
2. Commission communication (on the notification obligation) ⁽⁴⁾;

⁽¹⁾ OJ L 140, 30.4.2004.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ OJ C 252, 30.9.1980, p. 2.

⁽⁴⁾ OJ C 318, 24.11.1983, p. 3.

3. Commission communication on the cumulation of aids for different purposes ⁽⁵⁾;
4. Commission letter to Member States SG(89) D/5521 of 27 April 1989 (on the definition of putting an aid into effect) ⁽⁶⁾;
5. Commission letter to Member States SG(91) D/4577 of 4 March 1991 (Communication to Member States concerning the procedures for the notification of aid plans and procedures applicable when aid is provided in breach of the rules of Article 93(3) of the EEC Treaty) ⁽⁷⁾;
6. Guidance note on use of the *de minimis* facility provided for in the SME guidelines (letter of 23 March 1993, IV/D/6878 from DG IV to the Member States) ⁽⁸⁾;
7. Commission letter to Member States of 22 February 1995 (interest rates to be applied when aid granted unlawfully is being recovered) ⁽⁹⁾;
8. Commission communication to the Member States (on the recovery of aid granted unlawfully) ⁽¹⁰⁾;
9. Commission letter to Member States of 22 February 1994 (concerning notifications) ⁽¹¹⁾;

⁽⁵⁾ OJ C 3, 05.01.1985, p. 2.

⁽⁶⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 58.

⁽⁷⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 59.

⁽⁸⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 64.

⁽⁹⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 68.

⁽¹⁰⁾ OJ C 156, 22.6.1995, p. 5.

⁽¹¹⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 70.

10. Section A of the joint procedure for reporting and notification under the EC Treaty and under the WTO Agreement as identified in Commission letter to Member States of 2 August 1995; ⁽¹⁾
11. Commission letter to Member States SG(81) 12740 of 2 October 1981 (time limits for decisions) ⁽²⁾;
12. Commission letter to Member States of 30 April 1987 (Procedure pursuant to Article 93(2) of the EEC Treaty – time-limits) ⁽³⁾;
13. Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes ⁽⁴⁾;
14. Accelerated procedure for processing notifications of employment aid Standard notification form ⁽⁵⁾;
15. Commission letter to Member States of 27 June 1989 (Procedure pursuant to Article 93(2) of the EEC Treaty – Notice to Member States and other parties concerned to submit their comments) ⁽⁶⁾;
16. Commission Letter to Member States of 11 October 1990 (Notice to Member States and other parties about aid cases not objected to by the Commission) ⁽⁷⁾;
17. 'Guide to procedures in State aid cases' ⁽⁸⁾.

However, the Commission also wishes to inform Member States and interested parties that in so far as the provisions of Chapter V of Regulation (EC) 794/2004 only apply to decisions ordering the recovery of unlawful aid notified to Member States after the date of entry into force of the Regulation, the Commission communication of 8 May 2003 on the interest rates to be applied when aid granted unlawfully is being recovered ⁽⁹⁾ remains in effect as regards the execution by Member States of recovery orders notified before that date.

⁽¹⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 72. Section B of this letter, which covers reporting to the WTO under Article 25 of the Agreement on Subsidies and Countervailing Measures, remains applicable.

⁽²⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 89.

⁽³⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 90.

⁽⁴⁾ OJ C 213, 19.08.1992, p. 10.

⁽⁵⁾ OJ C 218, 27.07.1996, p. 4.

⁽⁶⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 99.

⁽⁷⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 100.

⁽⁸⁾ Competition Law in the European Communities, Volume IIA, Rules applicable to State aid, Brussels-Luxembourg 1999, ISBN 92-828-4008-5, English Version p. 23.

⁽⁹⁾ OJ C 110, 8.5.2003, p. 21.

**C. ENABLING REGULATION AND
GENERAL BLOCK EXEMPTION REGULATION**

I

(Acts whose publication is obligatory)

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

THE COUNCIL OF THE EUROPEAN UNION,

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

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

After consulting the European Parliament ⁽²⁾,

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

- (1) Whereas, pursuant to Article 94 of the Treaty, the Council may make any appropriate regulations for the application of Articles 92 and 93 and may, in particular, determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure;
- (2) Whereas, under the Treaty, the assessment of compatibility of aid with the common market essentially rests with the Commission;
- (3) Whereas the proper functioning of the internal market requires strict and efficient application of the rules of competition with regard to State aids;
- (4) Whereas the Commission has applied Articles 92 and 93 of the Treaty in numerous decisions and has also stated its policy in a number of communications; whereas, in the light of the Commission's considerable experience in applying Articles 92 and 93 of the Treaty and the general texts issued by the Commission on the basis of those provisions, it is appropriate, with a view to ensuring efficient supervision and simplifying administration, without weakening Commission monitoring, that

the Commission should be enabled to declare by means of regulations, in areas where the Commission has sufficient experience to define general compatibility criteria, that certain categories of aid are compatible with the common market pursuant to one or more of the provisions of Article 92(2) and (3) of the Treaty and are exempted from the procedure provided for in Article 93(3) thereof;

- (5) Whereas group exemption regulations will increase transparency and legal certainty; whereas they can be directly applied by national courts, without prejudice to Articles 5 and 177 of the Treaty;
- (6) Whereas it is appropriate that the Commission, when it adopts regulations exempting categories of aid from the obligation to notify provided for in Article 93(3) of the Treaty, specifies the purpose of the aid, the categories of beneficiaries and thresholds limiting the exempted aid, the conditions governing the cumulation of aid and the conditions of monitoring, in order to ensure the compatibility with the common market of aid covered by this Regulation;
- (7) Whereas it is appropriate to enable the Commission, when it adopts regulations exempting certain categories of aid from the obligation to notify in Article 93(3) of the Treaty, to attach further detailed conditions in order to ensure the compatibility with the common market of aid covered by this Regulation;
- (8) Whereas it may be useful to set thresholds of other appropriate conditions requiring the notification of awards of aid in order to allow the Commission to

⁽¹⁾ OJ C 262, 28. 8. 1997, p. 6.

⁽²⁾ OJ C 138, 4. 5. 1998.

⁽³⁾ OJ C 129, 27. 4. 1998, p. 70.

examine individually the effect of certain aid on competition and trade between Member States and its compatibility with the common market;

- (9) Whereas the Commission, having regard to the development and the functioning of the common market, should be enabled to establish by means of a regulation that certain aid does not fulfil all the criteria of Article 92(1) of the Treaty and is therefore exempted from the notification procedure laid down in Article 93(3), provided that aid granted to the same undertaking over a given period of time does not exceed a certain fixed amount;
- (10) 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 for this purpose and in order to ensure the largest possible degree of transparency and adequate control it is desirable that the Commission ensures the establishment of a reliable system of recording and storing information about the application of the regulations it adopts, to which all Member States have access, and that it receives all necessary information from the Member States on the implementation of aid exempted from notification to fulfil this obligation, which may be examined and evaluated with the Member States within the Advisory Committee; whereas for this purpose it is also desirable that the Commission may require such information to be supplied as is necessary to ensure the efficiency of such review;
- (11) Whereas the control of the granting of aid involves factual, legal and economic issues of a very complex nature and great variety in a constantly evolving environment; whereas the Commission should therefore regularly review the categories of aid which should be exempted from notification; whereas the Commission should be able to repeal or amend regulations it has adopted pursuant to this Regulation where circumstances have changed with respect to any important element which constituted grounds for their adoption or where the progressive development or the functioning of the common market so requires;
- (12) Whereas the Commission, in close and constant liaison with the Member States, should be able to define precisely the scope of these regulations and the conditions attached to them; whereas, in order to provide for cooperation between the Commission and the competent authorities of the Member States, it is appropriate to set up an advisory committee on State aid to be consulted before the Commission adopts regulations pursuant to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Group exemptions

1. The Commission may, by means of regulations adopted in accordance with the procedures laid down in Article 8 of this Regulation and in accordance with Article 92 of the Treaty, declare that the following categories of aid should be compatible with the common market and shall not be subject to the notification requirements of Article 93(3) of the Treaty:
 - (a) aid in favour of:
 - (i) small and medium-sized enterprises;
 - (ii) research and development;
 - (iii) environmental protection;
 - (iv) employment and training;
 - (b) aid that complies with the map approved by the Commission for each Member State for the grant of regional aid.
2. The Regulations referred to in paragraph 1 shall specify for each category of aid:
 - (a) the purpose of the aid;
 - (b) the categories of beneficiaries;
 - (c) thresholds expressed either in terms of aid intensities in relation to a set of eligible costs or in terms of maximum aid amounts;
 - (d) the conditions governing the cumulation of aid;
 - (e) the conditions of monitoring as specified in Article 3.
3. In addition, the regulations referred to in paragraph 1 may, in particular:
 - (a) set thresholds or other conditions for the notification of awards of individual aid;
 - (b) exclude certain sectors from their scope;
 - (c) attach further conditions for the compatibility of aid exempted under such regulations.

Article 2

De minimis

1. The Commission may, by means of a Regulation adopted in accordance with the procedure laid down in Article 8 of this Regulation, decide that, having regard to the development and functioning of the common market, certain aids do not meet all the criteria of Article 92(1) and that they are therefore exempted from the notification procedure provided for in Article 93(3), provided that aid granted to the same undertaking over a given period of time does not exceed a certain fixed amount.

2. At the Commission's request, Member States shall, at any time, communicate to it any additional information relating to aid exempted under paragraph 1.

Article 3

Transparency and monitoring

1. When adopting regulations pursuant to Article 1, the Commission shall impose detailed rules upon Member States to ensure transparency and monitoring of the aid exempted from notification in accordance with those regulations. Such rules shall consist, in particular, of the requirements laid down in paragraphs 2, 3 and 4.

2. On implementation of aid systems or individual aids granted outside any system, which have been exempted pursuant to such regulations, Member States shall forward to the Commission, with a view to publication in the *Official Journal of the European Communities*, summaries of the information regarding such systems of aid or such individual aids as are not covered by exempted aid systems.

3. Member States shall record and compile all the information regarding the application of the group exemptions. If the Commission has information which leads it to doubt that an exemption regulation is being applied properly, the Member States shall forward to it any information it considers necessary to assess whether an aid complies with that regulation.

4. At least once a year, Member States shall supply the Commission with a report on the application of group exemptions, in accordance with the Commission's specific requirements, preferably in computerised form. The Commission shall make access to those reports available to all the Member States. The Advisory Committee referred to in Article 7 shall examine and evaluate those reports once a year.

Article 4

Period of validity and amendment of regulations

1. Regulations adopted pursuant to Articles 1 and 2 shall apply for a specific period. Aid exempted by a regulation adopted pursuant to Articles 1 and 2 shall be exempted for the period of validity of that regulation and for the adjustment period provided for in paragraphs 2 and 3.

2. Regulations adopted pursuant to Articles 1 and 2 may be repeated or amended where circumstances have changed with respect to any important element that constituted grounds for their adoption or where the progressive development or the functioning of the common market so requires. In that case the new regulation shall set a period of adjustment of six months for the adjustment of aid covered by the previous regulation.

3. Regulations adopted pursuant to Articles 1 and 2 shall provide for a period as referred to in paragraph 2, should their application not be extended when they expire.

Article 5

Evaluation report

Every five years the Commission shall submit a report to the European Parliament and to the Council on the application of this Regulation. It shall submit a draft report for consideration by the Advisory Committee referred to in Article 7.

Article 6

Hearing of interested parties

Where the Commission intends to adopt a regulation, it shall publish a draft thereof to enable all interested persons and organisations to submit their comments to it within a reasonable time limit to be fixed by the Commission and which may not under any circumstances be less than one month.

Article 7

Advisory committee

An advisory committee, hereinafter referred to as the Advisory Committee on State Aid, shall be set up. It shall be composed of representatives of the Member States and chaired by the representative of the Commission.

Article 8

Consultation of the Advisory Committee

1. The Commission shall consult the Advisory Committee on State Aid:

- (a) before publishing any draft regulation;
- (b) before adopting any regulation.

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 the consultations referred to in paragraph 1(b), when urgent or for simple extension of a regulation.

3. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its 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 Advisory Committee may recommend publication of the 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 of the manner in which its opinion has been taken into account.

Article 9

Final provisions

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

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

Done at Brussels, 7 May 1998.

For the Council
The President
M. BECKETT

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 ⁽¹⁾, and in particular Article 2 thereof,

Having published a draft of this Regulation ⁽²⁾,

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 ⁽³⁾ 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 ⁽⁴⁾. 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 ⁽⁵⁾, 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 ⁽⁶⁾. Regulation (EC) No 1860/2004 should therefore be amended accordingly.

⁽¹⁾ OJ L 142, 14.5.1998, p. 1.

⁽²⁾ OJ C 137, 10.6.2006, p. 4.

⁽³⁾ OJ C 68, 6.3.1996, p. 9.

⁽⁴⁾ OJ L 10, 13.1.2001, p. 30.

⁽⁵⁾ OJ L 205, 2.8.2002, p. 1.

⁽⁶⁾ 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 ⁽¹⁾ 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

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

Community guidelines on State aid to promote risk capital investments in small and medium sized enterprises⁽¹⁾ 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⁽²⁾, 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.

⁽¹⁾ OJ C 194, 18.8.2006, p. 2.

⁽²⁾ 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:

2. For the purposes of 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 ⁽¹⁾;
- (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;

(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.

⁽¹⁾ 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

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⁽¹⁾, and in particular Article 1(1) points (a) and (b) thereof,

Having published a draft of this Regulation⁽²⁾,

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⁽³⁾, 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⁽⁴⁾, the implementation of the Commission communication on State aid and risk capital⁽⁵⁾ and the Community guidelines on State aid to promote risk capital investments in small and medium sized enterprises⁽⁶⁾, as well as the implementation of the Community framework for State aid for research and development and innovation⁽⁷⁾.

(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⁽⁸⁾, 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⁽⁹⁾, 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⁽¹⁰⁾ the Community framework for State aid for research and development⁽¹¹⁾, the Community Framework for State aid for research and development and innovation, the 2001 Community guidelines on State for environmental protection⁽¹²⁾, the 2008 Community guidelines on State aid for environmental protection⁽¹³⁾ and the Guidelines on national regional aid for 2007-2013⁽¹⁴⁾.

⁽³⁾ 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).

⁽⁴⁾ OJ L 63, 28.2.2004, p. 22.

⁽⁵⁾ OJ C 235, 21.8.2001, p. 3.

⁽⁶⁾ OJ C 194, 18.8.2006, p. 2.

⁽⁷⁾ OJ C 323, 30.12.2006, p. 1.

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

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

⁽¹⁰⁾ OJ L 302, 1.11.2006, p. 29.

⁽¹¹⁾ OJ C 45, 17.2.1996, p. 5.

⁽¹²⁾ OJ C 37, 3.2.2001, p. 3.

⁽¹³⁾ OJ C 82, 1.4.2008, p. 1.

⁽¹⁴⁾ OJ C 54, 4.3.2006, p. 13.

⁽¹⁾ OJ L 142, 14.5.1998, p. 1.

⁽²⁾ 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 ⁽¹⁾. 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 ⁽²⁾.
- (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.

⁽¹⁾ 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).

⁽²⁾ 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 ⁽¹⁾, 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 ⁽²⁾, 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 ⁽³⁾ 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 ⁽⁴⁾.

⁽¹⁾ 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).

⁽²⁾ OJ C 260, 28.10.2006, p. 7.

⁽³⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁴⁾ 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 ⁽¹⁾. 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.

⁽¹⁾ 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⁽¹⁾ 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.
- (1) 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 ⁽¹⁾.
- (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.

⁽¹⁾ 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 spillovers, public goods/knowledge spillovers, 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 ⁽¹⁾, 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.

⁽¹⁾ 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 ⁽¹⁾;
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;

⁽¹⁾ 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⁽¹⁾ 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;

⁽¹⁾ 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 ⁽¹⁾, 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 ⁽²⁾, 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;

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁾ 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/km² 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 ⁽¹⁾;
- (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.

⁽¹⁾ 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 under takings 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 under takings; or
 - (b) the obligation under Directive 2008/1/EC of the European Parliament and of the Council ⁽¹⁾ 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 ⁽²⁾; 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 ⁽³⁾ and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC ⁽⁴⁾;
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.

⁽¹⁾ OJ L 24, 29.1.2008, p. 8.

⁽²⁾ COM(2008) 19 final.

⁽³⁾ OJ L 52, 21.2.2004, p. 50.

⁽⁴⁾ 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 CO₂ Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO₂ 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.

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) ⁽¹⁾	Regional aid status ⁽²⁾
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 ⁽³⁾	Scheme	dd/mm/yy to dd/mm/yy
Date of granting ⁽⁴⁾	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. ⁽⁵⁾	
Type of beneficiary	SME	
	Large enterprises	

Budget	Annual overall amount of the budget planned under the scheme ⁽⁶⁾	National currency ... (in millions)	
	Overall amount of the ad hoc aid awarded to the undertaking ⁽⁷⁾	National currency ... (in millions)	
	For guarantees ⁽⁸⁾	National currency ... (in millions)	
Aid instrument (Art. 5)	Grant		
	Interest rate subsidy		
	Loan		
	Guarantee/Reference to the Commission decision ⁽⁹⁾		
	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)

⁽¹⁾ NUTS – Nomenclature of Territorial Units for Statistics.

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

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

⁽⁴⁾ 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.

⁽⁵⁾ NACE Rev.2 – Statistical classification of Economic Activities in the European Community.

⁽⁶⁾ 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.

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

⁽⁸⁾ For guarantees, indicate the (maximum) amount of loans guaranteed.

⁽⁹⁾ 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 (1) (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)	... %	

(¹) 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

COMMISSION RECOMMENDATION

of 6 May 2003

concerning the definition of micro, small and medium-sized enterprises

(notified under document number C(2003) 1422)

(Text with EEA relevance)

(2003/361/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 211, second indent, thereof,

Whereas:

- (1) In a report submitted to the Council in 1992 at the request of the 'Industry' Council held on 28 May 1990, the Commission had proposed limiting the proliferation of definitions of small and medium-sized enterprises in use at Community level. Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽¹⁾ was based on the idea that the existence of different definitions at Community level and at national level could create inconsistencies. Following the logic of a single market without internal frontiers, the treatment of enterprises should be based on a set of common rules. The pursuit of such an approach is all the more necessary in view of the extensive interaction between national and Community measures assisting micro, small and medium-sized enterprises (SME), for example in connection with Structural Funds or research. It means that situations in which the Community focuses its action on a given category of SMEs and the Member States on another must be avoided. In addition, it was considered that the application of the same definition by the Commission, the Member States, the European Investment Bank (EIB) and the European Investment Fund (EIF) would improve the consistency and effectiveness of policies targeting SMEs and would, therefore, limit the risk of distortion of competition.
- (2) Recommendation 96/280/EC has been applied widely by the Member States, and the definition contained in the Annex thereto has been taken over in 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⁽²⁾. Apart from the need to adapt Recommendation 96/280/EC to

economic developments, pursuant to Article 2 of the Annex thereto, consideration must be given to a number of difficulties of interpretation which have emerged in its application, as well as the observations received from enterprises. In view of the number of amendments now requiring to be made to Recommendation 96/280/EC, and for the sake of clarity, it is appropriate to replace the Recommendation.

- (3) It should also be made clear that, in accordance with Articles 48, 81 and 82 of the Treaty, as interpreted by the Court of Justice of the European Communities, an enterprise should be considered to be any entity, regardless of its legal form, engaged in economic activities, including in particular entities engaged in a craft activity and other activities on an individual or family basis, partnerships or associations regularly engaged in economic activities.
- (4) The criterion of staff numbers (the 'staff headcount criterion') remains undoubtedly one of the most important, and must be observed as the main criterion; introducing a financial criterion is nonetheless a necessary adjunct in order to grasp the real scale and performance of an enterprise and its position compared to its competitors. However, it would not be desirable to use turnover as the sole financial criterion, in particular because enterprises in the trade and distribution sector have by their nature higher turnover figures than those in the manufacturing sector. Thus the turnover criterion should be combined with that of the balance sheet total, a criterion which reflects the overall wealth of a business, with the possibility of either of these two criteria being exceeded.
- (5) The turnover ceiling refers to enterprises engaged in very different types of economic activity. In order not to restrict unduly the usefulness of applying the definition, it should be updated to take account of changes in both prices and productivity.

⁽¹⁾ OJ L 107, 30.4.1996, p. 4.

⁽²⁾ OJ L 10, 13.1.2001, p. 33.

- (6) As regards the ceiling for the balance sheet total, in the absence of any new element, it is justified to maintain the approach whereby the turnover ceilings are subjected to a coefficient based on the statistical ratio between the two variables. The statistical trend requires a greater increase to be made to the turnover ceiling. Since the trend differs according to the size-category of the enterprise, it is also appropriate to adjust the coefficient in order to reflect the economic trend as closely as possible and not to penalise microenterprises and small enterprises as opposed to medium-sized enterprises. This coefficient is very close to 1 in the case of microenterprises and small enterprises. To simplify matters, therefore, a single value must be chosen for those categories for the turnover ceiling and balance sheet total ceiling.
- (7) As in Recommendation 96/280/EC, the financial ceilings and the staff ceilings represent maximum limits and the Member States, the EIB and the EIF may fix ceilings lower than the Community ceilings if they wish to direct their measures towards a specific category of SME. In the interests of administrative simplification, the Member States, the EIB and the EIF may use only one criterion — the staff headcount — for the implementation of some of their policies. However, this does not apply to the various rules in competition law where the financial criteria must also be used and adhered to.
- (8) Following the endorsement of the European Charter for Small Enterprises by the European Council of Santa Maria da Feira in June 2000, microenterprises — a category of small enterprises particularly important for the development of entrepreneurship and job creation — should also be better defined.
- (9) To gain a better understanding of the real economic position of SMEs and to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous, whether they have holdings which do not entail a controlling position (partner enterprises), or whether they are linked to other enterprises. The current limit shown in Recommendation 96/280/EC, of a 25 % holding below which an enterprise is considered autonomous, is maintained.
- (10) In order to encourage the creation of enterprises, equity financing of SMEs and rural and local development, enterprises can be considered autonomous despite a holding of 25 % or more by certain categories of investors who have a positive role in business financing and creation. However, conditions for these investors have not previously been specified. The case of 'business angels' (individuals or groups of individuals pursuing a regular business of investing venture capital) deserves special mention because — compared to other venture capital investors — their ability to give relevant advice to new entrepreneurs is extremely valuable. Their investment in equity capital also complements the activity of venture capital companies, as they provide smaller amounts at an earlier stage of the enterprise's life.
- (11) To simplify matters, in particular for Member States and enterprises, use should be made when defining linked enterprises of the conditions laid down in Article 1 of Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts ⁽¹⁾, as last amended by Directive 2001/65/EC of the European Parliament and of the Council ⁽²⁾, in so far as these conditions are suitable for the purposes of this Recommendation. To strengthen the incentives for investing in the equity funding of an SME, the presumption of absence of dominant influence on the enterprise in question was introduced, in pursuance of the criteria of Article 5(3), of Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies ⁽³⁾, as last amended by Directive 2001/65/EC.
- (12) Account should also be taken, in suitable cases, of relations between enterprises which pass through natural persons, with a view to ensuring that only those enterprises which really need the advantages accruing to SMEs from the different rules or measures in their favour actually benefit from them. In order to limit the examination of these situations to the strict minimum, the account taken of such relationships has been restricted to the relevant market or to adjacent markets — reference being had, where necessary, to the Commission's definition of 'relevant markets' in the Commission notice on the definition of relevant market for the purposes of Community competition law ⁽⁴⁾.
- (13) In order to avoid arbitrary distinctions between different public bodies of a Member State, and given the need for legal certainty, it is considered necessary to confirm that an enterprise with 25 % or more of its capital or voting rights controlled by a public body is not an SME.
- (14) In order to ease the administrative burden for enterprises, and to simplify and speed up the administrative handling of cases for which SME status is required, it is appropriate to allow enterprises to use solemn declarations to certify certain of their characteristics.

⁽¹⁾ OJ L 193, 18.7.1983, p. 1.

⁽²⁾ OJ L 283, 27.10.2001, p. 28.

⁽³⁾ OJ L 222, 14.8.1978, p. 11.

⁽⁴⁾ OJ C 372, 9.12.1997, p. 5.

- (15) It is necessary to establish in detail the composition of the staff headcount for SME definition purposes. In order to promote the development of vocational training and sandwich courses, it is desirable, when calculating staff numbers, to disregard apprentices and students with a vocational training contract. Similarly, maternity or parental leave periods should not be counted.
- (16) The various types of enterprise defined according to their relationship with other enterprises correspond to objectively differing degrees of integration. It is therefore appropriate to apply distinct procedures to each of those types of enterprise when calculating the quantities representing their activities and economic power,

HEREBY RECOMMENDS:

Article 1

1. This Recommendation concerns the definition of micro, small and medium-sized enterprises used in Community policies applied within the Community and the European Economic Area.
2. Member States, the European Investment Bank (EIB) and the European Investment Fund (EIF), are invited:
 - (a) to comply with Title I of the Annex for their programmes directed towards medium-sized enterprises, small enterprises or microenterprises;
 - (b) to take the necessary steps with a view to using the size classes set out in Article 7 of the Annex, especially where the monitoring of their use of Community financial instruments is concerned.

Article 2

The ceilings shown in Article 2 of the Annex are to be regarded as maximum values. Member States, the EIB and the EIF may fix lower ceilings. In implementing certain of their policies, they may also choose to apply only the criterion of number of employees, except in fields governed by the various rules on State aid.

Article 3

This Recommendation will replace Recommendation 96/280/EC as from 1 January 2005.

Article 4

This Recommendation is addressed to the Member States, the EIB and the EIF.

They are requested to inform the Commission by 31 December 2004 of any measures they have taken further to it and, no later than 30 September 2005, to inform it of the first results of its implementation.

Done at Brussels, 6 May 2003.

For the Commission

Erkki LIIKANEN

Member of the Commission

ANNEX

TITLE I

DEFINITION OF MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES ADOPTED BY THE COMMISSION*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 ceilings 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 microenterprise 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 fewer 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 stakeholders.

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 ceilings 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 ceilings stated in Article 2, this will not result in the loss or acquisition of the status of medium-sized, small or microenterprise unless those ceilings 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 is 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 is 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 is 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.

TITLE II

SUNDRY PROVISIONS

Article 7

Statistics

The Commission will take the necessary measures to present the statistics that it produces in accordance with the following size-classes of enterprises:

- (a) 0 to 1 person;
- (b) 2 to 9 persons;
- (c) 10 to 49 persons;
- (d) 50 to 249 persons.

Article 8

References

1. Any Community legislation or any Community programme to be amended or adopted and in which the term 'SME', 'microenterprise', 'small enterprise' or 'medium-sized enterprise', or any other similar term occurs, should refer to the definition contained in this Recommendation.

2. As a transitional measure, current Community programmes using the SME definition in Recommendation 96/280/EC will continue to be implemented for the benefit of the enterprises which were considered SMEs when those programmes were adopted. Legally binding commitments entered into by the Commission on the basis of such programmes will remain unaffected.

Without prejudice to the first subparagraph, any amendment of the SME definition within the programmes can be made only by adopting the definition contained in this Recommendation in accordance with paragraph 1.

Article 9

Revision

On the basis of a review of the application of the definition contained in this Recommendation, to be drawn up by 31 March 2006, and taking account of any amendments to Article 1 of Directive 83/349/EEC on the definition of linked enterprises within the meaning of that Directive, the Commission will, if necessary, adapt the definition contained in this Recommendation, and in particular the ceilings for turnover and the balance-sheet total in order to take account of experience and economic developments in the Community.

Commission communication

Model declaration on the information relating to the qualification of an enterprise as an SME

(2003/C 118/03)

This Communication aims to promote the application of Commission Recommendation 2003/361/EC ⁽¹⁾ on the definition of SMEs, which replaces Recommendation 96/280/EC of 3 April 1996.

There are some 20 million micro, small and medium-sized enterprises in the European Economic Area. They are a major source of jobs and a challenge for competitiveness. Their ability to identify new needs of both end-consumers and industrial operators, their potential for absorbing new technologies, and their contribution to apprenticeship, vocational training and local development, govern future advances in productivity of the entire European Union and its ability to achieve the objectives set at the Lisbon European Council. The responsibility of local, national and Community administrations in devising enterprise policies which take account of the specific needs and skills of these categories of enterprise is thus a question of major importance.

Promoting the development of such policies is the main objective of the new Commission Recommendation on the definition of SMEs. A more precise definition will ensure greater legal certainty. More suited to the various subcategories of SME, and taking account of the various types of relations between enterprises, it will promote investment and innovation in SMEs and foster partnerships between enterprises. These advantages should be acquired while preventing enterprises which do not have the economic characteristics or face the problems of genuine SMEs from benefiting unduly from measures targeted at SMEs.

This Recommendation has been the subject of extremely wide-ranging discussions with business organisations, with the Member States and individual business experts within the Enterprise Policy Group ⁽²⁾. The preliminary draft was in addition the subject of two open consultations on the Internet. After work lasting for more than one year, there was almost complete consensus despite the diversity of the objectives pursued.

All those who contributed to the revision felt that it is important that the increased legal certainty and improved recognition of the economic reality, should be accompanied by an effort by administrations to simplify and speed up the administrative handling of cases requiring qualification as a micro, small or medium-sized enterprise. To this end, offering enterprises the possibility to complete themselves a concise declaration was considered a modern and convenient method. This declaration could, if necessary, be completed on-line and could also function as a practical 'users' manual' for enterprises.

The document attached to this Communication is a model for such a declaration. It is in no way mandatory as regards its use or content, either for enterprises or for the administrations of the Member States, but is designed as one possible example amongst others. Such declarations are without prejudice to the checks or investigations provided for under national or Community rules.

If those Member States using the definition of SMEs wish to speed up the processing of administrative files, it would of course be desirable for this declaration not to increase the overall administrative burden on enterprises, but to replace whenever possible other requests for information previously required. Also it could be preferably incorporated into the files relating to applications to take part in measures for which SME qualification is required.

⁽¹⁾ OJ L 124, 20.5.2003, p. . . .

⁽²⁾ Commission Decision 2000/690/EC of 8 November 2000 setting up an Enterprise Policy Group (OJ L 285, 10.11.2000, p. 24).

To this end, the model can be used in the form proposed in the annex. It can also be completed, simplified or adapted to take account of customary national administrative usage. In order to maximise the simplification effect, it would of course be desirable that the same model declaration established by a Member State be used for all administrative purposes in that Member State for which the SME qualification is required.

As the aim of the Recommendation is to provide a common reference framework for the definition of SMEs, it would of course be counter-productive if the use of such a model declaration were to lead to diverging interpretations of that definition. Attention is therefore drawn to the fact that any other model declaration serving the same purpose must take account of all the provisions of the text of the Recommendation in order to determine the qualification of the applicant enterprise as a micro, small or medium-sized enterprise within this Recommendation's meaning. It is the text of the Recommendation, and not that of the declaration, which sets out the conditions for the SME qualification.

In this regard, it must be stressed that the model declaration proposed refers to the Seventh Council Directive 83/349/EEC concerning consolidated accounts. Enterprises meeting one or other of the conditions set out in Article 1 of that Directive are in fact linked within the meaning of Article 3(3) of the definition of SMEs, having regard to the nature of those conditions. It is therefore convenient for enterprises which are obliged to draw up consolidated accounts, pursuant to that Council Directive, to know automatically that they are also linked within the meaning of the definition of SMEs. In the event of a subsequent amendment to that Directive leading to a divergence between the two definitions, the model declaration would, however, have to be adapted to take account of that.

In view of the timetable for the entry into force of any such possible amendment, that adaptation could probably take place simultaneously with any possible future amendment to the Recommendation on the definition of SMEs, pursuant to Article 9 of its annex.

MODEL DECLARATION

INFORMATION ON THE SME QUALIFICATION

Precise identification of the applicant enterprise

Name or business name:

Address (of registered office):

Registration/VAT number (1):

Names and titles of the principal director(s) (2):

Type of enterprise (see explanatory note)

Tick to indicate which case(s) applies to the applicant enterprise:

Autonomous enterprise In this case the data filled in the box below result from the accounts of the applicant enterprise only. Fill in the declaration only, without annex.

Partner enterprise Fill in and attach the annex (and any additional sheets), then complete the declaration by copying the results of the calculations into the box below.

Linked enterprise

Data used to determine the category of enterprise

Calculated according to Article 6 of the Annex to the Commission Recommendation C 2003/361/EC on the SME definition.

Reference period (*):

Headcount (AWU)	Annual turnover (**)	Balance sheet total (**)

(*) All data must be relating to the last approved accounting period and calculated on an annual basis. In the case of newly-established enterprises whose accounts have not yet been approved, the data to apply shall be derived from a reliable estimate made in the course of the financial year.

(**) EUR 1 000 .

Important: Compared to the previous accounting period there is a change regarding the data, which could result in a change of category of the applicant enterprise (micro, small, medium-sized or big enterprise).

No

Yes (in this case fill in and attach a declaration regarding the previous accounting period (3)).

Signature

Name and position of the signatory, being authorised to represent the enterprise:

.....

I declare on my honour the accuracy of this declaration and of any annexes thereto.

Done at

Signature:

(1) To be determined by the Member State according to its needs.

(2) Chairman (CEO), Director-General or equivalent.

(3) Definition, Article 4(2) of the annex to Commission Recommendation 2003/361/EC.

EXPLANATORY NOTE

ON THE TYPES OF ENTERPRISES TAKEN INTO ACCOUNT FOR CALCULATING THE HEADCOUNT AND THE FINANCIAL AMOUNTS

I. TYPES OF ENTERPRISES

The definition of an SME ⁽¹⁾ distinguishes three types of enterprise, according to their relationship with other enterprises in terms of holdings of capital or voting rights or the right to exercise a dominant influence ⁽²⁾.

Type 1: Autonomous Enterprise

This is by far the most common type of enterprise. It applies to all enterprises which are not one of the two other types of enterprise (partner or linked).

An applicant enterprise is autonomous if it:

- does not have a holding of 25 % ⁽³⁾ or more in any other enterprise,
- and is not 25 % ⁽³⁾ or more owned by any enterprise or public body or jointly by several linked enterprises or public bodies, apart from some exceptions ⁽⁴⁾,
- and does not draw up consolidated accounts and is not included in the accounts of an enterprise which draws up consolidated accounts and is thus not a linked enterprise ⁽⁵⁾.

Type 2: Partner Enterprise

This type represents the situation of enterprises which establish major financial partnerships with other enterprises, without the one exercising effective direct or indirect control over the other. Partners are enterprises which are not autonomous but which are not linked to one another.

The applicant enterprise is a partner of another enterprise if:

- it has a holding of more than 25 % ⁽³⁾ but less than 50 % ⁽³⁾ in the other enterprise,
- or the other enterprise has a holding of more than 25 % ⁽³⁾ but less than 50 % ⁽³⁾ in the applicant enterprise,
- and the applicant enterprise does not draw up consolidated accounts which include the other enterprise by consolidation, and is not included by consolidation in the accounts of the other enterprise or of an enterprise linked to it ⁽⁵⁾.

Type 3: Linked Enterprise

This type corresponds to the economic situation of enterprises which form a group through the direct or indirect control of the majority of the capital or voting rights (including through agreements or, in certain cases, through natural persons as shareholders), or through the ability to exercise a dominant influence on an enterprise. Such cases are thus less frequent than the two preceding types.

In order to avoid difficulties of interpretation for enterprises, the Commission has defined this type of enterprise by taking over — wherever they are suitable for the purposes of the Definition — the conditions set out in Article 1 of Council Directive 83/349/EEC on consolidated accounts ⁽⁶⁾, which has been applied for many years.

An enterprise thus generally knows immediately that it is linked, since it is already required under that Directive to draw up consolidated accounts or is included by consolidation in the accounts of an enterprise which is required to draw up such consolidated accounts.

The only two cases, which are however not very frequent, in which an enterprise can be considered linked although it is not already required to draw up consolidated accounts, are described in the first two indents of endnote 5 of this explanatory note. In those cases, the enterprise should check whether it meets one or other of the conditions set out in Article 3(3) of the Definition.

II. THE HEADCOUNT AND THE ANNUAL WORK UNITS (7)

The headcount of an enterprise corresponds to the number of annual work units (AWU).

Who is included in the headcount?

- The employees of the applicant enterprise,
- persons working for the enterprise being subordinate to it and considered to be employees under national law,
- owner-managers,
- 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 taken into account in the headcount.

How is the headcount calculated?

One AWU corresponds to one person who worked full-time in the enterprise in question or on its behalf during the entire reference year. The headcount is expressed in AWUs.

The work of persons, who did not work the entire year, or who worked part-time — regardless of its duration — and seasonal work is counted as fractions of AWU.

The duration of maternity or parental leaves is not counted.

(1) Henceforth in the text, the term 'Definition' refers to the Annex to Commission Recommendation 2003/361/EC on the definition of SMEs.

(2) Definition, Article 3.

(3) In terms of the share of the capital or voting rights, whichever is higher is applied. To this percentage should be added the holding in that same enterprise of each enterprise, which is linked to the holding company (Definition, Article 3(2)).

(4) An enterprise may continue being considered as autonomous when this 25 % threshold is reached or exceeded, if that percentage is held by the following categories of investors (provided that those are not linked with the applicant enterprise):

- 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. (Definition, Article 3(2), second subparagraph).

(5) — If the registered office of the enterprise is situated in a Member State which has provided for an exception to the requirement to draw up such accounts pursuant to the Seventh Council Directive 83/349/EEC of 13 June 1983, the enterprise should nevertheless check specifically whether it does not meet one or other of the conditions laid down in Article 3(3) of the Definition.

— There are also some very rare cases in which an enterprise may be considered linked to another enterprise through a person or a group of natural persons acting jointly (Definition, Article 3(3)).

— Conversely, there are very few cases of enterprises drawing up consolidated accounts voluntarily, without being required to do so under the Seventh Directive. In that case, the enterprise is not necessarily linked and can consider itself only a partner.

To determine whether the enterprise is linked or not, in each of the three situations it should be checked whether or not the enterprise meets one or other of the conditions laid down in Article 3(3) of the Definition, where applicable through a natural person or group of natural persons acting jointly.

(6) Seventh Council Directive 83/349/EEC of 13 June 1983, based on Article 54(3)(g) of the Treaty and concerning consolidated accounts (OJ L 193, 18.7.1983, p. 1), as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

(7) Definition, Article 5.

ANNEX TO THE DECLARATION

CALCULATION FOR THE PARTNER OR LINKED TYPE OF ENTERPRISE

Annexes to be enclosed if necessary

- Annex A if the applicant enterprise has at least one partner enterprise (and any additional sheets)
- Annex B if the applicant enterprise has at least one linked enterprise (and any additional sheets)

Calculation for the partner or linked type of enterprise ⁽¹⁾ (see explanatory note)Reference period ⁽²⁾:

	Headcount (AWU)	Annual turnover (*)	Balance sheet total (*)
1. Data ⁽²⁾ of the applicant enterprise or consolidated accounts (copy data from box B(1) in annex B ⁽³⁾)			
2. Proportionally aggregated data ⁽²⁾ of all partner enterprises (if any) (copy data from box A in annex A)			
3. Added up data ⁽²⁾ of all linked enterprises (if any) — if not included by consolidation in line 1 (copy data from box B(2) in annex B)			
Total			

(*) EUR 1 000.

⁽¹⁾ Definition, Article 6(2) and (3).⁽²⁾ All data must be relating to the last approved accounting period and calculated on an annual basis. In the case of newly-established enterprises whose accounts have not yet been approved, the data to apply shall be derived from a reliable estimate made in the course of the financial year (Definition, Article 4).⁽³⁾ The data of the enterprise, including the headcount, 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.

The data entered in the 'Total' srow of the above table should be entered in the box 'Data used to determine the category of enterprise' in the declaration.

ANNEX A

Partner enterprises

For each enterprise for which a 'partnership sheet' has been completed (one sheet for each partner enterprise of the applicant enterprise and for any partner enterprises of any linked enterprise, of which the data is not yet included in the consolidated accounts of that linked enterprise ⁽¹⁾), the data in the 'partnership box' in question should be entered in the summary table below:

Box A

Partner enterprise (name/identification)	Headcount (AWU)	Annual turnover (*)	Balance sheet total (*)
1.			
2.			
3.			
4.			
5.			
6.			
7.			
Total			

(*) EUR 1 000.

(attach sheets or expand the present table, if necessary)

Reminder: This data is the result of a proportional calculation done on the 'partnership sheet', for each direct or indirect partner enterprise.

The data entered in the 'Total' row of the above table should be entered in line 2 (regarding partner enterprises) of the table in the Annex to the declaration.

⁽¹⁾ If the data of an enterprise are included in the consolidated accounts to a lesser proportion than the one determined under Article 6(2), the percentage rate according to that article should be applied (Definition, Article 6(3), second subparagraph).

PARTNERSHIP SHEET

1. Precise identification of the partner enterprise

Name or business name:

Address (of registered office):.....

Registration/VAT number ⁽¹⁾:

Names and titles of the principal director(s) ⁽²⁾:

2. Raw data regarding that partner enterprise

Reference period:

	Headcount (AWU)	Annual turnover (*)	Balance sheet total (*)
Raw data			

(*) EUR 1 000.

Reminder: These raw data are derived from the accounts and other data of the partner enterprise, consolidated if they exist. To them are added 100 % of the data of enterprises which are linked to this partner enterprise, unless the accounts data of those linked enterprises are already included through consolidation in the accounts of the partner enterprise ⁽³⁾. If necessary, add 'linkage sheets' for the enterprises which are not yet included through consolidation.

3. Proportional calculation

a) Indicate precisely the holding ⁽⁴⁾ of the enterprise drawing up the declaration (or of the linked enterprise via which the relation to the partner enterprise is established) in the partner enterprise to which this sheet relates:

.....

.....

Indicate also the holding of the partner enterprise to which this sheet relates in the enterprise drawing up the declaration (or in the linked enterprise):

.....

.....

b) The higher of these two holding percentages should be applied to the raw data entered in the previous box. The results of this proportional calculation should be given in the following table:

'Partnership box'

Percentage: . . .	Headcount (AWU)	Annual turnover (*)	Balance sheet total (*)
Proportional results			

(*) EUR 1 000.

These data should be entered in Box A in Annex A.

⁽¹⁾ To be determined by the Member State according to its needs.
⁽²⁾ Chairman (CEO), Director-General or equivalent.
⁽³⁾ Definition, Article 6(3), first sub-paragraph.
⁽⁴⁾ In terms of the share of the capital or voting rights, whichever is higher. To this holding should be added the holding of each linked enterprise in the same enterprise (Definition, Article 3(2) first subparagraph).

ANNEX B

Linked enterprises**A) Determine the case applicable to the applicant enterprise:**

- Case 1:** The applicant enterprise draws up consolidated accounts or is included by consolidation in the consolidated accounts of another enterprise. (Box B(1))
- Case 2:** The applicant enterprise or one or more of the linked enterprises do not establish consolidated accounts or are not included in the consolidated accounts. (Box B(2)).

Please note: The data of the enterprises, which are linked to the applicant enterprise, are derived from their accounts and their other data, consolidated if they exist. To them are aggregated proportionally the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included through consolidation ⁽¹⁾.

B. Calculation methods for each case:

In case 1: The consolidated accounts serve as the basis for the calculation. Fill in box B(1) below.

Box B(1)

	Headcount (AWU) (*)	Annual turnover (**)	Balance sheet total (**)
Total			

(*) Where in the consolidated accounts no headcount data appears, the calculation of it is done by adding the data from the enterprises to which the enterprise in question is linked.

(**) EUR 1 000.

The data entered in the 'Total' row of the above table should be entered in line 1 of the table in the Annex to the declaration.

Identification of the enterprises included through consolidation

Linked enterprise (name/identification)	Address (of registered office)	Registration/ VAT number (*)	Names and titles of the principal director(s) (**)
A.			
B.			
C.			
D.			
E.			

(*) To be determined by the Member State according to its needs.

(**) Chairman ((CEO)), Director-General or equivalent.

Important: Partner enterprises of such a linked enterprise, which are not yet included through consolidation, are treated like direct partners of the applicant enterprise. Their data and a 'partnership sheet' should therefore be added in Annex A.

In case 2: For each linked enterprise (including links via other linked enterprises), complete a 'linkage sheet' and simply add together the accounts of all the linked enterprises by filling in Box B(2) below.

⁽¹⁾ Definition, Article 6(3), second subparagraph.

Box B(2)

Enterprise No.:	Headcount (AWU)	Annual turnover (**)	Balance sheet total (**)
1. (*)			
2. (*)			
3. (*)			
4. (*)			
5. (*)			
Total			

(*) attach one 'linkage sheet' per enterprise.

(**) EUR 1 000.

The data entered in the 'Total' row of the above table should be entered in line 3 (regarding linked enterprises) of the table in the Annex to the declaration.

LINKAGE SHEET

(only for linked enterprises not included by consolidation in Box B)

1. Precise identification of the enterprise

Name or business name:

Address (of registered office):

Registration/VAT number ⁽¹⁾:Names and titles of the principal director(s) ⁽²⁾:**2. Data on the enterprise**

Reference period:

	Headcount (AWU)	Annual turnover (*)	Balance sheet total (*)
Total			

(*) EUR 1 000

These data should be entered in Box B(2) in Annex B.

Important: The data of the enterprises, which are linked to the applicant enterprise, are derived from their accounts and their other data, consolidated if they exist. To them are aggregated proportionally the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included through consolidation ⁽³⁾.

Such partner enterprises are treated like direct partner enterprises of the applicant enterprise. Their data and a 'partnership sheet' have therefore to be added in Annex A.

⁽¹⁾ To be determined by the Member State according to its needs.

⁽²⁾ Chairman (CEO), Director-General or equivalent.

⁽³⁾ If the data of an enterprise are included in the consolidated accounts to a lesser proportion than the one determined under Article 6 (2), the percentage rate according to that article should be applied (Definition, Article 6 (3), second subparagraph).

CORRIGENDA**Corrigendum to the Commission Communication — Model Declaration on the information relating to the qualification of an enterprise as an SME**

(Official Journal of the European Union C 118 of 20 May 2003)

(2003/C 156/13)

On page 9, in footnote 4, the following is inserted after point (c):

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

**D. RULES ESTABLISHED IN RESPONSE TO
THE ECONOMIC AND FINANCIAL CRISIS**

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis

(2009/C 83/01)

1. THE FINANCIAL CRISIS, ITS IMPACT ON THE REAL ECONOMY AND THE NEED FOR TEMPORARY MEASURES**1.1. The financial crisis and its impact on the real economy**

On 26 November 2008 the Commission adopted the Communication 'A European Economic Recovery Plan' ⁽¹⁾ (the Recovery Plan) to drive Europe's recovery from the current financial crisis. The Recovery Plan is based on two mutually reinforcing main elements. Firstly, short-term measures to boost demand, save jobs and help restore confidence and, secondly, 'smart investment' to yield higher growth and sustainable prosperity in the longer term. The Recovery Plan will intensify and accelerate reforms already underway under the Lisbon Strategy.

In this context, the challenge for the Community is avoiding public intervention which would undermine the objective of less and better targeted State aid. Nevertheless, under certain conditions, there is a need for new temporary State aid.

The Recovery Plan also includes further initiatives to apply State aid rules in a way that achieves maximum flexibility for tackling the crisis while maintaining a level playing field and avoiding undue restrictions of competition. This Communication gives details of a number of additional temporary openings for Member States to grant State aid.

First, the financial crisis has a hard impact on the banking sector in the Community. The Council has stressed that, although public intervention has to be decided at national level, this needs to be done within a coordinated framework and on the basis of a number of common Community principles ⁽²⁾. The Commission reacted immediately with various measures including the adoption of the Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ⁽³⁾ and of a number of decisions authorising rescue aid to financial institutions.

Sufficient and affordable access to finance is a precondition for investment, growth and job creation by the private sector. Member States need to use the leverage they have acquired as a result of providing substantial financial support to the banking sector to ensure that this support does not lead merely to an improvement in the financial situation of the banks without any benefit to the economy at large. Support for the financial sector should therefore be well targeted to guarantee that banks resume their normal lending activities. The Commission will take this into account when reviewing State aid to banks.

⁽¹⁾ Communication from the Commission to the European Council, COM(2008) 800.

⁽²⁾ Conclusions of the ECOFIN Council of 7 October 2008.

⁽³⁾ OJ C 270, 25.10.2008, p. 8.

While the situation on financial markets appears to be improving, the full impact of the financial crisis on the real economy is now being felt. A very serious downturn is affecting the wider economy and hitting households, businesses and jobs. In particular, as a consequence of the crisis on financial markets, banks are deleveraging and becoming much more risk-averse than in previous years, leading to a credit squeeze. This financial crisis could trigger credit rationing, a drop in demand and recession.

Such difficulties could affect not only weak companies without solvency buffers, but also healthy companies which will find themselves facing a sudden shortage or even unavailability of credit. This will be particularly true for small and medium-sized undertakings ('SMEs'), which in any event face greater difficulties with access to finance than larger companies. This situation could not only seriously affect the economic situation of many healthy companies and their employees in the short and medium term but also have longer-lasting negative effects since all Community investments in the future – in particular, towards sustainable growth and other objectives of the Lisbon Strategy – could be delayed or even abandoned.

1.2. The need for close European coordination of national aid measures

In the current financial situation, Member States could be tempted to go it alone and, in particular, to wage a subsidy race to support their companies. Past experience shows that individual action of this kind cannot be effective and could seriously damage the internal market. When granting support, taking fully into consideration the current specific economic situation, it is crucial to ensure a level playing field for European companies and to avoid Member States engaging in subsidy races which would be unsustainable and detrimental to the Community as a whole. Competition policy is there to ensure this.

1.3. The need for temporary State aid measures

While State aid is no miracle cure to the current difficulties, well targeted public support for companies could be a helpful component in the overall effort both to unblock lending to companies and to encourage continued investment in a low-carbon future.

The temporary additional measures provided for in this Communication pursue two objectives: first, in the light of the exceptional and transitory financing problems linked to the banking crisis, to unblock bank lending to companies and thereby guarantee continuity in their access to finance. As borne out by the recently adopted Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Think Small First' – A 'Small Business Act' for Europe of 25 June 2008 ⁽⁴⁾, SMEs are particularly important for the whole economy in Europe and improving their financial situation will also have positive effects for large companies, thereby supporting overall economic growth and modernisation in the longer term.

The second objective is to encourage companies to continue investing in the future, in particular in a sustainable growth economy. There could indeed possibly be dramatic consequences if, as a result of the current crisis, the significant progress that has been achieved in the environmental field were to be halted or even reversed. For this reason, it is necessary to provide temporary support to companies for investing in environmental projects (which could, *inter alia*, give a technological edge to Community industry), thereby combining urgent and necessary financial support with long-term benefits for Europe.

This Communication first recalls the manifold opportunities for public support which are already at the disposal of Member States under existing State aid rules, before setting out additional State aid measures that Member States may grant temporarily in order to remedy the difficulties which some companies are currently encountering with access to finance and to promote investment pursuing environmental objectives.

The Commission considers that the proposed aid instruments are the most appropriate ones to achieve those objectives.

⁽⁴⁾ COM(2008) 394 final.

2. GENERAL ECONOMIC POLICY MEASURES

The Recovery Plan was adopted in response to the current economic situation. Given the scale of the crisis, the Community needs a coordinated approach, big enough and bold enough to restore consumer and business confidence.

The strategic aims of the Recovery Plan are to:

- swiftly stimulate demand and boost consumer confidence;
- lessen the human cost of the economic downturn and its impact on the most vulnerable. Many workers and their families are or will be hit by the crisis. Action can be taken to help stem the loss of jobs and then to help people return rapidly to the labour market, rather than face long-term unemployment;
- help Europe to prepare to capitalise when growth returns, so that the European economy is in tune with the demands for competitiveness and sustainability and the needs of the future, as outlined in the Lisbon Strategy. That means supporting innovation, building a knowledge economy and speeding up the shift towards a low-carbon and resource-efficient economy.

To achieve those objectives, Member States already have at their disposal a number of instruments which are not considered State aid. For instance, some companies may be experiencing even more acute difficulties with access to finance than others, thereby delaying or even scuppering the financing necessary for their growth and for seeing through investments envisaged. For this purpose, Member States could adopt a series of general policy measures, applicable to all companies on their territories and, consequently, falling outside the State aid rules, with the aim of temporarily alleviating financing problems in the short and medium term. For example, payment deadlines for social security and similar charges, or even taxes could be extended or measures for employees could be introduced. If such measures are open to all undertakings, in principle they do not constitute State aid.

Member States may also grant financial support directly to consumers, for instance for scrapping old products and/or buying green products. If such aid is granted without discrimination based on the origin of the product, it does not constitute State aid.

Moreover, general Community programmes, like the Competitiveness and Innovation Framework Programme (2007 to 2013) established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006⁽⁵⁾ and the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) established by Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006⁽⁶⁾ may be used to best effect to deliver support to SMEs, but also to large undertakings. This is fully in line with other European initiatives, such as the European Investment Bank's decision to mobilise EUR 30 billion to support European SMEs and its commitment to step up its ability to intervene in infrastructure projects.

3. STATE AID POSSIBLE UNDER EXISTING INSTRUMENTS

Over the last few years, the Commission has significantly modernised the State aid rules in order to encourage Member States to target public support better on sustainable investments, thus contributing to the Lisbon Strategy. In this context, particular emphasis has been given to SMEs, accompanied by more openings for granting State aid. In addition, the State aid rules have been greatly simplified and streamlined 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)⁽⁷⁾ ('the GBER') which now offers Member States a wide panoply of aid measures with minimum administrative burden. In the current economic situation, the following existing State aid instruments are of particular importance:

⁽⁵⁾ OJ L 310, 9.11.2006, p. 15.

⁽⁶⁾ OJ L 412, 30.12.2006, p. 1.

⁽⁷⁾ OJ L 214, 9.8.2008, p. 3.

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 ⁽⁸⁾ ('the *de minimis* Regulation') specifies that support measures worth up to EUR 200 000 per company over any three-year period do not constitute State aid within the meaning of the Treaty. The same Regulation also states that guarantees of up to EUR 1,5 million do not exceed the *de minimis* threshold and therefore do not constitute aid. Consequently, Member States can grant such guarantees without calculation of the corresponding aid equivalent and without administrative burdens.

The GBER forms a central element of the State aid rules by simplifying the State aid procedure for certain important aid measures and fostering redirection of State aid to priority Community objectives. All previously existing block exemptions, along with new areas (innovation, environment, research and development for large companies and risk capital measures for SMEs), have been brought under a single instrument. In all the cases covered by the GBER, Member States can grant aid without prior notification to the Commission. Therefore, the speed of the process lies fully in the hands of Member States. The GBER is particularly important for SMEs, in that it provides for special rules on investment and employment aid exclusively for SMEs. In addition, all the 26 measures covered are open to SMEs, allowing Member States to accompany SMEs during the different stages in their development, assisting them in areas ranging from access to finance to research and development, innovation, training, employment, environmental measures, etc.

New Community guidelines on State aid for environmental protection ⁽⁹⁾ were adopted as part of the Energy and Climate Change Package at the beginning of 2008. Under those guidelines, Member States may grant State aid, *inter alia*, as follows:

- aid for companies which improve their environmental performance beyond Community standards, or in the absence of Community standards, of up to 70 % of the extra investment costs (up to 80 % in the field of eco-innovation) for small undertakings and of up to 100 % of the extra investment costs if the aid is granted following a genuinely competitive bidding process, even for large companies; aid for early adaptation to future Community standards and aid for environmental studies is also allowed;
- in the field of renewable energies and cogeneration, Member States may grant operating aid to cover all extra production costs;
- in order to attain environmental targets for energy saving and for reductions in greenhouse gas emissions, Member States may grant aid enabling undertakings to achieve energy savings and aid for renewable energy sources and cogeneration of up to 80 % of the extra investment costs for small undertakings and of up to 100 % of the extra investment costs if the aid is granted following a genuinely competitive bidding process.

In December 2006, the Commission adopted a new Community framework for State aid for research and development and innovation ⁽¹⁰⁾. That text contains new provisions on innovation, specially targeted at SMEs and also corresponding to better targeting of aid on job and growth creation along the lines set out in the Lisbon Strategy. In particular Member States may grant State aid, *inter alia*, as follows:

- aid for R&D projects, in particular aid for fundamental research, of up to 100 % of the eligible costs and aid for industrial research of up to 80 % for small enterprises;
- aid for young innovative enterprises of up to EUR 1 million and even more in assisted regions, aid for innovation clusters, aid for innovation advisory services and aid for innovation support services;

⁽⁸⁾ OJ L 379, 28.12.2006, p. 5.

⁽⁹⁾ OJ C 82, 1.4.2008, p. 1.

⁽¹⁰⁾ OJ C 323, 30.12.2006, p. 1.

- aid for the loan of highly qualified personnel, aid for technical feasibility studies, aid for process and organisational innovation in services and aid for industrial property rights costs for SMEs.

Training is another key element for competitiveness. It is critically important to maintain investment in training, even at a time of rising unemployment, in order to develop new skills. Under the GBER, Member States may grant both general and specific training aid to companies totalling up to 80 % of the eligible costs.

In 2008, the Commission adopted a new Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽¹¹⁾, which specifies the conditions under which public guarantees for loans do not constitute State aid. In accordance with that Notice, guarantees are not considered State aid, in particular, when a market price is paid for them. Besides clarifying the conditions which determine whether or not aid in the form of guarantees is present, the Notice also introduces, for the first time, specific safe-harbour premiums for SMEs, allowing easier but safe use of guarantees in order to foster the financing of SMEs.

New Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises ⁽¹²⁾ were adopted by the Commission in July 2006. They are aimed at innovative and fast-growing SMEs – a key focus of the Lisbon Strategy. The Commission put in place a new safe-harbour threshold of EUR 1,5 million per target SME, a 50 % increase. Beneath that ceiling the Commission accepts that, as a rule, alternative means of funding from financial markets are lacking (that is to say, that a market failure exists). In addition, aid for risk capital has been included in the GBER.

In disadvantaged regions, Member States can grant investment aid for setting up a new establishment, extending an existing establishment or diversifying into new products under the Guidelines on national regional aid for 2007-2013 ⁽¹³⁾, which have applied since January 2007.

The Guidelines on national regional aid for 2007-2013 also introduce a new form of aid to provide incentives to support business start-ups and the early-stage development of small enterprises in assisted areas.

Under the existing Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁴⁾, Member States can also grant aid to companies requiring public support. For that purpose, Member States may notify rescue and/or restructuring aid schemes for SMEs.

On the basis of the existing State aid possible, the Commission has already authorised a large number of schemes that Member States may use to respond to the current financial situation.

4. APPLICABILITY OF ARTICLE 87(3)(B)

4.1. General principles

Pursuant to Article 87(3)(b) of the Treaty the Commission may declare compatible with the common market aid 'to remedy a serious disturbance in the economy of a Member State'. In this context, the Court of First Instance of the European Communities has ruled that the disturbance must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in line with the need to interpret strictly any derogating provision such as Article 87(3)(b) of the Treaty ⁽¹⁵⁾.

⁽¹¹⁾ OJ C 155, 20.6.2008, p. 10.

⁽¹²⁾ OJ C 194, 18.8.2006, p. 2.

⁽¹³⁾ OJ C 54, 4.3.2006, p. 13.

⁽¹⁴⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹⁵⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, paragraph 167.

This strict interpretation has been consistently applied by the Commission ⁽¹⁶⁾ in its decision-making.

In this context, the Commission considers that, beyond emergency support for the financial system, the current global crisis requires exceptional policy responses.

All Member States will be affected by this crisis, albeit in different ways and to different degrees, and it is likely that unemployment will increase, demand fall and fiscal positions deteriorate.

In the light of the seriousness of the current financial crisis and its impact on the overall economy of the Member States, the Commission considers that certain categories of State aid are justified, for a limited period, to remedy those difficulties and that they may be declared compatible with the common market on the basis of Article 87(3)(b) of the Treaty.

Therefore Member States have to show that the State aid measures notified to the Commission under this framework are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State and that all the conditions are fully respected.

4.2. Compatible limited amount of aid

4.2.1. Existing framework

Article 2 of the *de minimis* Regulation, states that:

'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.

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.'

4.2.2. New measure

The financial crisis is affecting not only structurally weak companies but also companies which will find themselves facing a sudden shortage or even unavailability of credit. An improvement in the financial situation of those companies will have positive effects for the whole European economy.

Therefore, in view of the current economic situation, it is considered necessary to temporarily allow the granting of a limited amount of aid that will nevertheless fall within the scope of Article 87(1) of the Treaty, since it exceeds the threshold indicated in the *de minimis* Regulation.

The Commission will consider such State aid compatible with the common market on the basis of Article 87(3)(b) of the Treaty, provided all the following conditions are met:

⁽¹⁶⁾ Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1; Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 *et seq.*; and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See Commission Decision in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision in Case NN 25/08 *Rescue aid to WestLB* (OJ C 189, 26.7.2008, p. 3) and Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published.

- (a) the aid does not exceed a cash grant of EUR 500 000 per undertaking; all figures used must 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 is the gross grant equivalent of the aid;
- (b) the aid is granted in the form of a scheme;
- (c) the aid is granted to firms which were not in difficulty⁽¹⁷⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;
- (d) the aid scheme does not apply to firms active in the fisheries sector;
- (e) the aid is not export aid or aid favouring domestic over imported products;
- (f) the aid is granted no later than 31 December 2010;
- (g) prior to granting the aid, the Member State obtains a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid and aid pursuant to this measure received during the current fiscal year and checks that the aid will not raise the total amount of aid received by the undertaking during the period from 1 January 2008 to 31 December 2010, to a level above the ceiling of EUR 500 000;
- (h) the aid scheme does not apply to undertakings active in the primary production of agricultural products⁽¹⁸⁾; it may apply to undertakings active in the processing and marketing of agricultural products⁽¹⁹⁾ unless 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 the aid is conditional on being partly or entirely passed on to primary producers.

4.3. Aid in the form of guarantees

4.3.1. Existing framework

The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees is intended to give Member States detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 87 and 88 and application thereof to State guarantees. In particular, the Notice specifies the conditions under which State aid can be considered not to be present. It does not provide compatibility criteria for assessment of guarantees.

4.3.2. New measure

In order further to encourage access to finance and to reduce the current high risk aversion on the part of banks, subsidised loan guarantees for a limited period can be an appropriate and well targeted solution to give firms easier access to finance.

⁽¹⁷⁾ For the purposes of this Communication 'firm in difficulty' means:

— for large companies, a firm in difficulty as defined in point 2.1 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty

— for SMEs, a firm in difficulty as defined in Article 1(7) of the GBER.

⁽¹⁸⁾ As defined in Article 2(2) of 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).

⁽¹⁹⁾ As defined in Article 2(3) and 2(4) of Regulation (EC) No 1857/2006.

The Commission will consider such State aid compatible with the common market on the basis of Article 87(3)(b) of the Treaty, provided all the following conditions are met:

- (a) for SMEs, Member States grant a reduction of up to 25 % of the annual premium to be paid for new guarantees granted in accordance with the safe-harbour provisions as set out in the Annex ⁽²⁰⁾;
- (b) for large companies, Member States also grant a reduction of up to 15 % of the annual premium for new guarantees calculated on the basis of the same safe-harbour provisions set out in the Annex;
- (c) when the aid element in guarantee schemes is calculated through methodologies already accepted by the Commission following their notification under a regulation adopted by the Commission in the field of State aid ⁽²¹⁾, Member States may also grant a similar reduction of up to 25 % of the annual premium to be paid for new guarantees for SMEs and up to 15 % for large companies;
- (d) the maximum loan does not exceed the total annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the company site but formally in the payroll of subcontractors) for 2008. In the case of companies created on or after 1 January 2008, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation;
- (e) guarantees are granted until 31 December 2010 at the latest;
- (f) the guarantee does not exceed 90 % of the loan for the duration of the loan;
- (g) the guarantee may relate to both investment and working capital loans;
- (h) the reduction of the guarantee premium is applied during a maximum period of 2 years following the granting of the guarantee. If the duration of the underlying loan exceeds 2 years, Member States may apply for an additional maximum period of 8 years the safe-harbour premiums set out in the Annex without reduction;
- (i) the aid is granted to firms which were not in difficulty ⁽²²⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

4.4. Aid in the form of subsidised interest rate

4.4.1. Existing framework

The Commission Communication on the revision of the method for setting the reference and discount rates ⁽²³⁾ establishes a method for calculation of the reference rate, based on the one-year inter-bank offered rate (IBOR) increased by margins ranging from 60 to 1 000 base points, depending on the creditworthiness of the company and the level of collateral offered. The method for calculation of the reference and discount rates may be amended by the Commission, in order to reflect the prevailing market conditions. If Member States apply the calculation method of the reference and discount rates established in the Commission communication in force at the moment of the grant of the loan and comply with the conditions set out in that communication, the interest rate does, in principle, not contain State aid.

⁽²⁰⁾ The premiums in the Annex refines the safe-harbour provisions of 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 155, 20.6.2008) by taking account of different levels of collateralisation. They may also be used as benchmark to calculate the compatible aid element for guarantee measures falling under point 4.2 of this framework.

The calculation of the safe-harbour premiums is based on the margins provided by the Commission Communication on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6), taking account of an additional reduction of 20 basis points (see footnote 11 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees). For each rating category, however, the safe-harbour premium as set out in 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 155, 20.6.2008) remained the upper premium limit for each rating category. As to the definition of the different levels of collateralisation see footnote 2, page 3 of the Commission Communication on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

⁽²¹⁾ Such as the GBER or Regulation (EC) No 1628/2006 or Regulation (EC) No 1857/2006, provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

⁽²²⁾ See footnote 17.

⁽²³⁾ OJ C 14, 19.1.2008, p. 6.

4.4.2. *New measure*

Companies may have difficulties in finding finance in the current market circumstances. Therefore the Commission will accept that public or private loans are granted at an interest rate which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average one year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Commission Communication on the revision of the method for setting the reference and discount rates.

The aid element contained in the difference between this interest rate and the reference rate defined by the Commission Communication on the revision of the method for setting the reference and discount rates will be considered, on a temporary basis, to be compatible with the Treaty on the basis of Article 87(3)(b), provided the following conditions are met:

- (a) this method applies to all contracts concluded on 31 December 2010 at the latest; it may cover loans of any duration; the reduced interest rates may be applied for interest payments before 31 December 2012 ⁽²⁴⁾; an interest rate at least equal to the rate defined in the reference and discount rate Communication must apply to loans after that date;
- (b) the aid is granted to firms which were not in difficulty on 1 July 2008 ⁽²⁵⁾; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

4.5. **Aid for the production of green products**

4.5.1. *Existing framework*

The Commission Communication on the revision of the method for setting the reference and discount rates ⁽²⁶⁾ establishes a method for calculation of the reference rate, based on the one-year inter-bank offered rate (IBOR) increased by margins ranging from 60 to 1 000 base points, depending on the creditworthiness of the company and the level of collateral offered. The method for calculation of the reference and discount rates may be amended by the Commission in order to reflect the prevailing market conditions. If Member States apply the calculation method of the reference and discount rates established in the Commission communication in force at the moment of the grant of the loan and comply with the conditions set out in that communication, the interest rate does, in principle, not contain State aid.

4.5.2. *New measure*

Because of the current financial crisis, companies are also finding it more difficult to gain access to finance for production of more environmentally friendly products. Aid in the form of guarantees may not be sufficient to finance costly projects aiming at increasing environmental protection by adapting earlier to future standards not yet in force or by going beyond such standards.

The Commission considers that environmental goals should remain a priority despite the financial crisis. Production of more environmentally friendly, including energy-efficient, products, is in the Community's interest and it is important that the financial crisis should not impede that objective.

Therefore, additional measures in the form of subsidised loans could encourage production of 'green products'. However, subsidised loans may cause serious distortions of competition and should be strictly limited to specific situations and targeted investment.

⁽²⁴⁾ Member States who want to use this facility have to publish the daily overnight rates online and have to make them available to the Commission.

⁽²⁵⁾ See footnote 17.

⁽²⁶⁾ OJ C 14, 19.1.2008, p. 6.

The Commission considers that, for a limited period, Member States should be given the possibility of granting aid in the form of an interest-rate reduction.

On the basis of Article 87(3)(b) of the Treaty, the Commission will consider compatible with the common market any interest-rate subsidy for investment loans that meets all the following conditions:

- (a) the aid relates to investment loans for financing projects consisting of production of new products which significantly improve environmental protection;
- (b) the aid is necessary for launching a new project; in the case of existing projects, aid may be granted if it becomes necessary, due to the new economic situation, in order to pursue the project;
- (c) the aid is granted only for projects consisting of production of products involving early adaptation to or going beyond future Community product standards⁽²⁷⁾ which increase the level of environmental protection and are not yet in force;
- (d) for products involving early adaptation to or going beyond future Community environmental standards, the investment starts on 31 December 2010 at the latest with the objective of putting the product on the market at least two years before the standard enters into force;
- (e) loans may cover the costs of investment in tangible and intangible assets⁽²⁸⁾ with the exception of loans for investments which account for production capacities of more than 3 % on product markets⁽²⁹⁾ where the average annual growth rate, over the last five years before the start of the investment, of the apparent consumption on the EEA market, measured in value data, remained below the average annual growth rate of the European Economic Area's GDP over the same five year reference period;
- (f) the loans are granted on 31 December 2010 at the latest;
- (g) for calculation of the aid, the starting point should be the individual rate of the beneficiary as calculated on the basis of the methodology contained in point 4.4.2 of this Communication. On the basis of that methodology, the company may benefit from an interest-rate reduction of:
 - 25 % for large companies;
 - 50 % for SMEs;
- (h) the subsidised interest rate applies during a maximum period of 2 years following the granting of loan;
- (i) the reduction in the interest rate may be applied to loans granted by the State or public finance institutions and to loans granted by private financial institutions. Non-discrimination between public and private entities should be ensured;
- (j) the aid is granted to firms which were not in difficulty⁽³⁰⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;
- (k) Member States ensure that the aid is not directly or indirectly transferred to financial entities.

⁽²⁷⁾ Future Community product standard means a mandatory Community standard setting environmental levels to be attained for products sold in the Community which has been adopted but is not yet in force.

⁽²⁸⁾ As defined in point 70 of the Community guidelines on State aid for environmental protection.

⁽²⁹⁾ As defined in point 69 of the Guidelines on national regional aid for 2007-2013.

⁽³⁰⁾ See footnote 17.

4.6. Risk capital measures

4.6.1. Existing framework

The Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises set out the conditions under which State aid supporting risk capital investment may be considered compatible with the common market in accordance with Article 87(3) of the Treaty.

Based on the experience gained from applying the guidelines on State aid to promote risk capital investments in small and medium-sized enterprises, the Commission considers that there is no general risk capital market failure in the Community. It does, however, accept that there are market gaps for some types of investment at certain stages of enterprises' development which are the result of imperfect matching of supply of and demand for risk capital and can generally be described as an equity gap.

Point 4.3 of the guidelines states that for tranches of finance not exceeding EUR 1,5 million per target SME over each period of twelve months, under certain conditions market failure is presumed and does not need to be demonstrated by Member States.

Point 5.1(a) of the same guidelines states that *The Commission is aware of the constant fluctuation of the risk capital market and of the equity gap over time, as well as of the different degree by which enterprises are affected by the market failure depending on their size, on their stage of business development, and on their economic sector. Therefore, the Commission is prepared to consider declaring risk capital measures providing for investment tranches exceeding the threshold of EUR 1,5 million per enterprise per year compatible with the common market, provided the necessary evidence of the market failure is submitted.*

4.6.2. Temporary adaptation of the existing rules

The turmoil on the financial market has had a negative effect on the risk capital market for early growth SMEs by tightening the availability of risk capital. Due to the currently greatly increased risk perception associated with risk capital linked with uncertainties resulting from possibly lower yield expectations, investors are currently tending to invest in safer assets the risks of which are easier to assess as compared to those associated with risk capital investments. Furthermore the illiquid nature of risk capital investments has proven to be a further disincentive for investors. There is evidence that the resulting restricted liquidity under current market circumstances has widened the equity gap for SMEs. It is therefore considered appropriate to temporarily raise the safe-harbour threshold for risk capital investments to meet the increased equity gap and to temporarily lower the percentage of minimum private investor participation to 30 % also in the case of measures targeting SMEs in non assisted areas.

Accordingly, on the basis of Article 87(3)(b) of the Treaty, certain limits set out in the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises are temporarily adapted until 31 December 2010 as follows:

- (a) for the purposes of point 4.3.1.; the maximum permitted tranches of finance are increased to EUR 2,5 million, from EUR 1,5 million per target SME over each period of twelve months;
- (b) for the purposes of point 4.3.4, the minimum amount of funding to be provided by private investors is 30 % both in and outside assisted areas;
- (c) other conditions laid down in the guidelines remain applicable;
- (d) this temporary adaptation of the guidelines does not apply to risk capital measures covered by the GBER.
- (e) Member States may adapt approved schemes to reflect the temporary adaptation of the guidelines.

4.7. Cumulation

The aid ceilings fixed under this Communication will be applied regardless of whether the support for the aided project is financed entirely from State resources or partly financed by the Community.

The temporary aid measures foreseen by this Communication may not be cumulated with aid falling within the scope of the *de minimis* Regulation for the same eligible costs. If the undertaking has already received *de minimis* aid prior to the entry into force of this temporary framework the sum of the aid received under the measures covered by point 4.2 of this Communication and the *de minimis* aid received must not exceed EUR 500 000 between 1 January 2008 and 31 December 2010. The amount of *de minimis* aid received from 1 January 2008 must be deducted from the amount of compatible aid granted for the same purpose under points 4.3, 4.4, 4.5 or 4.6.

The temporary aid measures may be cumulated with other compatible aid or with other forms of Community financing provided that the maximum aid intensities indicated in the relevant guidelines or block exemptions Regulations are respected.

5. SIMPLIFICATION MEASURES

5.1. Short-term export credit insurance

The Communication from the Commission to 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⁽³¹⁾ stipulates that marketable risks cannot be covered by export-credit insurance with the support of Member States. Marketable risks are commercial and political risks on public and non-public debtors established in countries listed in the Annex to that Communication, with a maximum risk period of less than two years. Risks concerning debtors established in the Member States and eight further members of the Organisation for Economic Co-operation and Development are considered marketable.

The Commission considers that, as a consequence of the current financial crisis, a lack of insurance or reinsurance capacity does not exist in every Member State, but it cannot be excluded that, in certain countries cover for marketable risks could be temporarily unavailable.

Point 4.4 of the Communication states that: *'In such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for the account of or with the guarantee of the State. The insurer should, as far as possible, align its premium rates for such risks with the rates charged elsewhere by private export-credit insurers for the type of risk in question.'*

Any Member State intending to use that escape clause should immediately notify the Commission of its draft decision. That notification should contain a market report demonstrating the unavailability of cover for the risks in the private insurance market by producing evidence thereof from two large, well-known international private export-credit insurers as well as a national credit insurer, thus justifying the use of the escape clause. It should, moreover, contain a description of the conditions which the public or publicly supported export-credit insurer intends to apply in respect of such risks.

Within two months of the receipt of such notification, the Commission will examine whether the use of the escape clause is in conformity with the above conditions and compatible with the Treaty.

If the Commission finds that the conditions for the use of the escape clause are fulfilled, its decision on compatibility is limited to two years from the date of the decision, provided that the market conditions justifying the use of the escape clause do not change during that period.

Furthermore, the Commission may, in consultation with the other Member States, revise the conditions for the use of the escape clause; it may also decide to discontinue it or replace it with another appropriate system.'

⁽³¹⁾ OJ C 281, 17.9.1997, p. 4.

Those provisions, applicable to large companies and SMEs, are an appropriate instrument in the current economic situation if Member States consider that cover is unavailable on the private insurance market for certain marketable credit risks and/or for certain buyers of risk protection.

In this context, in order to speed up the procedure for Member States, the Commission considers that, until 31 December 2010, Member States may demonstrate the lack of market by providing sufficient evidence of the unavailability of cover for the risk in the private insurance market. Use of the escape clause will in any case be considered justified if:

- a large well-known international private export credits insurer and a national credit insurer produce evidence of the unavailability of such cover or
- at least four well-established exporters in the Member State produce evidence of refusal of cover from insurers for specific operations.

The Commission, in close cooperation with the Member States concerned, will ensure swift adoption of decisions concerning the application of the escape clause.

5.2. Simplification of procedures

State aid measures referred to in this Communication must be notified to the Commission. Beyond the substantive measures set out in this Communication, the Commission is committed to ensuring the swift authorisation of aid measures that address the current crisis in accordance with this Communication provided close cooperation and full information is provided by the Member States concerned.

This commitment will complement the on-going process, whereby the Commission is currently drafting a number of improvements to its general State aid procedures, particularly to allow quicker and more effective decision-making in close cooperation with Member States. This general simplification package should, in particular, enshrine joint commitments by the Commission and Member States to more streamlined and predictable procedures at each step of a State aid investigation and allow faster approval of straightforward cases.

6. MONITORING AND REPORTING

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽³²⁾ and 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⁽³³⁾ require Member States to submit annual reports to the Commission.

By 31 July 2009, Member States must provide the Commission with a list of schemes put in place on the basis of this Communication.

Member States must ensure that detailed records regarding the granting of aid provided for by this Communication are maintained. Such records, which must contain all information necessary to establish that the necessary conditions have been observed, must be maintained for 10 years and be provided to the Commission upon request. In particular, Member States must have obtained information demonstrating that the aid beneficiaries under the measures provided for in points 4.2, 4.3, 4.4 and 4.5 were not companies in difficulty on 1 July 2008.

In addition, a report on the measures put in place on the basis of this Communication should be provided to the Commission by Member States by 31 October 2009. In particular, the report should provide elements indicating the need for the Commission to maintain the measures provided for by this Communication after 31 December 2009, as well as detailed information on the environmental benefits of the subsidised loans. Member States must provide this information for any subsequent year during which this Communication is applied, before 31 October of each year.

⁽³²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³³⁾ OJ L 140, 30.4.2004, p. 1.

The Commission may request additional information regarding the aid granted, to check whether the conditions laid down in the Commission decision approving the aid measure have been met.

7. FINAL PROVISIONS

The Commission applies this Communication from 17 December 2008, the date on which it agreed in principle its content, having regard to the financial and economic context which required immediate action. This Communication is justified by the current exceptional and transitory financing problems related to the banking crisis and will not be applied after 31 December 2010. After consulting Member States, the Commission may review it before that date on the basis of important competition policy or economic considerations. Where this would be helpful, the Commission may also provide further clarifications of its approach to particular issues.

The Commission applies the provisions of this Communication to all notified risk capital measures on which it must take a decision after 17 December 2008, even if the measures were notified prior to that date.

In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽³⁴⁾, the Commission applies the following in respect of non-notified aid:

- (a) this Communication, if the aid was granted after 17 December 2008;
- (b) the guidelines applicable when the aid was granted in all other cases.

The Commission, in close cooperation with the Member States concerned, ensures swift adoption of decisions upon complete notification of measures covered by this Communication. Member States should inform the Commission of their intentions and notify plans to introduce such measures as early and comprehensively as possible.

The Commission wishes to recall that any procedural improvement depends entirely on submission of clear and complete notifications.

⁽³⁴⁾ OJ C 119, 22.5.2002, p. 22.

ANNEX

Safe-harbours Temporary Framework in basis points (*)			
Rating category (Standard & Poor's)	Collateralisation		
	High	Normal	Low
AAA	40	40	40
AA+ AA AA-	40	40	40
A+ A A-	40	55	55
BBB+ BBB BBB-	55	80	80
BB+ BB	80	200	200
BB- B+	200	380	380
B B-	200	380	630
CCC and below	380	630	980

(*) For companies 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), Member States may grant a reduction up to 15 % (25 % for SMEs) on the specific safe-harbour premium set at 3,8 % in 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 155, 20.6.2008). However, the premium can never be lower than the premium which would be applicable to the parent company or companies.

Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis

(2009/C 261/02)

1. INTRODUCTION

The Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis applies from 17 December 2008 until 31 December 2010 ⁽¹⁾.

The possibility under point 4.2 to grant a compatible limited amount of aid does not apply to undertakings active in the primary production of agricultural products. Farmers, however, encounter increased difficulties to obtain credit as a consequence of the financial crisis.

Following the Communication from the Commission to the Council on the dairy market situation 2009 of 22 July 2009 (SEC(2009) 1050) and the outcome of the Council meeting of agriculture ministers of 7 September 2009, it is appropriate to introduce a separate compatible limited amount of aid for undertakings active in the primary production of agricultural products.

2. AMENDMENTS TO THE TEMPORARY COMMUNITY FRAMEWORK

The following amendments to the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis will take effect from 28 October 2009:

1. point 4.2.2(g) is replaced by the following:

‘prior to granting the aid, the Member State obtains a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid and aid pursuant to this measure received during the current fiscal year and checks that the aid will not raise the total amount of aid received by the undertaking during the period from 1 January 2008 to 31 December 2010, to a level above the

ceiling of EUR 500 000, and of EUR 15 000 respectively in case of aid to undertakings active in the primary production of agricultural products ⁽²⁾;

2. point 4.2.2(h) is replaced by the following:

‘the aid scheme applies as such to undertakings active in the processing and marketing of agricultural products ⁽³⁾, unless the aid is conditional on being partly or entirely passed on to primary producers. Where the aid is granted to undertakings active in the primary production of agricultural products (either directly or passed on from undertakings processing and marketing agricultural products), the cash grant (or gross grant equivalent) does not exceed EUR 15 000 per undertaking; aid to undertakings active in the primary production of agricultural products is not fixed on the basis of the price or quantity of products put on the market; aid to undertakings active in the processing and marketing of agricultural products is not fixed on the basis of the price or quantity of products purchased from primary producers or put on the market by the undertakings concerned.’

3. point 4.7, paragraph 2 is replaced by the following:

‘The temporary aid measures foreseen by this Communication may not be cumulated with aid falling within the scope of the *de minimis* Regulations for the same eligible costs. If the undertaking has already received *de minimis* aid prior to the entry into force of this temporary framework the sum of the aid received under the measures covered by point 4.2 of this Communication and the *de minimis* aid received must not exceed EUR 500 000, and EUR 15 000 respectively in case of aid to primary agricultural producers, between 1 January 2008 and 31 December 2010. The amount of *de minimis* aid received from 1 January 2008 must be deducted from the amount of compatible aid granted for the same purpose under points 4.3, 4.4, 4.5 or 4.6.’

⁽¹⁾ OJ C 83, 7.4.2009, p. 1 (consolidated version including the amendments introduced by Commission Communication of 25 February 2009).

⁽²⁾ As defined in Article 2(2) of 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).

⁽³⁾ As defined in Articles 2(3) and 2(4) of Regulation (EC) No 1857/2006.

Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis

(2009/C 303/04)

1. INTRODUCTION

On 17 December 2008, the Commission adopted the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis ⁽¹⁾.

The aim of the Temporary Framework is in particular to unblock bank lending to companies and thereby encouraging companies to continue investing in the future. Signs of improvement in the economic situation have become increasingly apparent in both confidence indicators and hard data since the last summer. Nevertheless, to support the sustainability of the recovery, it is essential to look to medium and long-term objectives and notably to encourage investment.

The provisions of the Temporary Framework concerning notably aid in the form of guarantees have contributed to unblock bank lending to companies. The Commission considers that in the context of the current economic situation and for a limited period of time, subsidised loan guarantees can be an appropriate and well targeted instrument to give firms easier access to finance and thus encourage investment necessary for long-term recovery.

Under the existing Temporary Framework, the maximum loan which benefits from the guarantee cannot exceed the total annual wage bill of the beneficiary for 2008. The purpose of this cap is to limit the aid to the amount which is strictly necessary and avoid undue distortion of competition. Nevertheless, in the current economic situation, this provision may be too restrictive and prevent investments, in particular in Member States with low labour costs.

Consequently, the Commission considers that, in order to facilitate access to finance and encourage long-term investment, Member States should have the possibility to determine the maximum amount of investment loan concerned by a guarantee on the basis of the total annual wage bill of the beneficiary for 2008, or on the basis of the Community average labour costs established by Eurostat and specified in the present communication.

2. AMENDMENTS TO THE TEMPORARY COMMUNITY FRAMEWORK

1. Point 4.3.2(d) of the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis is replaced by the following:

‘The maximum loan does not exceed the total annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the company site but formally in the payroll of subcontractors) for 2008. In the case of companies created on or after 1 January 2008, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation.

For investments loans, Member States may choose to calculate the maximum loan on the basis of the annual EU 27 average labour costs ⁽²⁾.

2. The amendment of the Temporary Community Framework is applicable from the date of adoption by the Commission.

⁽¹⁾ OJ C 83, 7.4.2009, p. 1.

⁽²⁾ Source: Eurostat. Last information available EU 27 2007. Monthly labour costs: EUR 3 028.

Communication of the Commission — Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis

(Text with EEA relevance)

(2011/C 6/05)

1. The financial and economic crisis, its impact on the real economy and the need for temporary measures

1.1. *The financial and economic crisis and its impact on the real economy*

Since the beginning of the global financial and economic crisis in the autumn of 2008, the Commission has issued a number of Communications which provide detailed guidance on the criteria for the compatibility of Member States' support to banks and non-financial firms with the requirements of Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU). In particular, the Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis⁽¹⁾ (the temporary framework) was adopted on 19 January 2009.

The financial and economic crisis caused a serious downturn of the real economy, hitting households, business and jobs. Expectations on growth rapidly dropped and both trade and investments were quickly scaled down. Banks had, on the one hand, to deleverage and absorb losses and, on the other hand, to re-price risks, thereby becoming more risk-averse. Even creditworthy businesses faced sudden problems in gaining access to finance⁽²⁾.

The temporary framework was intended to provide Member States with the possibility to adopt additional State aid measures aimed at facilitating companies' access to finance and at the same time encouraging companies to continue investing in the future during these exceptional circumstances. The temporary framework is due to expire on 31 December 2010. By adopting a single framework applicable to all Member States, the Commission encouraged a coordinated action to ensure transparency and a level playing field for firms and Member States in the single market.

The temporary framework was consolidated and amended in February 2009⁽³⁾ and amended again in December 2009⁽⁴⁾ to introduce some technical adjustments, in particular as regards aid in the form of guarantees. In October 2009, the Commission introduced another amendment to the temporary framework in order to allow for a compatible limited amount of aid of EUR 15 000 for the agricultural sectors⁽⁵⁾.

1.2. *Use of the temporary framework and the need to amend certain measures and replace it*

Since its adoption, Member States have made substantial use of the possibilities under the temporary framework. Evidence collected by the Commission shows that it constituted a useful additional instrument to secure credit flows to firms in times of crisis.

The Commission carried out a first evaluation of the temporary framework in October 2009, with a view to deciding whether it was necessary to maintain it after 31 December 2009. On 17 March 2010, a second public questionnaire was launched focusing on the impact of the temporary framework and its effectiveness in the reactivation of access to finance.

⁽¹⁾ OJ C 16, 22.1.2009, p. 1.

⁽²⁾ See European Commission, Economic and Financial Affairs: *Interim Forecast 2010*, as well as IMF: *World Economic Outlook*, October 2010; See also ECB: *The Euro Area Bank Lending Survey*, October 2010 and ECB: *Survey on the access to finance of SMEs in the Euro area*, March to September 2010.

⁽³⁾ Communication from the Commission — Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

⁽⁴⁾ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 303, 15.12.2009, p. 6).

⁽⁵⁾ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 261, 31.10.2009, p. 2).

In deciding on 'the phasing-out' of the measures currently set out in the temporary framework, consideration should be given to the following factors: on the one hand, the evolution of the economic situation and the capacity of financial institutions and markets to supply adequate funds to the creditworthy corporate sector; on the other hand, the appropriateness of the temporary framework as an instrument to sustain the economic recovery in the longer term and its effects on competition between firms and across Member States.

The economic recovery, which has slowly taken hold since the beginning of 2010, has been proceeding at a somewhat faster pace than expected earlier this year. While recovery is still fragile and uneven across the Union, some Member States are showing modest or even more robust growth rates. In addition, despite some pockets of vulnerability, in broad terms the health of the banking sector has improved compared with the situation one year ago. Lending activity to the private sector appears to have turned positive in line with past patterns. As the economic recovery gains firmer ground and concerns about fiscal sustainability are addressed, financial-market conditions should continue to gradually improve and provide support to the recovery. However, the uncertainty about the developments in particular market segments and countries remain⁽⁶⁾. The future evolution of financing remains therefore uncertain and the risk persists that the banking system may not be ready to sustain the recovery when credit demand picks up unless banks fully address their restructuring needs.

In view of high volatility of financial markets and the uncertainty about the economic outlook, the prolongation of certain measures currently set out in the temporary framework until 31 December 2011, targeted at facilitating companies' access to finance is justified by market conditions. This is also the case for temporary aid for the production of green products considering that firms are still finding it difficult to gain access to finance for the production of more environmentally friendly products due to the financial and economic crisis.

However, the continued availability of aid measures pursuant to Article 107(3)(b) TFEU in the face of exceptional market conditions should not obstruct the process of disengagement from temporary extraordinary support measures. With regard to the banking sector, the Economic and Financial Affairs Council of 2 December 2009 concluded on the necessity to design a strategy for the phasing out of support measures which should be transparent and duly coordinated among Member States to avoid negative spill-over effects. Consequently, the Commission already implemented the first step of a gradual exit process for banks in 2010⁽⁷⁾.

For the temporary framework measures, no such steps have yet been undertaken. Therefore, the Commission considers that a limited prolongation of certain measures currently set out in the temporary framework, accompanied by the introduction of stricter conditions on the prolonged measures, constitutes a central element of a gradual return to normal State aid rules, while limiting their impact on competition. In particular, by decreasing the applicable reductions and by introducing stricter conditions for large companies in comparison to those for SMEs.

Moreover, aid measures should be targeted to investments which contribute to a long term sustainable economy by providing support to viable firms. Even in periods of financial and economic crisis, a necessary restructuring of ailing firms should take place in order to put them on a sound footing in the long term. This is essential in order not to delay the necessary restructuring of the economy and thus deepen the recession and its long term effects. Therefore, in the future, firms in economic difficulty should not benefit from the temporary framework measures.

⁽⁶⁾ See also European Commission, Economic and Financial Affairs: *Autumn Forecast 2010* (29 November 2010).

⁽⁷⁾ Since 1 July 2010, the Commission has applied tighter conditions for the compatibility of government guarantees under Article 107(3)(b) TFEU. See Directorate General Competition Commission Staff Working Document of 30 April 2010: The application of State aid rules to Government Guarantee schemes covering bank debt to be issued after 30 June 2010.

The provision of a compatible limited amount of aid was introduced in the temporary framework as an extraordinary measure to provide Member States with an additional instrument during the time when the financial and economic crisis hit hardest even if it was not targeted to any particular objective. It is important to indicate that this measure falls within the scope of Article 107(1) TFEU since it exceeds the threshold of EUR 200 000 per company indicated in the 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 ⁽⁸⁾ (the *de minimis* Regulation).

In the entire period of application of the temporary framework, this measure has been used by most Member States (23 schemes in 23 Member States). However, only a very small percentage of the funds allocated by the Member States and approved by the Commission under this measure have been actually paid out (around 7 %). Furthermore, the bulk of aid disbursed under this measure is concentrated in one Member State, Germany (over 78 % of the funds granted), while Member States like Italy or the United Kingdom have respectively spent 8 % and 1,1 % of the total expenditure on this measure ⁽⁹⁾.

It follows, therefore, that, if this measure might have been useful as a short-term instrument when the uncertainty of the economic outlook was at the highest, it has also given rise to disparities in the internal market. The Commission therefore believes that, in the context of a phasing-out strategy, we should return to State aid measures which are less distortive and more growth-oriented, in particular by requesting a counterpart from the beneficiaries which aims at a particular common interest objective. Hence, the Commission considers that the compatible limited amount of aid measure should not be continued after 31 December 2010. This will be without prejudice to applications made before the end of that year on the basis of schemes approved by the Commission, which still need to be processed after that date.

The temporary adaptations of the Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises ⁽¹⁰⁾ (the Risk Capital Guidelines) gave a positive signal to Member States and market participants. Data suggest that the financial and economic crisis has left an impact on venture capital markets and that the upper boundary of the SME equity gap has grown. The Commission therefore considers that the increased maximum permitted tranches of finance per SME over a period of twelve months can be applied also outside the context of the financial and economic crisis. The Commission will amend accordingly the Risk Capital Guidelines based on Article 107(3)(c) TFEU.

Finally, concerning access to trade financing instruments, it appears from the data available and the information submitted by the Member States, that market conditions have been slowly improving; nevertheless, companies still find it difficult to find coverage from private insurers in many sectors and many Member States. Consequently, the procedural simplification introduced by the temporary framework on the Communication on short-term export credit insurance ⁽¹¹⁾ is still justified during 2011.

As certain measures set out in the temporary framework have already been amended and now need to be further amended to suit the current economic situation, in the interests of clarity, it is appropriate to replace the existing temporary framework by this Communication.

⁽⁸⁾ OJ L 379, 28.12.2006, p. 5.

⁽⁹⁾ Based on data submitted by the Member States in reply to the Commission's questionnaire on the application of the Temporary Framework, public consultation held between 18.3.2010 to 26.4.2010. No reply was given by Portugal and Slovakia and no data were submitted by France as regards this measure.

⁽¹⁰⁾ OJ C 194, 18.8.2006, p. 2.

⁽¹¹⁾ The Communication from the Commission to 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).

2. **Applicability of Article 107(3)(b)**

2.1. *General principles*

Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid 'to remedy a serious disturbance in the economy of a Member State'. In this context, the General Court ruled that the disturbance must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in line with the need to interpret strictly any derogating provision such as Article 107(3)(b) TFEU ⁽¹²⁾.

This strict interpretation has been consistently applied by the Commission ⁽¹³⁾ in its decision-making.

In this context, the Commission considers that, beyond emergency support for the financial system, the current global crisis may still require exceptional policy responses. As all Member States are affected by this crisis, albeit in different ways and to different degrees, and given the current degree of integration of both national European economies and financial markets, together with their current fragility, there is an increased risk of serious spillovers of an individual crisis into the general system. Therefore, the availability of the recourse to Article 107(3)(b) TFEU should remain a possibility for the Member States when duly justified.

In light of the seriousness of the current financial and economic crisis and its impact on the overall economy of the Member States, the Commission considers that certain categories of State aid may be justified, for a limited period, to remedy those difficulties and that they may be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU.

Therefore, Member States must show that the State aid measures notified to the Commission under this framework are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned and that all the conditions are fully respected.

2.2. *Compatible limited amount of aid*

The Commission will consider such State aid compatible with the internal market on the basis of Article 107(3)(b) TFEU, provided that all the following conditions are met:

- (a) the beneficiary has submitted a complete application no later than 31 December 2010 under a national aid scheme approved by the Commission in accordance with the temporary framework and no later than 31 March 2011 for undertakings active in the primary production of agricultural products ⁽¹⁴⁾;
- (b) the aid does not exceed a cash grant of EUR 500 000 per undertaking; all figures used must 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 is the gross grant equivalent of the aid;
- (c) the aid is granted in the form of a scheme;

⁽¹²⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [1999] ECR II-3663, paragraph 167.

⁽¹³⁾ Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1; Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 *et seq.*; and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See Commission Decision in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision in Case NN 25/08 *Rescue aid to Risikoabschirmung WestLB* (OJ C 189, 26.7.2008, p. 3) and Commission Decision of 4 June 2008 in State aid C 9/08 *SachsenLB* (OJ L 104, 24.4.2009, p. 34).

⁽¹⁴⁾ As defined in Article 2(3) and (4) of 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).

- (d) the aid is granted to firms which were not in difficulty⁽¹⁵⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;

- (e) the aid scheme does not apply to firms active in the fisheries sector;

- (f) the aid is not export aid or aid favouring domestic over imported products;

- (g) the aid scheme may apply as such to undertakings active in the processing and marketing of agricultural products⁽¹⁶⁾, unless the aid is conditional on being partly or entirely passed on to primary producers. Where the aid is granted to undertakings active in the primary production of agricultural products⁽¹⁷⁾ (either directly or passed on from undertakings processing and marketing agricultural products), the cash grant (or gross grant equivalent) does not exceed EUR 15 000 per undertaking; aid to undertakings active in the primary production of agricultural products is not fixed on the basis of the price or quantity of products put on the market; aid to undertakings active in the processing and marketing of agricultural products is not fixed on the basis of the price or quantity of products purchased from primary producers or put on the market by the undertakings concerned.

- (h) the Member State obtains a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid and aid pursuant to this measure received during the current fiscal year and checks that the aid will not raise the total amount of aid received by the undertaking during the period from 1 January 2008 to 31 December 2011, to a level above the ceiling of EUR 500 000 and of EUR 15 000 respectively in case of aid to undertakings active in the primary production of agricultural products;

- (i) the aid is granted no later than 31 December 2011;

- (j) the national aid scheme authorising the grant of the aid after 31 December 2010 is notified by the Member State and authorised by the Commission pursuant to Article 108(3) TFEU.

2.3. Aid in the form of guarantees

In order further to encourage access to finance and to reduce the current high risk aversion on the part of banks, subsidised loan guarantees for a limited period can be an appropriate and well targeted solution to give firms easier access to finance.

The Commission will consider such State aid compatible with the internal market on the basis of Article 107(3)(b) TFEU, provided that all the following conditions are met:

- (a) for SMEs, Member States grant a reduction of up to 15 % of the annual premium to be paid for new guarantees granted in accordance with the safe-harbour provisions set out in the Annex;

⁽¹⁵⁾ As defined in point 2.1 of Communication from the Commission — the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

⁽¹⁶⁾ As defined in Article 2(3) and (4) of Regulation (EC) No 1857/2006.

⁽¹⁷⁾ As defined in Article 2(2) of Regulation (EC) No 1857/2006.

- (b) for large companies, Member States may calculate the annual premium for new guarantees on the basis of the safe-harbour provisions set out in the Annex;
- (c) when the aid element in guarantee schemes is calculated through methodologies already accepted by the Commission following their notification under a regulation adopted by the Commission in the field of State aid ⁽¹⁸⁾, Member States may also grant a similar reduction of up to 15 % of the annual premium to be paid for new guarantees for SMEs;
- (d) the maximum loan does not exceed the total annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the company site but formally in the payroll of subcontractors) for 2010. In the case of companies created on or after 1 January 2010, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation; for investment loans, Member States may choose to calculate the maximum loan on the basis of the annual EU 27 average labour costs ⁽¹⁹⁾;
- (e) guarantees are granted until 31 December 2011 at the latest;
- (f) the guarantee does not exceed 80 % of the loan for the duration of the loan;
- (g) for SMEs, the guarantee may relate to both investment and working capital loans; for large companies, the guarantee may relate to investment loans only;
- (h) the reduction of the guarantee premium for SMEs is applied during a maximum period of two years following the granting of the guarantee. If the duration of the underlying loan exceeds two years, Member States may apply for an additional maximum period of eight years the safe-harbour premiums set out in the Annex without reduction; for large companies, Member States may apply the safe-harbour provisions set out in the Annex for a maximum period of 10 years;
- (i) firms in difficulty ⁽²⁰⁾ are excluded from the scope of application of the measure.

2.4. Aid in the form of subsidised interest rate

Companies may have difficulties in finding finance in the current market circumstances. Therefore the Commission will accept that public or private loans are granted at an interest rate which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average one year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Commission Communication on the revision of the method for setting the reference and discount rates ⁽²¹⁾.

The aid element contained in the difference between this interest rate and the reference rate defined by the Communication from the Commission on the revision of the method for setting the reference and discount rates will be considered, on a temporary basis, to be compatible with the Treaty on the basis of Article 107(3)(b) TFEU, provided that all the following conditions are met:

⁽¹⁸⁾ Such as 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) (OJ L 214, 9.8.2008, p. 3), 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), or Regulation (EC) No 1857/2006, provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

⁽¹⁹⁾ Source: Eurostat. Last information available EU 27 2007. Monthly labour costs: EUR 3 028.

⁽²⁰⁾ See footnote 15.

⁽²¹⁾ OJ C 14, 19.1.2008, p. 6.

- (a) this method applies to all contracts concluded on 31 December 2011 at the latest; it may cover loans of any duration; the reduced interest rates may be applied for interest payments until 31 December 2013 ⁽²²⁾; an interest rate at least equal to the rate defined in the reference and discount rate Communication must apply to loans after that date;
- (b) for SMEs, the reduced interest rates may relate to both investment and working capital loans; for large companies, it may relate to investment loans only;
- (c) firms in difficulty ⁽²³⁾ are excluded from the scope of application of the measure.

2.5. Aid for the production of green products

Because of the current financial and economic crisis, companies are also finding it more difficult to gain access to finance for the production of more environmentally friendly products. Aid in the form of guarantees may not be sufficient to finance costly projects aimed at increasing environmental protection by adapting earlier to future standards not yet in force or by going beyond such standards.

The Commission considers that environmental goals should remain a priority despite the financial and economic crisis. The production of more environmentally friendly, including resource and energy-efficient, products, is in line with the Europe 2020 Strategy, is in the Union's interest and it is important that the crisis should not impede that objective.

Therefore, additional measures in the form of subsidised loans could encourage the production of 'green products'. However, subsidised loans may cause serious distortions of competition and should be strictly limited to specific situations and targeted investment.

The Commission considers that, for a limited period, Member States should be given the possibility of granting aid in the form of an interest-rate reduction.

On the basis of Article 107(3)(b) TFEU, the Commission will consider compatible with the internal market any interest-rate subsidy for investment loans, provided that all the following conditions are met:

- (a) the aid relates to investment loans for financing projects consisting of the production of new products which significantly improve environmental protection ⁽²⁴⁾;
- (b) the aid is necessary for launching a new project; in the case of existing projects, aid may be granted if it becomes necessary, due to the new economic situation, in order to pursue the project;
- (c) the aid is granted only for projects consisting of the production of products involving early adaptation to or going beyond future Union product standards ⁽²⁵⁾ which increase the level of environmental protection and are not yet in force;
- (d) for products involving early adaptation to or going beyond future Union environmental standards, the investment starts on 31 December 2011 at the latest with the objective of putting the product on the market at least two years before the standard enters into force;

⁽²²⁾ Member States who want to use this facility have to publish the daily overnight rates online and have to make them available to the Commission.

⁽²³⁾ See footnote 15.

⁽²⁴⁾ As defined in point 70.1 of section 2.2 (definitions) of the Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

⁽²⁵⁾ Future Union product standard means a mandatory Union standard setting environmental levels to be attained for products sold in the Union which has been adopted but is not yet in force.

- (e) loans may cover the costs of investment in tangible and intangible assets ⁽²⁶⁾ with the exception of loans for investments which account for production capacities of more than 3 % on product markets ⁽²⁷⁾ where the average annual growth rate, over the last five years before the start of the investment, of the apparent consumption on the EEA market, measured in value data, remained below the average annual growth rate of the European Economic Area's GDP over the same five year reference period;
- (f) the loans are granted on 31 December 2011 at the latest;
- (g) for the calculation of the aid, the starting point should be the individual rate of the beneficiary as calculated on the basis of the methodology contained in point 2.3 of this Communication. On the basis of that methodology, the company may benefit from an interest-rate reduction of:
 - 15 % for large companies;
 - 25 % for SMEs;
- (h) the subsidised interest rate applies during a maximum period of two years following the granting of loan;
- (i) the reduction in the interest rate may be applied to loans granted by the State or public finance institutions and to loans granted by private financial institutions. Non-discrimination between public and private entities should be ensured;
- (j) firms in difficulty ⁽²⁸⁾ are excluded from the scope of application of the measure;
- (k) Member States ensure that the aid is not directly or indirectly transferred to financial entities.

2.6. Cumulation

The aid ceilings fixed under this Communication will be applied regardless of whether the support for the aided project is financed entirely from State resources or partly financed by the Union.

The temporary aid measures provided for by this Communication may not be cumulated with aid falling within the scope of the *de minimis* Regulation for the same eligible costs.

The temporary aid measures may be cumulated with other compatible aid or with other forms of Union financing provided that the maximum aid intensities indicated in the relevant guidelines or block exemptions Regulations are respected.

In case of co-financing with the EU Structural Funds and other EU financing instruments, the applicable rules must be respected.

3. Simplification measures

3.1. Short-term export credit insurance

The Communication of the Commission to 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 ⁽²⁹⁾ stipulates that marketable risks cannot be covered by export-credit insurance with the support of Member States. Marketable risks are commercial and political risks on public and non-public debtors established in countries listed in the Annex to that Communication, with a maximum risk period of less than two years. Risks concerning debtors established in the Member States and eight further members of the Organisation for Economic Co-operation and Development are considered marketable.

The Commission considers that, as a consequence of the current financial and economic crisis, a lack of insurance or reinsurance capacity does not exist in every Member State, but it cannot be excluded that, in certain countries cover for marketable risks could be temporarily unavailable.

⁽²⁶⁾ As defined in point 70 of the Community guidelines on State aid for environmental protection.

⁽²⁷⁾ As defined in point 69 of the Guidelines on national regional aid for 2007-2013.

⁽²⁸⁾ See footnote 15.

⁽²⁹⁾ OJ C 281, 17.9.1997, p. 4.

Point 4.4 of the Communication states that: ‘... In such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for the account of or with the guarantee of the State. The insurer should, as far as possible, align its premium rates for such risks with the rates charged elsewhere by private export-credit insurers for the type of risk in question.

Any Member State intending to use that escape clause should immediately notify the Commission of its draft decision. That notification should contain a market report demonstrating the unavailability of cover for the risks in the private insurance market by producing evidence thereof from two large, well-known international private export-credit insurers as well as a national credit insurer, thus justifying the use of the escape clause. It should, moreover, contain a description of the conditions which the public or publicly supported export-credit insurer intends to apply in respect of such risks.

Within two months of the receipt of such notification, the Commission will examine whether the use of the escape clause is in conformity with the above conditions and compatible with the Treaty.

If the Commission finds that the conditions for the use of the escape clause are fulfilled, its decision on compatibility is limited to two years from the date of the decision, provided that the market conditions justifying the use of the escape clause do not change during that period.

Furthermore, the Commission may, in consultation with the other Member States, revise the conditions for the use of the escape clause; it may also decide to discontinue it or replace it with another appropriate system.’

Those provisions, applicable to large companies and SMEs, are an appropriate instrument in the current economic situation if Member States consider that cover is unavailable on the private insurance market for certain marketable credit risks and/or for certain buyers of risk protection.

In this context, in order to speed up the procedure for Member States, the Commission considers that, until 31 December 2011, Member States may demonstrate the lack of a market by providing sufficient evidence of the unavailability of cover for the risk in the private insurance market. Use of the escape clause will in any case be considered justified if:

- (a) a large well-known international private export credits insurer and a national credit insurer produce evidence of the unavailability of such cover; or
- (b) at least four well-established exporters in the Member State produce evidence of refusal of cover from insurers for specific operations.

The Commission, in close cooperation with the Member States concerned, will ensure swift adoption of decisions concerning the application of the escape clause.

4. **Monitoring and reporting**

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽³⁰⁾ and 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⁽³¹⁾ require Member States to submit annual reports to the Commission.

Member States must ensure that detailed records regarding the granting of aid provided for by this Communication are maintained. Such records, which must contain all information necessary to establish that the necessary conditions have been observed, must be maintained for a period of 10 years and be provided to the Commission upon request.

In addition, a report on the measures put in place on the basis of this Communication should be provided to the Commission by the Member States by 15 September 2011 at the latest.

⁽³⁰⁾ OJ L 83, 27.3.1999, p. 1.

⁽³¹⁾ OJ L 140, 30.4.2004, p. 1.

The Commission may request additional information regarding the aid granted, to check whether the conditions laid down in the Commission decision approving the aid measure have been met.

5. Final provisions

This Communication applies from 1 January 2011 to 31 December 2011.

It is justified by the current exceptional and transitory financing problems related to the banking crisis. After consulting Member States, the Commission may review it before 31 December 2011 on the basis of important competition policy or economic considerations. Where this would be helpful, the Commission may also provide further clarifications of its approach to particular issues.

This Communication 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 internal 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 internal market.

In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽³²⁾, the Commission will apply the following in respect of non-notified aid:

- (a) this Communication, if the aid was granted after 1 January 2011;
- (b) the guidelines applicable when the aid was granted in all other cases.

⁽³²⁾ OJ C 119, 22.5.2002, p. 22.

ANNEX

Safe-harbour premiums — Temporary Framework in basis points (*)			
Rating category (Standard & Poor's)	Collateralisation		
	High	Normal	Low
AAA	40	40	40
AA + AA AA –	40	40	40
A + A A –	40	55	55
BBB + BBB BBB –	55	80	80
BB + BB	80	200	200
BB – B +	200	380	380
B B –	200	380	630
CCC and below	380	630	980

(*) For companies 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), Member States may grant a reduction of up to 15 % on the specific safe-harbour premium set at 3,8 % in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽¹⁾. However, the premium can never be lower than the premium which would be applicable to the parent company or companies.
⁽¹⁾ OJ C 155, 20.6.2008, p. 10.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis

(2008/C 270/02)

1. INTRODUCTION

1. The global financial crisis has intensified markedly and has now impacted heavily on the EU banking sector. Over and above specific problems related in particular to the US mortgage market and mortgage backed assets or linked to losses stemming from excessively risky strategies of individual banks, there has been a general erosion of confidence in the past weeks within the banking sector. The pervasive uncertainty about the credit risk of individual financial institutions has dried up the market of interbank lending and has consequently made access to liquidity progressively more difficult for financial institutions across the board.

2. The current situation threatens the existence of individual financial institutions with problems that are a result of their particular business model or business practices whose weaknesses are exposed and exacerbated by the crisis in the financial markets. If such institutions are to be returned to long term viability rather than liquidated, a far reaching restructuring of their operations will be required. Under the prevailing circumstances, the crisis equally affects financial institutions that are fundamentally sound and whose difficulties stem exclusively from the general market conditions which have severely restricted access to liquidity. Long term viability of these institutions may require less substantial restructuring. In any case however, measures taken by a Member State to support (certain) institutions operating within its national financial market may favour these institutions to the detriment of others operating within that Member State or in other Member States.

3. The ECOFIN Council on 7 October 2008 adopted Conclusions committing to take all necessary measures to

enhance the soundness and stability of the banking system in order to restore confidence and the proper functioning of the financial sector. The recapitalisation of vulnerable systemically relevant financial institutions was recognized as one means, among others, of appropriately protecting the depositors' interests and the stability of the system. It was further agreed that public intervention has to be decided on at national level but within a coordinated framework and on the basis of a number of EU common principles⁽¹⁾. On the same occasion the Commission offered to shortly issue guidance as to the broad framework within which the State aid compatibility of recapitalisation and guarantee schemes, and cases of application of such schemes, could be rapidly assessed.

4. Given the scale of the crisis, now also endangering fundamentally sound banks, the high degree of integration and interdependence of European financial markets, and the drastic repercussions of the potential failure of a systemically relevant financial institution further exacerbating the crisis, the Commission recognises that Member States may consider it necessary to adopt appropriate measures to safeguard the stability of the financial system. Due to the particular nature of the current problems in the financial

(¹) The ECOFIN Council conclusions enumerate the following principles:

- interventions should be timely and the support should in principle be temporary,
- Member States will be watchful regarding the interests of taxpayers,
- existing shareholders should bear the due consequences of the intervention,
- Member States should be in a position to bring about a change of management,
- the management should not retain undue benefits — governments may have *inter alia* the power to intervene in remuneration,
- legitimate interest of competitors must be protected, in particular through the State aid rules,
- negative spill over effects should be avoided.

sector such measures may have to extend beyond the stabilisation of individual financial institutions and include general schemes.

5. While the exceptional circumstances prevailing at the moment have to be duly taken into account when applying the State aid rules to measures addressing the crisis in the financial markets the Commission has to ensure that such measures do not generate unnecessary distortions of competitions between financial institutions operating in the market or negative spillover effects on other Member States. It is the purpose of this Communication to provide guidance on the criteria relevant for the compatibility with the Treaty of general schemes as well as individual cases of application of such schemes and *ad hoc* cases of systemic relevance. In applying these criteria to measures taken by Member States, the Commission will proceed with the swiftness that is necessary to ensure legal certainty and to restore confidence in financial markets.

2. GENERAL PRINCIPLES

6. State aid to individual undertakings in difficulties is normally assessed under Article 87(3)(c) of the Treaty and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁾ (hereinafter 'R&R guidelines') which articulate the Commission's understanding of Article 87(3)(c) of the Treaty for this type of aid. The R&R guidelines are of general application, while foreseeing certain specific criteria for the financial sector.

7. In addition, under Article 87(3)(b) of the Treaty the Commission may allow State aid 'to remedy a serious disturbance in the economy of a Member State'.

8. The Commission reaffirms that, in line with the case law and its decision making practice ⁽²⁾, Article 87(3)(b) of the Treaty necessitates a restrictive interpretation of what can be considered a serious disturbance of a Member State's economy.

9. In the light of the level of seriousness that the current crisis in the financial markets has reached and of its possible impact on the overall economy of Member States, the Commission considers that Article 87(3)(b) is, in the present circumstances, available as a legal basis for aid measures undertaken to address this systemic crisis. This applies, in particular, to aid that is granted by way of a general scheme available to several or all financial institutions in a Member State. Should the Member State's authorities responsible for financial stability declare to the Commission that there is a risk of such a serious disturbance, this shall be of particular relevance for the Commission's assessment.

10. *Ad hoc* interventions by Member States are not excluded in circumstances fulfilling the criteria of Article 87(3)(b). In the case of both schemes and *ad hoc* interventions, while the assessment of the aid should follow the general principles laid down in the R&R guidelines adopted pursuant to Article 87(3)(c) of the Treaty, the current circumstances may allow the approval of exceptional measures such as structural emergency interventions, protection of rights of third parties such as creditors, and rescue measures potentially going beyond 6 months.

11. It needs to be emphasised, however, that the above considerations imply that the use of Article 87(3)(b) cannot be envisaged as a matter of principle in crisis situations in other individual sectors in the absence of a comparable risk that they have an immediate impact on the economy of a Member State as a whole. As regards the financial sector, invoking this provision is possible only in genuinely exceptional circumstances where the entire functioning of financial markets is jeopardised.

12. Where there is a serious disturbance of a Member State's economy along the lines set out above, recourse to Article 87(3)(b) is possible not on an open ended basis but only as long as the crisis situation justifies its application.

13. This entails the need for all general schemes set up on this basis, e.g. in the form of a guarantee or recapitalization scheme, to be reviewed on a regular basis and terminated as soon as the economic situation of the Member State in question so permits. While acknowledging that it is currently impossible to predict the duration of the current extraordinary problems in the financial markets and that it may be indispensable in order to restore confidence to signal that a measure will be extended as long as the crisis continues, the Commission considers it a necessary element for the compatibility of any general scheme that the Member State carries out a review at least every six months and reports back to the Commission on the result of such review.

14. Furthermore, the Commission considers that the treatment of illiquid but otherwise fundamentally sound financial institutions in the absence of the current exceptional circumstances should be distinguished from the treatment of financial institutions characterized by endogenous problems. In the first case, viability problems are

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽²⁾ Cf. in principle case *Joined Cases T 132/96 and T 143/96 Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II 3663, paragraph 167. Confirmed in Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1, Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 *et seq.* and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See Commission Decision in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision in Case NN 25/08 *Rescue aid to WestLB* (OJ C 189, 26.7.2008, p. 3), Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published.

inherently exogenous and have to do with the present extreme situation in the financial market rather than with inefficiency or excessive risk taking. As a result distortions of competition resulting from schemes supporting the viability of such institutions will normally be more limited and require less substantial restructuring. By contrast, other financial institutions, likely to be particularly affected by losses stemming from inefficiencies, poor asset liability management or risky strategies, would fit with the normal framework of rescue aid, and in particular need a far reaching restructuring, as well as compensatory measures to limit distortions of competition ⁽¹⁾. In all cases, however, in the absence of appropriate safeguards, distortions of competition may be substantial from the implementation of guarantee and recapitalization schemes, as they could unduly favour the beneficiaries to the detriment of their competitors or may aggravate the liquidity problems for financial institutions located in other Member States.

15. Moreover, in line with the general principles underlying the State aid rules of the Treaty, which require that the aid granted does not exceed what is strictly necessary to achieve its legitimate purpose and that distortions of competition are avoided or minimized as far as possible, and taking due account of the current circumstances, all general support measures have to be:

- well targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy,
- proportionate to the challenge faced, not going beyond what is required to attain this effect, and
- designed in such a way as to minimize negative spill over effects on competitors, other sectors and other Member States.

16. The observance of these criteria in compliance with the State aid rules and the fundamental freedoms enshrined in the Treaty, including the principle of non discrimination, is necessary for the preservation of the proper functioning of the internal market. In its assessment, the Commission will take into account the following criteria to decide upon the compatibility of the State aid measures enumerated below.

3. GUARANTEES COVERING THE LIABILITIES OF FINANCIAL INSTITUTIONS

17. The principles set out above translate into the following considerations as regards guarantee schemes protecting liabilities established by way of a declaration, legislation or contractual regime, it being understood that these considerations are of a general nature and need to be adapted to the particular circumstances of every individual case.

⁽¹⁾ It being understood that the exact nature and timing of the restructuring to be carried out may be affected by the present turmoil in the financial markets.

Eligibility for a guarantee scheme

18. A significant distortion of competition may arise if some market players are excluded from the benefit of the guarantee. The eligibility criteria of financial institutions for coverage by such a guarantee must be objective, taking due account of their role in the relevant banking system and the overall economy, and non discriminatory so as to avoid undue distortive effects on neighbouring markets and the internal market as a whole. In application of the principle of non discrimination on the grounds of nationality, all institutions incorporated in the Member State concerned, including subsidiaries, and with significant activities in that Member State should be covered by the scheme.

Material scope of a guarantee — types of liabilities covered

19. In the present exceptional circumstances, it may be necessary to reassure depositors with financial institutions that they will not suffer losses, so as to limit the possibility of bank runs and undue negative spillover effects on healthy banks. In principle, therefore, in the context of a systemic crisis, general guarantees protecting retail deposits (and debt held by retail clients) can be a legitimate component of the public policy response.

20. As regards guarantees going beyond retail deposits, the selection of the types of debt and liabilities covered must be targeted, to the extent practicable, to the specific source of difficulties and restricted to what can be considered necessary to confront the relevant aspects of the current financial crisis, as they could otherwise delay the necessary adjustment process and generate harmful moral hazard ⁽²⁾.

21. In the application of this principle, the drying up of interbank lending due to an erosion of confidence between financial institutions may also justify guaranteeing certain types of wholesale deposits and even short and medium term debt instruments, to the extent such liabilities are not already adequately protected by existing investor arrangements or other means ⁽³⁾.

22. The extension of the coverage of any guarantee to further types of debt beyond this relatively broad scope would require a closer scrutiny as to its justification.

23. Such guarantees should not, in principle, include subordinated debt (tier 2 capital) or an indiscriminate coverage of all liabilities, as it would merely tend to safeguard the interests of shareholders and other risk capital investors. If such debt is covered, thereby allowing expansion of capital and thus of lending activity, specific restrictions may be necessary.

⁽²⁾ The limitation of the amount of the guarantee available, possibly in relation to the balance sheet size of the beneficiary may also be an element safeguarding the proportionality of the scheme in this respect.

⁽³⁾ Such as, for example, covered bonds and debt and deposits with collateral in government bonds or covered bonds.

Temporal scope of the guarantee scheme

24. The duration and scope of any guarantee scheme going beyond retail deposit guarantee schemes must be limited to the minimum necessary. In line with the general principles set out above, taking into account the currently unpredictable duration of the fundamental shortcomings in the functioning of financial markets, the Commission considers it a necessary element for the compatibility of any general scheme for the Member State to carry out a review every six months, covering the justification for the continued application of the scheme and the potential for adjustments to deal with evolution in the situation of financial markets. The results of this review will have to be submitted to the Commission. Provided that such regular review is ensured, the approval of the scheme may cover a period longer than six months and up to two years in principle. It may be further extended, upon Commission approval, as long as the crisis in the financial markets so requires. Should the scheme permit guarantees to continue to cover the relevant debt until a maturity date later than the expiry of the issuance period under the scheme, additional safeguards would be necessary in order to prevent excessive distortion of competition. Such safeguards may include a shorter issuance period than that allowed in principle under the present communication, deterrent pricing conditions and appropriate quantitative limits on the debt covered.

Aid limited to the minimum — private sector contribution

25. In application of the general State aid principle that the amount and intensity of the aid must be limited to the strict minimum, Member States have to take appropriate steps to ensure a significant contribution from the beneficiaries and/or the sector to the cost of the guarantee and, where the need arises, the cost of State intervention if the guarantee has to be drawn upon.

26. The exact calculation and composition of such contribution depends on the particular circumstances. The Commission considers that an adequate combination of some or all of the following elements ⁽¹⁾ would satisfy the requirement of aid being kept to the minimum:

- the guarantee scheme must be based on an adequate remuneration by the beneficiary financial institutions individually and/or the financial sector at large ⁽²⁾. Bearing in mind the difficulty of determining a market rate for guarantees of this nature and dimension in the absence of a comparable benchmark, and taking into account the potential difficulties in the current circumstances for beneficiaries to bear the amounts that might properly be charged, the fees charged for the provision of the scheme should come as close as possible to what could be considered a market price. Appropriate pricing mechanisms reflecting the varying

⁽¹⁾ This is a non exhaustive list of tools contributing to the objective of keeping the aid to the minimum.

⁽²⁾ E.g. through an association of private banks.

degree of risks and the beneficiaries' different credit profiles and needs, will be important contributions to the proportionality of the measure,

- if the guarantee has to be activated, a further significant private sector contribution could consist in the coverage of at least a considerable part of the outstanding liabilities incurred by the beneficiary undertaking (if it continues to exist) or by the sector, the Member State's intervention being limited to amounts exceeding this contribution,
- the Commission recognizes that beneficiaries may not immediately be able to pay an appropriate remuneration in its entirety. Therefore, in order to complement or partially substitute the preceding elements, Member States could consider a clawback/better fortunes clause that would require beneficiaries to pay either an additional remuneration for the provision of the guarantee as such (in case it does not have to be activated) or to reimburse at least a part of any amounts paid by the Member State under the guarantee (in case it needs to be drawn upon) as soon as they are in a position to do so.

Avoidance of undue distortions of competition

27. Given the inherent risks that any guarantee scheme will entail negative effects on non beneficiary banks, including those in other Member States, the system must include appropriate mechanisms to minimize such distortions and the potential abuse of the preferential situations of beneficiaries brought about by a State guarantee. Such safeguards, which are also important to avoid moral hazard, should include an adequate combination of some or all of the following elements ⁽³⁾:

- behavioural constraints ensuring that beneficiary financial institutions do not engage in aggressive expansion against the background of the guarantee to the detriment of competitors not covered by such protection. This can be done, for example by:
 - restrictions on commercial conduct, such as advertising invoking the guaranteed status of the beneficiary bank, pricing or on business expansion, e.g. through the introduction of a market share ceiling ⁽⁴⁾,
 - limitations to the size of the balance sheet of the beneficiary institutions in relation to an appropriate benchmark (e.g. gross domestic product or money market growth ⁽⁵⁾),

⁽³⁾ This is a non exhaustive list of tools contributing to the objective of avoiding undue distortions of competition.

⁽⁴⁾ The retention of profits in order to ensure adequate recapitalization could also be an element to be considered in this context.

⁽⁵⁾ While safeguarding the availability of credit to the economy notably in case of recession.

- the prohibition of conduct that would be irreconcilable with the purpose of the guarantee such as, for example, share repurchases by beneficiary financial institutions or the issuance of new stock options for management,
- appropriate provisions that enable the Member State concerned to enforce these behavioural constraints including the sanction of removing the guarantee protection from a beneficiary financial institution in case of non compliance.

Follow-up by adjustment measures

28. The Commission considers that, in order to avoid distortions of competition to the maximum extent possible, a general guarantee scheme needs to be seen as a temporary emergency measure to address the acute symptoms of the current crisis in financial markets. Such measures cannot, by definition, represent a fully fledged response to the root causes of this crisis linked to structural shortcomings in the functioning of the organization of financial markets or to specific problems of individual financial institutions or to a combination of both.
29. Therefore, a guarantee scheme needs to be accompanied, in due course, by necessary adjustment measures for the sector as a whole and/or by the restructuring or liquidation of individual beneficiaries, in particular for those for which the guarantee has to be drawn upon.

Application of the scheme to individual cases

30. Where the guarantee scheme has to be called upon for the benefit of individual financial institutions it is indispensable that this emergency rescue measure aimed to keep the insolvent institution afloat, which gives rise to an additional distortion of competition over and above that resulting from the general introduction of the scheme, is followed up as soon as the situation of the financial markets so permits, by adequate steps leading to a restructuring or liquidation of the beneficiary. This triggers the requirement of the notification of a restructuring or liquidation plan for recipients of payments under the guarantee which will be separately assessed by the Commission as to its compliance with the State aid rules ⁽¹⁾.
31. In the assessment of a restructuring plan, the Commission will be guided by the requirements:
- to ensure the restoration of long term viability of the financial institution in question,

⁽¹⁾ As a matter of principle, the Commission considers that in the event of payments having to be made to beneficiary financial institution, the payment has to be followed within six months by a restructuring plan or a liquidation plan, as the case may be. In order to facilitate the work of the Member States and the Commission, the Commission will be prepared to examine grouped notifications of similar restructuring/liquidation cases. The Commission may consider that there is no need to submit a plan for the pure liquidation of an institution, or where the size of the institution is negligible.

- to ensure that aid is kept to the minimum and that there is substantial private participation to the costs of the restructuring,
- to safeguard that there is no undue distortion of competition and no unjustified benefits deriving from the activation of the guarantee.

32. In this assessment, the Commission can build on the experience gathered in the application of State aid rules to financial institutions in the past, having regard to the particular features of a crisis that has reached a dimension to qualify as a serious disturbance of the economy of Member States.

33. The Commission will also take into account the distinction between aid measures necessitated exclusively by the current bottleneck in access to liquidity in relation to an otherwise fundamentally sound financial institution, as opposed to assistance provided to beneficiaries that are additionally suffering from structural solvency problems linked for instance to their particular business model or investment strategy. In principle, assistance to the latter category of beneficiaries is likely to raise greater concerns.

4. RECAPITALISATION OF FINANCIAL INSTITUTIONS

34. A second systemic measure in response to the ongoing financial crisis would be the establishment of a recapitalisation scheme which would be used to support financial institutions that are fundamentally sound but may experience distress because of extreme conditions in financial markets. The objective would be to provide public funds so as to strengthen the capital base of the financial institutions directly or to facilitate the injection of private capital by other means, so as to prevent negative systemic spillovers.

35. In principle, the above considerations in relation to general guarantee schemes apply, *mutatis mutandis*, also to recapitalisation schemes. This holds true for:

- objective and non discriminatory criteria for eligibility,
- the temporal scope of the scheme,
- limitation of the aid to the strict necessary,
- the need for safeguards against possible abuses and undue distortions of competition, bearing in mind that the irreversible nature of capital injections entails the need for provisions in the scheme which allow the Member State to monitor and enforce the observance of these safeguards and to take steps avoiding undue distortions of competition, where appropriate, at a later stage ⁽²⁾, and

⁽²⁾ According to the principles of the R&R guidelines.

- the requirement for recapitalisation as an emergency measure to support the financial institution through the crisis to be followed up by a restructuring plan for the beneficiary to be separately examined by the Commission, taking into account both the distinction between fundamentally sound financial institutions solely affected by the current restrictions on access to liquidity and beneficiaries that are additionally suffering from more structural solvency problems linked for instance to their particular business model or investment strategy and the impact of that distinction on the extent of the need for restructuring.
36. The particular nature of a recapitalisation measure gives rise to the following considerations.
37. Eligibility should be based on objective criteria, such as the need to ensure a sufficient level of capitalisation with respect to the solvency requirements that do not lead to unjustified discriminatory treatment. Evaluation of the need for support by the financial supervisory authorities would be a positive element.
38. The capital injection must be limited to the minimum necessary and should not allow the beneficiary to engage in aggressive commercial strategies or expansion of its activities or other purposes that would imply undue distortions of competition. In that context the maintenance of enhanced minimum solvency requirement levels, and/or limitation to the total size of the balance sheet of the financial institution will be evaluated positively. The beneficiaries should contribute as much as possible in the light of the current crisis through their own means including private participation ⁽¹⁾.
39. Capital interventions in financial institutions must be done on terms that minimise the amount of the aid. According to the instrument chosen (e.g. shares, warrants, subordinated capital, ...) the Member State concerned should, in principle, receive rights, the value of which corresponds to their contribution to the recapitalisation. The issue price of new shares must be fixed on the basis of a market oriented valuation. In order to ensure that the public support is only given in return for an appropriate counterpart, instruments such as preferred shares with adequate remuneration, will be regarded positively. Alternatively the introduction of claw back mechanisms or better fortunes clauses will have to be considered.
40. Similar considerations will apply to other measures and schemes aimed at tackling the problem from the financial institutions' asset side, that would contribute to the strengthening of the institutions' capital requirements. In particular, where a Member State buys or swaps assets this will have to be done at a valuation which reflects their underlying risks, with no undue discrimination as to the sellers.
41. The approval of the aid scheme does not exempt Member States from submitting a report to the Commission on the use of the scheme every six months and individual plans for the beneficiary undertakings within 6 months from the date of the intervention ⁽²⁾.
42. As in the case of guarantee schemes but having regard to the inherently irreversible nature of recapitalisation measures, the Commission will carry out its assessment of such plans in such a way as to ensure the coherence of the overall results of recapitalisation under the scheme with those of a recapitalisation measure taken outside such a scheme according to the principles of the R&R guidelines, taking into consideration the particular features of a systemic crisis in the financial markets.
- 5. CONTROLLED WINDING UP OF FINANCIAL INSTITUTIONS**
43. In the context of the current financial crisis a Member State may also wish to carry out a controlled winding up of certain financial institutions in its jurisdiction. Such a controlled liquidation, possibly carried out in conjunction with a contribution of public funds, may be applied in individual cases, either as a second step, after rescue aid to an individual financial institution when it becomes clear that the latter cannot be restructured successfully, or in one single action. Controlled winding up may also constitute an element of a general guarantee scheme, e.g. where a Member State undertakes to initiate liquidation of the financial institutions for which the guarantee needs to be activated.
44. Again, the assessment of such a scheme and of individual liquidation measures taken under such a scheme follows the same lines, *mutatis mutandis*, as set out above for guarantee schemes.
45. The particular nature of a liquidation measure gives rise to the following considerations.
46. In the context of liquidation, particular care has to be taken to minimise moral hazard, notably by excluding shareholders and possibly certain types of creditors from receiving the benefit of any aid in the context of the controlled winding up procedure.
47. To avoid undue distortions of competition, the liquidation phase should be limited to the period strictly necessary for the orderly winding up. As long as the beneficiary financial institution continues to operate it should not pursue any new activities, but merely continue the ongoing ones. The banking licence should be withdrawn as soon as possible.

⁽¹⁾ The upfront provision of a certain contribution may need to be supplemented by provisions allowing the imposition of additional contributions at a later stage.

⁽²⁾ In order to facilitate the work of the Member States and the Commission, the Commission will be prepared to examine grouped notifications of similar restructuring cases. The Commission may also consider that there is no need to submit a plan relating to a pure liquidation of the institution, or where the size of the residual economic activity is negligible.

48. In ensuring that the aid amount is kept to the minimum necessary in view of the objective pursued, it needs to be taken into account that the protection of financial stability within the current financial turmoil may imply the necessity to reimburse certain creditors of the liquidated bank through aid measures. The choice of criteria for the selection of the types of liabilities for this purpose should follow the same rules as in relation to the liabilities covered by a guarantee scheme.
49. In order to ensure that no aid is granted to the buyers of the financial institution or parts of it or to the entities sold, it is important that certain sales conditions are respected. The following criteria will be taken into account by the Commission when determining the potential existence of aid:
- the sales process should be open and non discriminatory,
 - the sale should take place on market terms,
 - the financial institution or the government, depending on the structure chosen, should maximise the sales price for the assets and liabilities involved,
 - in case it is necessary to grant an aid to the economic activity to be sold, this will lead to an individual examination according to the principles of the R&R guidelines.
50. Where the application of these criteria leads to the finding of aid to buyers or to sold entities, the compatibility of that aid will have to be assessed separately.

6. PROVISION OF OTHER FORMS OF LIQUIDITY ASSISTANCE

51. In dealing with acute liquidity problems of some financial institutions, Member States may wish to accompany guarantees or recapitalisation schemes with complementary forms of liquidity support, with the provisions of public funds (including funds from the central bank). The Commission has already clarified that where a Member State/central bank reacts to a banking crisis not with selective measures in favour of individual banks, but with general measures open to all comparable market players in the market (e.g. lending to the whole market on equal terms), such general measures are often outside the scope of the State aid rules and do not need to be notified to the Commission. The Commission considers for instance that activities of central banks related to monetary policy, such as open market operations and standing facilities, are not caught by the State aid rules. Dedicated support to a specific financial institution may also be found not to constitute aid in specific circumstances. The Commission

considers ⁽¹⁾ that the provision of central banks' funds to the financial institution in such a case may be found not to constitute aid when a number of conditions are met, such as:

- the financial institution is solvent at the moment of the liquidity provision and the latter is not part of a larger aid package,
- the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value,
- the central bank charges a penal interest rate to the beneficiary,
- the measure is taken at the central bank's own initiative, and in particular is not backed by any counter guarantee of the State.

52. The Commission considers that in the current exceptional circumstances a scheme of liquidity support from public sources (including the central bank) where it constitutes aid, can be found compatible, according to the principles of the R&R guidelines. Provided that the regular review of such a liquidity scheme every six months is ensured ⁽²⁾, the approval of the scheme may cover a period longer than six months and up to two years, in principle. It may be further extended, upon Commission approval, in the event that the crisis in the financial markets so requires.

7. RAPID TREATMENT OF STATE AID INVESTIGATIONS

53. When applying the State aid rules to the measures dealt with in this Communication in a manner that takes account of prevailing financial market conditions, the Commission, in co operation with the Member States, should ensure both that they achieve their objective and that the related distortions of competition both within and between Member States are kept to a minimum. In order to facilitate this cooperation and to provide both Member States and third parties with the necessary legal certainty on the compliance of the measures undertaken with the Treaty (which is a significant component of restoring confidence to the markets), it is of paramount importance that Member States inform the Commission of their intentions and notify plans to introduce such measures as early and comprehensively as possible and in any event before the measure is implemented. The Commission has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend.

⁽¹⁾ See for instance *Northern Rock* (OJ C 43, 16.2.2008, p. 1).

⁽²⁾ The principles set out above in point 24 would apply to this review.

Communication from the Commission — The recapitalisation of financial institutions ⁽¹⁾ in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition

(Text with EEA relevance)

(2009/C 10/03)

1. INTRODUCTION

- (1) The Commission Communication of 13 October 2008 on *The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis* ⁽²⁾ ('the Banking Communication') recognizes that recapitalisation schemes are one of the key measures that Member States can take to preserve the stability and proper functioning of financial markets.
- (2) The ECOFIN Council of 7 October 2008 and the Eurogroup meeting of 12 October 2008 addressed recapitalisation in a similar spirit by concluding that '*Governments commit themselves to provide capital when needed in appropriate volume while favouring by all available means the raising of private capital. Financial institutions should be obliged to accept additional restrictions, notably to preclude possible abuse of such arrangements at the expense of non beneficiaries*', and '*legitimate interest of competitors must be protected, in particular through the State aid rules*'.
- (3) So far, the Commission has approved recapitalisation schemes in three Member States, as well as individual recapitalisation measures, in line with the principles laid down in the Banking Communication ⁽³⁾. Recapitalisation, notably in the form of ordinary and preferred shares, has been authorized, subject in particular to the introduction of market oriented remuneration rates, appropriate behavioural safeguards and regular review. However, as the nature, scope and conditions of recapitalisation schemes currently being envisaged vary considerably, both Member States and potential beneficiary institutions have called for more detailed guidance as to whether specific forms of recapitalisation would be acceptable under State aid rules. In particular, some Member States envisage the recapitalisation of banks, not primarily to rescue them but rather to ensure lending to the real economy. The ECOFIN Council of 2 December 2008 recognised the need for further guidance for precautionary recapitalisations to sustain credit, and called for its urgent adoption by the Commission. The present Communication provides guidance for new recapitalisation schemes and opens the possibility for adjustment of existing recapitalisation schemes.

Common objectives: Restoring financial stability, ensuring lending to the real economy and dealing with the systemic risk of possible insolvency

- (4) In the context of the current situation in the financial markets, the recapitalisation of banks can serve a number of objectives. First, recapitalisations contribute to the restoration of financial stability and help restore the confidence needed for the recovery of inter bank lending. Moreover, additional capital provides a cushion in recessionary times to absorb losses and limits the risk of banks becoming insolvent. Under current conditions, triggered in particular by the collapse of Lehman Brothers, fundamentally sound banks may require capital injections to respond to a widespread perception that higher capital ratios are necessary in view of the past underestimation of risk and the increased cost of funding.

⁽¹⁾ For the convenience of the reader, financial institutions are referred to simply as 'banks' in this document.

⁽²⁾ OJ C 270, 25.10.2008, p. 8.

⁽³⁾ See Commission Decision of 13 October 2008 in Case N 507/08 *Financial Support Measures to the banking Industry in the UK* (OJ C 290, 13.11.2008, p. 4), Commission Decision of 27 October 2008 in Case N 512/08 *Support measures for financial institutions in Germany* (OJ C 293, 15.11.2008, p. 2) and Commission Decision of 19 November 2008 in Case N 560/08 *Support measures for the credit institutions in Greece*, Commission Decision of 12 November 2008 in Case N 528/08 *the Netherlands, Aid to ING Groep N.V.*, Commission Decision of 25 November 2008 in Case NN 68/08 on *Latvian State support to JSC Parex Banka*.

- (5) Second, recapitalisations can have as objective to ensure lending to the real economy. Fundamentally sound banks may prefer to restrict lending in order to avoid risk and maintain higher capital ratios. State capital injection may prevent credit supply restrictions and limit the pass on of the financial markets' difficulties to other businesses.
- (6) Third, State recapitalisation may also be an appropriate response to the problems of financial institutions facing insolvency as a result of their particular business model or investment strategy. A capital injection from public sources providing emergency support to an individual bank may also help to avoid short term systemic effects of its possible insolvency. In the longer term, recapitalisation could support efforts to prepare the return of the bank in question to long term viability or its orderly winding up.

Possible competition concerns

- (7) With these common objectives in mind, the assessment of any recapitalisation scheme or measure must take into account possible distortions of competition at three different levels.
- (8) First, recapitalisation by one Member State of its own banks should not give those banks an undue competitive advantage over banks in other Member States. Access to capital at considerably lower rates than competitors from other Member States, in the absence of an appropriate risk based justification, may have a substantial impact on the competitive position of a bank in the wider single European market. Excessive aid in one Member State could also prompt a subsidy race among Member States and create difficulties for the economies of Member States which have not introduced recapitalisation schemes. A coherent and coordinated approach to the remuneration of public capital injections, and to the other conditions attached to recapitalisation, is indispensable to the preservation of a level playing field. Unilateral and uncoordinated action in this area may also undermine efforts to restore financial stability ('Ensuring fair competition between Member States').
- (9) Secondly, recapitalisation schemes which are open to all banks within a Member State without an appropriate degree of differentiation between beneficiary banks according to their risk profiles may give an undue advantage to distressed or less performing banks compared to banks which are fundamentally sound and better performing. This will distort competition on the market, distort incentives, increase moral hazard and weaken the overall competitiveness of European banks ('Ensuring fair competition between banks').
- (10) Thirdly, public recapitalisation, in particular its remuneration, should not have the effect of putting banks that do not have recourse to public funding, but seek additional capital on the market, in a significantly less competitive position. A public scheme which crowds out market based operations will frustrate the return to normal market functioning ('Ensuring a return to normal market functioning').
- (11) Any proposed recapitalisation has cumulative competitive effects at each of these three levels. However, a balance must be struck between these competition concerns and the objectives of restoring financial stability, ensuring lending to the real economy and dealing with the risk of insolvency. On the one hand, banks must have sufficiently favourable terms of access to capital in order to make the recapitalisation as effective as necessary. On the other hand, the conditions tied to any recapitalisation measure should ensure a level playing field and, in the longer term, a return to normal market conditions. State interventions should therefore be proportionate and temporary and should be designed in a way that provides incentives for banks to redeem the State as soon as market circumstances permit, in order for a competitive and efficient European banking sector to emerge from the crisis. Market oriented pricing of capital injections would be the best safeguard against unjustified disparities in the level of capitalisation and improper use of such capital. In all cases, Member States should ensure that any recapitalisation of a bank is based on genuine need.
- (12) The balance to be achieved between financial stability and competition objectives underlines the importance of the distinction between fundamentally sound, well performing banks on one hand and distressed, less performing banks on the other.

- (13) In its assessment of recapitalisation measures, whether in the form of schemes or support to individual banks, the Commission will therefore pay particular attention to the risk profile of the beneficiaries ⁽¹⁾. In principle, banks with a higher risk profile should pay more. In designing recapitalisation schemes open to a set of different banks, Member States should carefully consider the entry criteria and the treatment of banks with different risk profiles and differentiate in their treatment accordingly (see Annex 1). Account needs to be taken of the situation of banks which face difficulties due to the current exceptional circumstances, although they would have been regarded as fundamentally sound before the crisis.
- (14) In addition to indicators such as compliance with regulatory solvency requirements and prospective capital adequacy as certified by the national supervisory authorities, pre crisis CDS spreads and ratings should, for example, be a good basis for differentiation of remuneration rates for different banks. Current spreads may also reflect inherent risks which will weaken the competitive situation of some banks as they come out of the general crisis conditions. Pre crisis and current spreads should in any event reflect the burden, if any, of toxic assets and/or the weakness of the bank's business model due to factors such as overdependence on short term financing or abnormal leverage.
- (15) It may be necessary, in duly justified cases, to accept lower remuneration in the short term for distressed banks, on the assumption and condition that in the longer term the costs of public intervention in their favour will be reflected in the restructuring necessary to restore viability and to take account of the competitive impact of the support given to them in compensatory measures. Financially sound banks may be entitled to relatively low rates of entry to any recapitalisation, and correspondingly significantly reduced conditions on public support in the longer term, provided that they accept terms on the redemption or conversion of the instruments so as to retain the temporary nature of the State's involvement, and its objective of restoring financial stability/lending to the economy, and the need to avoid abuse of the funds for wider strategic purposes.

Recommendations of the Governing Council of the European Central Bank (ECB)

- (16) In the Recommendations of its Governing Council of 20 November 2008, the European Central Bank proposed a methodology for benchmarking the pricing of State recapitalisation measures for fundamentally sound institutions in the Euro area. The guiding considerations underlying these Recommendations fully reflect the principles set out in this introduction. In line with its specific tasks and responsibilities, the ECB places particular emphasis on the effectiveness of recapitalisation measures with a view to strengthening financial stability and fostering the undisturbed flow of credit to the real economy. At the same time, it underlines the need for market oriented pricing, including the specific risk of the individual beneficiary banks and the need to preserve a level playing field between competing banks.
- (17) The Commission welcomes the ECB Recommendations which propose a pricing scheme for capital injections based on a corridor for rates of return for beneficiary banks which, notwithstanding variations in their risk profile, are fundamentally sound financial institutions. This document aims to extend guidance to conditions other than remuneration rates and to the terms under which banks which are not fundamentally sound may have access to public capital.
- (18) In addition, while acknowledging that the current exceptional market rates do not constitute a reasonable benchmark for determining the correct level of remuneration of capital, the Commission is of the view that recapitalisation measures by Member States should take into account the underestimation of risk in the pre crisis period. Without this, public remuneration rates could give undue competitive advantages to beneficiaries and eventually lead to the crowding out of private recapitalisation.

⁽¹⁾ See Annex 1 for more details.

2. PRINCIPLES GOVERNING DIFFERENT TYPES OF RECAPITALISATION

- (19) Closeness of pricing to market prices is the best guarantee to limit competition distortions ⁽¹⁾. It follows that the design of recapitalisation should be determined in a way that takes the market situation of each institution into account, including its current risk profile and level of solvency, and maintains a level playing field by not providing too large a subsidy in comparison to current market alternatives. In addition, pricing conditions should provide an incentive for the bank to redeem the State as soon as the crisis is over.
- (20) These principles translate into the assessment of the following elements of the overall design of recapitalisation measures: objective of recapitalisation, soundness of the beneficiary bank, remuneration, exit incentives, in particular with a view to the replacement of State capital by private investors ⁽²⁾, to ensure the temporary nature of the State's presence in banks' capital, safeguards against abuse of aid and competition distortions, and the review of the effects of the recapitalisation scheme and the beneficiaries' situation through regular reports or restructuring plans where appropriate.

2.1. Recapitalisations at current market rates

- (21) Where State capital injections are on equal terms with significant participation (30 % or more) of private investors, the Commission will accept the remuneration set in the deal ⁽³⁾. In view of the limited competition concerns raised by such an operation, unless the terms of the deal are such as to significantly alter the incentives of private investors, in principle there does not appear to be any need for *ex ante* competition safeguards or exit incentives.

2.2. Temporary recapitalisations of fundamentally sound banks in order to foster financial stability and lending to the real economy

- (22) In evaluating the treatment of banks in this category, the Commission will place considerable weight on the distinction between fundamentally sound and other banks which has been discussed in paragraphs 12 to 15.
- (23) An overall remuneration needs to adequately factor in the following elements:
- (a) current risk profile of each beneficiary ⁽⁴⁾;
 - (b) characteristics of the instrument chosen, including its level of subordination; risk and all modalities of payment ⁽⁵⁾;
 - (c) built in incentives for exit (such as step up and redemption clauses);
 - (d) appropriate benchmark risk free rate of interest.
- (24) The *remuneration* for State recapitalisations cannot be as high as current market levels (about 15 %) ⁽⁶⁾ since these may not necessarily reflect what could be considered as normal market conditions ⁽⁷⁾. Consequently, the Commission is prepared to accept the *price* for recapitalisations of fundamentally

⁽¹⁾ See point 39 of the Banking Communication.

⁽²⁾ All the references to exit incentives or incentives to redeem the State in this document have to be understood as aiming at the replacement of State capital by private capital to the extent necessary and appropriate in the context of a return to normal market conditions.

⁽³⁾ See for example Commission Decision of 27 October 2008 in Case N 512/08 *Support measures for financial institutions in Germany*, point 54.

⁽⁴⁾ See Annex 1 for more details.

⁽⁵⁾ For example, a number of parameters increase or decrease the value of preferred shares, depending on their exact definition, such as: convertibility into ordinary shares or other instruments, cumulative or non cumulative dividends, fixed or adjustable dividend rate, liquidation preference before ordinary shares, participation or not in earnings above dividend rate paid to ordinary shares, put option, redemption clauses, voting rights. The Commission will use the general classification of capital instrument among the different regulatory categories as a benchmark (e.g. core/non core, Tier 1/Tier 2).

⁽⁶⁾ For example JP Morgan, Europe Credit Research, 27 October 2008; Merrill Lynch data on euro denominated Tier 1 debt from at least investment grade rated financial institutions, publicly issued in the Eurobond market or in the domestic market of Member States having adopted the euro. Data are provided by ECOWIN (ml: et10yld).

⁽⁷⁾ Current levels of remuneration may also reflect present relatively high demand for Tier 1 capital, as banks move away from what is now perceived as the undercapitalised business model of the past, combined with relatively small supply and high market volatility.

sound banks at rates below current market rates, in order to facilitate banks to avail themselves of such instruments and to thereby favour the restoration of financial stability and ensuring lending to the real economy.

- (25) At the same time, the total expected return on recapitalisation to the State should not be too distant from current market prices because (i) it should avoid the pre crisis under pricing of risk, (ii) it needs to reflect the uncertainty about the timing and level of a new price equilibrium, (iii) it needs to provide incentives for exiting the scheme and (iv) it needs to minimise the risk of competition distortions between Member States, as well as between those banks which raise capital on the market today without any State aid. A remuneration rate not too distant from current market prices is essential to avoid crowding out recapitalisation via the private sector and facilitating the return to normal market conditions.

Entry level price for recapitalisations

- (26) The Commission considers that an adequate method to determine the price of recapitalisations is provided by the Eurosystem recommendations of 20 November 2008. The remunerations calculated using this methodology represent in the view of the Eurosystem an appropriate basis (entry level) for the required nominal rate of return for the recapitalisation of fundamentally sound banks. This price may be adjusted upwards to account for the need to encourage the redemption of State capital ⁽¹⁾. The Commission considers that such adjustments will also serve the objective of protecting undistorted competition.
- (27) The Eurosystem recommendations consider that the required rate of return by the government on recapitalisation instruments for *fundamentally sound banks* — preferred shares and other hybrid instruments — could be determined on the basis of a 'price corridor' defined by: (i) the required rate of return on subordinated debt representing a *lower bound*, and (ii) the required rate of return on ordinary shares representing an *upper bound*. This methodology involves the calculation of a price corridor on the basis of different components, which should also reflect the specific features of individual institutions (or sets of similar institutions) and of Member States. The application of the methodology by using average (mean or median) values of the relevant parameters (government bond yields, CDS spreads, equity risk premia) determines a corridor with an average required rate of return of 7 % on preferred shares with features similar to those of subordinated debt and an average required rate of return of 9,3 % on ordinary shares relating to Euro area banks. As such, this average price corridor represents an indicative range.
- (28) The Commission will accept a minimum remuneration based on the above methodology for fundamentally sound banks ⁽²⁾. This remuneration is differentiated at the level of an individual bank on the basis of different parameters:
- (a) the type of capital chosen ⁽³⁾: the lower the subordination, the lower the required remuneration in the price corridor;
 - (b) appropriate benchmark risk free interest rate;
 - (c) the individual risk profile at national level of all eligible financial institutions, (including both financially sound and distressed banks).
- (29) Member States may choose a pricing formula that in addition includes step up or payback clauses. Such features should be appropriately chosen so that, while encouraging an early end to the State's capital support of banks, they should not result in an excessive increase in the cost of capital.
- (30) The Commission will also accept alternative pricing methodologies, provided they lead to remunerations that are higher than the above methodology.

⁽¹⁾ See points 5 to 7 of the ECB Governing Council recommendations on the pricing of recapitalisations of 20 November 2008.

⁽²⁾ Specific situation of Member States outside the Eurosystem may have to be taken into account.

⁽³⁾ Such as ordinary shares, non core Tier 1 capital, or Tier 2 capital.

Incentives for State capital redemption

- (31) Recapitalisation measures need to contain appropriate incentives for State capital to be redeemed when the market so allows ⁽¹⁾. The simplest way to provide an incentive for banks to look for alternative capital is for Member States to require an adequately high remuneration for the State recapitalisation. For that reason, the Commission considers it useful that an add on be generally added to the entry price determined ⁽²⁾ to incentivise exit. A pricing structure including increase over time and step up clauses will reinforce this mechanism to incentivise exit.
- (32) If a Member State prefers not increasing the nominal rate of remuneration, it may consider increasing the global remuneration through call options or other redemption clauses, or mechanisms that encourage private capital raising, for instance by linking the payment of dividends to an obligatory remuneration of the State which increases over time.
- (33) Member States may also consider using a restrictive dividend policy to ensure the temporary character of State intervention. A restrictive dividend policy would be coherent with the objective of safeguarding lending to the real economy and strengthening the capital basis of beneficiary banks. At the same time, it would be important to allow for dividend payment where this represents an incentive to provide new private equity to fundamentally sound banks ⁽³⁾.
- (34) The Commission will assess proposed exit mechanisms on a case by case basis. In general, the higher the size of the recapitalization and the higher the risk profile of the beneficiary bank, the more necessary it becomes to set out a clear exit mechanism. The combination of the level and type of remuneration and, where and to the extent appropriate, a restrictive dividend policy, needs to represent, in its entirety, a sufficient exit incentive for the beneficiary banks. The Commission considers, in particular, that restrictions on payment of dividends are not needed where the level of pricing correctly reflects the banks' risk profile, and step up clauses or comparable elements provide sufficient incentives for exit and the recapitalisation is limited in size.

Prevention of undue distortions of competition

- (35) The Banking Communication stresses, in point 35, the need for safeguards against possible abuses and distortions of competition in recapitalisation schemes. Point 38 of the Banking Communication requires capital injections to be limited to the minimum necessary and not to allow the beneficiary to engage in aggressive commercial strategies which would be incompatible with the underlying objectives of recapitalisation ⁽⁴⁾.
- (36) As a general principle, the higher the remuneration the less there is a need for safeguards, as the level of price will limit distortions of competition. Banks receiving State recapitalisation should also avoid advertising it for commercial purposes.
- (37) Safeguards may be necessary to prevent aggressive commercial expansion financed by State aid. In principle, mergers and acquisitions can constitute a valuable contribution to the consolidation of the banking industry with a view to achieving the objectives of stabilising financial markets and ensuring a steady flow of credit to the real economy. In order not to privilege those institutions with public support to the detriment of competitors without such support, mergers and acquisitions should generally be organised on the basis of a competitive tendering process.

⁽¹⁾ Taking into account the type of recapitalisation instrument and its classification by supervisory authorities.

⁽²⁾ This is all the more important as the method presented above may be affected by under pricing of risk before the crisis.

⁽³⁾ Taking into account these considerations, restrictions on the payment of dividends could for example be limited in time or to a percentage of the generated profits, or linked to the contribution of new capital, (for example by paying out dividends in the form of new shares). Where the redemption of the State is likely to occur in several steps, it could also be envisaged to foresee the gradual relaxation on any restriction on dividends in tune with the progress of redemption.

⁽⁴⁾ Given the objectives of ensuring lending to the real economy, balance sheet growth restrictions are not necessary in recapitalisation schemes of fundamentally sound banks. This should in principle apply also to guarantee schemes, unless there is a serious risk of displacement of capital flows between Member States.

- (38) The extent of behavioural safeguards will be based on a proportionality assessment, taking into account all relevant factors and, in particular, the risk profile of the beneficiary bank. While banks with a very low risk profile may require only very limited behavioural safeguards, the need for such safeguards increases with a higher risk profile. The proportionality assessment is further influenced by the relative size of the capital injection by the State and the reached level of capital endowment.
- (39) When Member States use recapitalisation with the objective of financing the real economy, they have to ensure that the aid effectively contributes to this. To that end, in accordance with national regulation, they should attach effective and enforceable national safeguards to recapitalisation which ensure that the injected capital is used to sustain lending to the real economy.

Review

- (40) In addition, as indicated in the Banking Communication ⁽¹⁾, recapitalisations should be subject to regular review. Six months after their introduction, Member States should submit a report to the Commission on the implementation of the measures taken. The report needs to provide complete information on:
- (a) the banks that have been recapitalised, including in relation to the elements identified in point 12 to 15, Annex 1, and an assessment of the bank's business model, with a view to appreciating the banks' risk profile and viability;
 - (b) the amounts received by those banks and the terms on which recapitalisation has taken place;
 - (c) the use of the capital received, including in relation to (i) the sustained lending to the real economy and (ii) external growth and (iii) the dividend policy of beneficiary banks;
 - (d) the compliance with the commitments made by Member States in relation to exit incentives and other conditions and safeguards; and
 - (e) the path towards exit from reliance on State capital ⁽²⁾.
- (41) In the context of the review, the Commission will assess, amongst others, the need for the continuation of behavioural safeguards. Depending on the evolution of market conditions, it may also request a revision of the safeguards accompanying the measures in order to ensure that aid is limited to the minimum amount and minimum duration necessary to weather the current crisis.
- (42) The Commission recalls that where a bank that was initially considered fundamentally sound falls into difficulties after recapitalisation has taken place, a restructuring plan for that bank must be notified.

2.3. Rescue recapitalisations of other banks

- (43) The recapitalisation of banks which are not fundamentally sound should be subject to stricter requirements.
- (44) As far as remuneration is concerned, as set out above, it should in principle reflect the risk profile of the beneficiary and be higher than for fundamentally sound banks ⁽³⁾. This is without prejudice to the possibility for supervisory authorities to take urgent action where necessary in cases of restructuring. Where the price cannot be set to levels that correspond to the risk profile of the bank, it would never theless need to be close to that required for a similar bank under normal market conditions. Notwithstanding the need to ensure financial stability, the use of State capital for these banks can only be accepted on the condition of either a bank's winding up or a thorough and far reaching restructuring, including a change in management and corporate governance where appropriate. Therefore, either a comprehensive restructuring plan or a liquidation plan will have to be presented for these banks within six months of recapitalisation. As indicated in the Banking Communication, such a plan will be assessed according to the principles of the rescue and restructuring guidelines for firms in difficulties, and will have to include compensatory measures.

⁽¹⁾ See points 34 to 42 of the Banking Communication. In line with the Banking Communication, individual recapitalisation measures taken in conformity with a recapitalisation scheme approved by the Commission do not require notification and will be assessed by the Commission in the context of the review and the presentation of a viability plan.

⁽²⁾ Taking into account the characteristics of the recapitalisation instrument.

⁽³⁾ See paragraph 28 on the extended price corridor implying increased rates of remuneration for distressed banks.

- (45) Until redemption of the State, behavioural safeguards for distressed banks in the rescue and restructuring phases should, in principle, include: a restrictive policy on dividends (including a ban on dividends at least during the restructuring period), limitation of executive remuneration or the distribution of bonuses, an obligation to restore and maintain an increased level of the solvency ratio compatible with the objective of financial stability, and a timetable for redemption of State participation.

2.4. Final remarks

- (46) Finally, the Commission takes into account the possibility that banks' participation in recapitalisation operations is open to all or a good portion of banks in a given Member State, also on a less differentiated basis, and aimed at achieving an appropriate overall return over time. Some Member States may prefer, for reasons of administrative convenience for instance, to use less elaborated methods. Without prejudice to the possibility for Member States to base their pricing on the methodology above, the Commission will accept pricing mechanisms leading to a level of a total expected annualised return for all banks participating in a scheme sufficiently high to cater for the variety of banks and the incentive to exit. This level should normally be set above the upper bound referred to in paragraph 27 for Tier 1 capital instruments ⁽¹⁾. This can include a lower entry price and an appropriate step up, as well as other differentiation elements and safeguards as described above ⁽²⁾.

⁽¹⁾ The Commission has so far accepted recapitalisation measures with a total expected annualised return of at least 10 % for Tier 1 instruments for all banks participating in a scheme. For Member States with risk free rates of return significantly divergent from the Eurozone average such a level may need to be adapted accordingly. Adjustments will also be necessary in function of developments of the risk free rates.

⁽²⁾ See, as an example of a combination of a low entry price with such differentiation elements, the Commission Decision of 12 November 2008 in Case N 528/08 the Netherlands, *Aid to ING Groep N.V.* where for the remuneration of a sui generis capital instrument categorized as core Tier 1 capital a fixed coupon (8,5 %) is coupled with over proportionate and increasing coupon payments and a possible upside, which results in an expected annualised return in excess of 10 %.

ANNEX

Pricing of equity

Equity (ordinary shares, common shares) is the best known form of core Tier 1 capital. Ordinary shares are remunerated by uncertain future dividend payments and the increase of the share price (capital gain/loss), both of which ultimately depend on the expectations of future cash flows/profits. In the current situation, a forecast of future cash flows is even more difficult than under normal conditions. The most noticeable factor, therefore, is the quoted market price of ordinary shares. For non quoted banks, as there is no quoted share price, Member States should come to an appropriate market based approach, such as full valuation.

If assistance is given in the issuance of ordinary shares (underwriting), any shares not taken up by existing or new investors will be taken up by the Member State as underwriter at the lowest possible price compared to the share price immediately prior to the announcement of placing an open offer. An adequate underwriting fee should also be payable by the issuing institution ⁽¹⁾. The Commission will take into account the influence that previously received State aid may have on the share price of the beneficiary.

Indicators for the assessment of a bank's risk profile

In evaluating a bank's risk profile for the purpose of the appreciation of a recapitalisation measure under State aid rules, the Commission will take into account the bank's position in particular with respect to the following indicators:

- capital adequacy: The Commission will value positively the assessment of the bank's solvency and its prospective capital adequacy as a result of a review by the national supervisory authority; such a review will evaluate the bank's exposure to various risks (such as credit risk, liquidity risk, market risk, interest rate and exchange rate risks), the quality of the asset portfolio (within the national market and in comparison with available international standards), the sustainability of its business model in the long term and other pertinent elements;
- size of the recapitalisation: The Commission will value positively a recapitalisation limited in size, such as for instance no more than 2 % of the bank's risk weighted assets;
- current CDS spreads: The Commission will consider a spread equal or inferior to the average as an indicator of a lower risk profile;
- current rating of the bank and its outlook: The Commission will consider a rating of A or above and a stable or positive outlook as an indicator of a lower risk profile.

In the evaluation of these indicators, account needs to be taken of the situation of banks which face difficulties due to the current exceptional circumstances, although they would have been regarded as fundamentally sound before the crisis, as shown, for instance, by the evolution of market indicators such as CDS spreads and share prices.

Table 1

Types of capital

Debt	Tier 2
	Fixed term debt instruments
Greater return required ↓	Perpetual Subordinated Debt instruments
	Cumulative preference shares or other similar instruments
Greater loss absorbency	Tier 1
	Non-cumulative preference shares or other similar instruments
Equity	Other high quality hybrids
	Reserves/Retained earnings
	Ordinary shares

⁽¹⁾ See for example, Commission Decision of 13 October 2008 in Case N 507/08 *Financial Support Measures to the banking Industry in the UK*, at point 11, Commission Decision of 27 October 2008 in Case N 512/08 *Support measures for financial institutions in Germany*, at point 12.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission on the treatment of impaired assets in the Community banking sector

(2009/C 72/01)

1. INTRODUCTION

1. Since mid 2007, the functioning of wholesale credit markets has been severely disrupted. The result has been a drying up of liquidity in the banking sector and a reluctance of banks to lend to each other and to the broader economy. As the disruption of credit markets has intensified over the past eighteen months, the financial crisis has intensified and the global economy has entered a severe recession.
2. It is difficult to envisage a resolution of the financial crisis and a recovery in the global economy without assured stability in the banking sector and the broader financial system. Only then will investor confidence return and banks resume their normal lending behaviour. Accordingly, Member States have put measures in place to support the stability of their banking sectors and underpin lending, notably the injection of new capital using public funds and the provision of government guarantees for bank borrowing. These measures were announced in October 2008 and have been gradually implemented over the past months.
3. Recently, several Member States have announced their intention to complement their existing support measures by providing some form of relief for impaired bank assets. Those announcements, in parallel with a similar initiative in the United States, have triggered a wider debate within the Community on the merits of asset relief as a government support measure for banks. In the context of that debate, this Communication has been prepared by the Commission, in consultation with the European Central Bank (ECB), and builds on the recommendations issued on 5 February 2009 by the Eurosystem (see Annex I).
4. This Communication focuses on issues to be addressed by Member States in considering, designing and implementing asset relief measures. At a general level, those issues include the rationale for asset relief as a measure to safeguard financial stability and underpin bank lending, the longer term considerations of banking sector viability and budgetary sustainability to be taken into account when considering asset relief measures and the need for a common and co-ordinated Community approach to asset relief, notably to ensure a level playing field. In the context of such a Community approach, this Communication also offers more specific guidance on the application of State aid rules to asset relief, focusing on issues such as (i) transparency and disclosure requirements; (ii) burden sharing between the State, shareholders and creditors; (iii) aligning incentives for beneficiaries with public policy objectives; (iv) principles for designing asset relief measures in terms of eligibility, valuation and management of impaired assets; and (v) the relationship between asset relief, other government support measures and the restructuring of banks.

2. ASSET RELIEF AS A MEASURE TO SAFEGUARD FINANCIAL STABILITY AND UNDERPIN BANK LENDING

5. The immediate objectives of the Member State rescue packages announced in October 2008 are to safeguard financial stability and underpin the supply of credit to the real economy. It is too early to draw definitive conclusions on the effectiveness of the packages, but it is clear that they have averted the risk of financial meltdown and have supported the functioning of important inter bank markets. On the other hand, the evolution in lending to the real economy since the announcement of the packages has been unfavourable, with recent statistics suggesting a sharp deceleration in credit growth ⁽¹⁾. In many Member States, reports of businesses being denied access to bank credit are now widespread and it would seem that the squeeze on credit goes beyond that justified by cyclical considerations.
6. A key reason identified for the insufficient flow of credit is uncertainty about the valuation and location of impaired assets, a source of problems in the banking sector since the beginning of the crisis. Uncertainty regarding asset valuations has not only continued to undermine confidence in the banking sector, but has weakened the effect of the government support measures agreed in October 2008. For example, bank recapitalisation has provided a cushion against asset impairment but much of the capital buffer provided has been absorbed by banks in provisioning against future asset impairments. Banks have already taken steps to address the problem of impaired assets. They have recorded substantial write downs in asset values ⁽²⁾, taken steps to limit remaining losses by reclassification of assets within their balance sheets and gradually put additional capital aside to strengthen their solvency positions. However, the problem has not been resolved to a sufficient degree and the unexpected depth of the economic slowdown now suggests a further and more extensive deterioration in credit quality of bank assets.
7. Asset relief would directly address the issue of uncertainty regarding the quality of bank balance sheets and therefore help to revive confidence in the sector. It could also help to avoid the risk of repeated rounds of recapitalisation of banks as the extent of asset impairment increases amid a deteriorating situation in the real economy. On this basis, several Member States are actively considering relief for impaired bank assets as a complement to other measures in implementing the strategy agreed by Heads of State and Government in October 2008.

3. LONGER TERM CONSIDERATIONS: A RETURN TO VIABILITY IN THE BANKING SECTOR AND SUSTAINABILITY OF PUBLIC FINANCES

8. Asset relief measures must be designed and implemented in the manner that most effectively achieves the immediate objectives of safeguarding financial stability and underpinning bank lending. An important issue to be addressed in this context is ensuring an adequate participation in the asset relief measures by setting appropriate pricing and conditions and through mandatory participation if deemed necessary. However, the focus in designing and implementing asset relief measures should not be limited to these immediate objectives. It is essential that longer term considerations are also taken into account.
9. If asset relief measures are not carried out in such a way as to ring fence the danger of serious distortions of competition among banks (both within Member States and on a cross border basis) in compliance with the State aid rules of the Treaty establishing the European Community, including where necessary the restructuring of beneficiaries, the outcome will be a structurally weaker Community banking sector with negative implications for productive potential in the broader economy. Furthermore, it could lead to a recurrent need for government intervention in the sector, implying a progressively heavier burden on public finances. Such risks are serious given the likely scale of State exposure.

⁽¹⁾ While official data for the euro area suggest that bank lending to businesses is still resilient, the underlying trend is weakening, with month on month growth rates in lending slowing markedly toward the end of 2008. In December 2008, bank loans to the private economy (loans to non MFI excl. governments) fell by 0,4 % relative to November.

⁽²⁾ From mid 2007 to date, there has been a total of USD 1 063 billion in asset write downs, of which USD 737,6 billion has been reported by US based banks and USD 293,7 has been reported by European based banks. Of the latter, USD 68 billion has been reported in Switzerland. Despite the scale of asset write downs already reported, the IMF currently estimates that the total of bank losses related to asset impairment is likely to reach USD 2 200 billion. This estimate is based on global holdings of U.S. originated and securitized mortgage, consumer, and corporate debt and has been steadily rising since the beginning of the crisis. Some market commentators suggest that total losses may be substantially higher. For example, Nouriel Roubini who has consistently argued that official estimates are too low now suggests that total losses could be USD 3 600 billion for the United States alone.

In order to limit the risk of such longer term damage, government intervention in the banking sector should be appropriately targeted and accompanied by behavioural safeguards that align the incentives of banks with the objectives of public policy. Asset relief measures should form part of an overall effort to restore the viability of the banking sector, based on necessary restructuring. The need for restructuring in the banking sector as a counterpart of government support is discussed in more detail in the context of State aid rules in Sections 5 and 6.

10. In considering the design and implementation of asset relief measures, it is also essential that Member States take account of the budgetary context. Estimates of total expected asset write downs suggest that the budgetary costs — actual, contingent or both — of asset relief could be substantial — both in absolute terms and relative to gross domestic product (GDP) in Member States. Government support through asset relief (and other measures) should not be on such a scale that it raises concern about the sustainability of public finances such as over indebtedness or financing problems. Such considerations are particularly important in the current context of widening budget deficits, rising public debt levels and challenges facing sovereign bond issuance.
11. More specifically, the budgetary situation of Member States will be an important consideration in the choice of management arrangement for assets subject to relief, namely asset purchase, asset insurance, asset swap or a hybrid of such arrangements ⁽¹⁾. The implications for budgetary credibility may not differ significantly between the various approaches to asset relief, as financial markets are likely to discount potential losses on a similar basis ⁽²⁾. However, an approach requiring the outright purchase of impaired assets would have a more immediate impact on budgetary ratios and government financing. While the choice of management arrangement for impaired assets is the responsibility of each Member State, hybrid approaches whereby bad assets are segregated from the balance sheet of banks in a separate entity (either within or outside the banks) which benefits in some way from a government guarantee could be considered. Such an approach is attractive as it provides many of the benefits of the asset purchase approach from the perspective of restoring confidence in the banking system, while limiting the immediate budgetary impact.
12. In a context of scarce budgetary resources, it may be appropriate to focus asset relief measures on a limited number of banks of systemic importance. For some Member States, asset relief for banks may be severely constrained, due to their existing budgetary constraints and/or the size of their banks' balance sheet relative to GDP.

4. NEED FOR A COMMON AND CO ORDINATED COMMUNITY APPROACH

13. In considering some form of asset relief measures, there is a need to reconcile the immediate objectives of financial stability and bank lending with the need to avoid longer term damage to the banking sector within the Community, to the single market and to the broader economy. This can be achieved most effectively by a common and co ordinated Community approach, with the following broad objectives:
 - (a) boosting market confidence by demonstrating a capacity for an effective Community level response to the financial crisis and creating the scope for positive spillovers among Member States and on the wider financial markets;
 - (b) limiting negative spillovers among Member States, where the introduction of asset relief measures by a first mover Member State results in pressure on other Member States to follow suit and risks launching a subsidy race between Member States;

⁽¹⁾ These arrangements are discussed in more detail in Annex II.

⁽²⁾ Asset purchases by government need not imply heavy budgetary costs in the longer term if a sufficient portion of the acquired assets can be subsequently sold at a profit (see US and Swedish examples in Annex II). However, they imply an upfront budgetary outlay which would increase gross public debt and the government's gross financing requirements. An approach based on swapping government debt for impaired assets could be used to ease the operational problems relating to issuance, but would not avoid the impact on the budgetary ratios nor an increase in the supply of government debt in the market.

- (c) protecting the single market in financial services by ensuring consistency in asset relief measures introduced by the Member States and resisting financial protectionism;
 - (d) ensuring compliance with State aid control requirements and any other legal requirements by further ensuring consistency among asset relief measures, and by minimising competitive distortions and moral hazard.
14. Co ordination among Member States would only be necessary at a general level and could be achieved while retaining sufficient flexibility to tailor measures to the specific situations of individual banks. In the absence of sufficient coordination *ex ante*, many of those objectives will only be met by additional State aid control requirements *ex post*. Common guidance on the basic features of relief measures would, therefore, help to minimise the need for corrections and adjustments as a result of assessment under the State aid rules. Such guidance is provided in the following Sections.

5. GUIDELINES ON THE APPLICATION OF STATE AID RULES TO ASSET RELIEF MEASURES

15. It is the normal duty of banks to assess the risk of the assets they acquire and to make sure they can cover any associated losses ⁽¹⁾. Asset relief may, however, be considered to support financial stability. Public asset relief measures are State aid inasmuch as they free the beneficiary bank from (or compensate for) the need to register either a loss or a reserve for a possible loss on its impaired assets and/or free regulatory capital for other uses. This would notably be the case where impaired assets are purchased or insured at a value above the market price, or where the price of the guarantee does not compensate the State for its possible maximum liability under the guarantee ⁽²⁾.
16. Any aid for asset relief measures should, however, comply with the general principles of necessity, proportionality and minimisation of the competition distortions. Such assistance implies serious distortions of competition between beneficiaries and non beneficiary banks and among beneficiary banks with different degrees of need. Non beneficiary banks that are fundamentally sound may feel obliged to consider seeking government intervention to preserve their competitive position in the market. Similar distortions in competition may arise among Member States, with the risk of a subsidy race between Member States (trying to save their banks without regard to the effects on banks in other Member States) and a drift towards financial protectionism and fragmentation of the internal market. Participation in the asset relief scheme should therefore be conditioned upon clearly defined and objective criteria, in order to avoid that individual banks take unwarranted advantage.
17. The principles governing the application of the State aid rules and, in particular, Article 87(3)(b) of the Treaty to any support measure for banks in the context of the global financial crisis in were established in the Communication from the Commission — *The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis* ⁽³⁾. More detailed guidance on the practical implementation of these principles to recapitalisation was subsequently provided in the Communication from the Commission — *The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition* ⁽⁴⁾. In the same vein, the guidelines set out in this Communication, based on the same principles, identify the key features of asset relief measures or schemes, which determine their effectiveness as well as their impact on competition. These guidelines apply to all banks that are granted asset relief, irrespective of

⁽¹⁾ Banks typically hold a variety of assets, including: cash, financial assets (treasury bills, debt securities, equity securities, traded loans, and commodities), derivatives (swaps, options), loans, financial investments, intangible assets, property, plant and equipment. Losses may be incurred when assets are sold below their book value, when their value is decreased and reserves are created on possible loss or *ex post* when the revenue streams at maturity are lower than the book value.

⁽²⁾ A guarantee is presumed to constitute State aid when the beneficiary bank cannot find any independent private operator on the market willing to provide a similar guarantee. The amount of State aid is set at the maximum net liability for the State.

⁽³⁾ OJ C 270, 25.10.2008, p. 8.

⁽⁴⁾ OJ C 10, 15.1.2009, p. 2.

their individual situation, but the practical implications of their application may vary depending on the risk profile and viability of a beneficiary. The principles of these guidelines apply *mutatis mutandis* where two or more Member States coordinate measures to provide asset relief to cross border banks.

18. This Communication aims to establish coordinated principles and conditions to ensure the effectiveness of asset relief measures in the single market as far as possible, taking account of the long term objective of a return to normal market conditions, while remaining flexible enough so as to cater for specific features or provide additional measures or procedures at individual or national levels for reasons of financial stability. Effective asset relief measures should have as a consequence the maintenance of lending to the real economy.

5.1. Appropriate identification of the problem and options for solution: full *ex ante* transparency and disclosure of impairments and an upfront assessment of eligible banks

19. Any asset relief measure must be based on a clear identification of the magnitude of the bank's asset related problems, its intrinsic solvency prior to the support and its prospects for return to viability, taking into due consideration all possible alternatives, in order to facilitate the necessary restructuring process, prevent distortion in the incentives of all players and avoid waste of State resources without contributing to resumption in the normal flow of credit to the real economy.
20. Therefore, in order to minimise the risk of a recurrent need for State interventions in favour of the same beneficiaries, the following criteria should be satisfied as a prerequisite for benefitting from asset relief:
 - (a) applications for aid should be subject to full *ex ante* transparency and disclosure of impairments by eligible banks on the assets which will be covered by the relief measures, based on adequate valuation, certified by recognised independent experts and validated by the relevant supervisory authority, in line with the principles of valuation developed in Section 5.5 ⁽¹⁾; such disclosure of impairments should take place prior to government intervention; this should lead to the identification of the aid amount and of the incurred losses for the bank from the asset transfer ⁽²⁾;
 - (b) an application for aid by an individual bank should be followed by a full review of that bank's activities and balance sheet, with a view to assessing the bank's capital adequacy and its prospects for future viability (viability review); that review must occur in parallel with the certification of the impaired assets covered by the asset relief programme but, given its scale, could be finalised after the bank enters into the asset relief programme; the results of the viability review must be notified to the Commission and will be taken into account in the assessment of necessary follow up measures (see Section 6).

5.2. Burden-sharing of the costs related to impaired assets between the State, shareholders and creditors

21. As a general principle, banks ought to bear the losses associated with impaired assets to the maximum extent. This requires, firstly, full *ex ante* transparency and disclosure, followed by the correct valuation of assets prior to government intervention and a correct remuneration of the State for the asset relief measure, whatever its form, so as to ensure equivalent shareholder responsibility and burden sharing

⁽¹⁾ Without prejudice to the necessity of making public the impact on the balance sheet of an asset relief measure implying appropriate burden sharing, the terms 'transparency' and 'full disclosure' should be understood as meaning transparency *vis à vis* the national authorities, the independent experts involved and the Commission.

⁽²⁾ The aid amount corresponds to the difference between the transfer value of the assets (normally based on their real economic value) and the market price. In this paper, the incurred losses correspond to the difference between the transfer value and the book value of the assets. Actual losses will normally only be known *ex post*.

irrespective of the exact model chosen. The combination of those elements should lead to overall coherence concerning burden sharing across various forms of State support, having regard to the specific distinctive features of different types of assistance ⁽¹⁾.

22. Once assets have been properly evaluated and losses are correctly identified ⁽²⁾, and if this would lead to a situation of technical insolvency without State intervention, the bank should either be put into administration or be wound up, according to Community and national law. In such a situation, with a view to preserving financial stability and confidence, protection or guarantees to bondholders ⁽³⁾ may be appropriate.
23. Where putting a bank into administration or its orderly winding up appears inadvisable for reasons of financial stability ⁽⁴⁾, aid in the form of guarantee or asset purchase, limited to the strict minimum, could be awarded to banks so that they can continue to operate for the period necessary to allow to devise a plan for either restructuring or orderly winding up. In such cases, shareholders should also be expected to bear losses at least until the regulatory limits of capital adequacy are reached. Nationalisation options may also be considered.
24. Where it is not possible to achieve full burden sharing *ex ante*, the bank should be requested to contribute to the loss or risk coverage at a later stage, for example in the form of claw back clauses or, in the case of an insurance scheme, by a clause of 'first loss', to be borne by the bank (typically with a minimum of 10 %) and a clause of 'residual loss sharing', through which the bank participates to a percentage (typically with a minimum of 10 %) of any additional losses ⁽⁵⁾.
25. As a general rule, the lower the contribution upfront, the higher the need for a shareholder contribution at a later stage, either in the form of a conversion of State losses into bank shares and/or in the form of additional compensatory measures to limit the distortion of competition when assessing necessary restructuring.

5.3. Aligning incentives for banks to participate in asset relief with public policy objectives

26. As a general feature, impaired asset relief programmes should have an enrolment window limited to six months from the launch of the scheme by the government. This will limit incentives for banks to delay necessary disclosures in the hope of higher levels of relief at a later date, and facilitate a rapid resolution of the banking problems before the economic downturn further aggravates the situation. During the six month window, the banks would be able to present eligible assets baskets to be covered by the asset relief measures, with the possibility of rollover ⁽⁶⁾.
27. Appropriate mechanisms may need to be devised so as to ensure that the banks most in need of asset relief participate in the government measure. Such mechanisms could include mandatory participation in the programme, and should include at least mandatory disclosure to the supervisory authorities. The obligation for all banks to reveal the magnitude of their asset related problems will contribute to the clear identification of the need and necessary scope for an asset relief scheme at the Member State level.

⁽¹⁾ Asset relief measures are somewhat comparable to capital injections insofar as they provide a loss absorption mechanism and have a regulatory capital effect. However, with the former the State generally incurs a larger risk, related to a specific portfolio of impaired assets, with no direct contribution of other bank's income generating activities and funds, and beyond its possible stake into the bank. In view of the larger down side and more limited up side remuneration for asset relief should normally be higher than for capital injections.

⁽²⁾ Comparing the book value of the assets with their transfer value (i.e. their real economic value).

⁽³⁾ Shareholder protection should, however, normally be excluded. See Decisions NN 39/08 (Denmark, Aid for liquidation of Roskilde Bank) and NN 41/08 (United Kingdom, Rescue aid to Bradford & Bingley).

⁽⁴⁾ That may be the case where the bank's size or type of activity would be unmanageable in an administrative or judiciary procedure or via an orderly winding up without having dangerous systemic implications on other financial institutions or on lending to the real economy. A justification by the monetary and/or supervisory authority would be necessary in this respect.

⁽⁵⁾ Other factors, for example higher remuneration, may influence the appropriate level. Moreover, it has to be noted that *ex post* compensations may only occur several years after the measure has been introduced and may therefore unsatisfactorily prolong the uncertainty linked to the valuation of the impaired assets. Claw back clauses based on *ex ante* valuation would not have this problem.

⁽⁶⁾ Case of enrolled assets that may mature afterwards.

28. Where participation is not mandatory, the scheme could include appropriate incentives (such as the provision of warrants or rights to existing shareholders so that they may participate in future private capital raising at preferential terms) to facilitate take up by the banks without derogating from the principles of transparency and disclosure, fair valuation and burden sharing.
29. Participation after the expiration of the six month enrolment window should be possible only in exceptional and unforeseeable circumstances for which the bank is not responsible ⁽¹⁾, and subject to stricter conditions, such as higher remuneration to the State and/or higher compensatory measures.
30. Access to asset relief should always be conditional on a number of appropriate behavioural constraints. In particular, beneficiary banks should be subject to safeguards which ensure that the capital effects of relief are used for providing credit to appropriately meet demand according to commercial criteria and without discrimination and not for financing a growth strategy (in particular acquisitions of sound banks) to the detriment of competitors.
31. Restrictions on dividend policy and caps on executive remuneration should also be considered. The specific design of behavioural constraints should be determined on the basis of a proportionality assessment taking account of the various factors that may imply the necessity of restructuring (see Section 6).

5.4. Eligibility of assets

32. When determining the range of eligible assets for relief, a balance needs to be found between meeting the objective of immediate financial stability and the need to ensure the return to normal market functioning over the medium term. Assets commonly referred to as 'toxic assets' (for example, US mortgage backed securities and associated hedges and derivatives), which have triggered the financial crisis and have largely become illiquid or subject to severe downward value adjustments, appear to account for the bulk of uncertainty and scepticism concerning the viability of banks. Restricting the range of eligible assets to such assets would limit the State's exposure to possible losses and contribute to the prevention of competition distortions ⁽²⁾. However, an overly narrow relief measure would risk falling short of restoring confidence in the banking sector, given the differences between the specific problems encountered in different Member States and banks and the extent to which the problem of impairment has now spread to other assets. This would plead in favour of a pragmatic approach including elements of flexibility, which would ensure that other assets also benefit from relief measures to an appropriate extent and where duly justified.
33. A common and coordinated Community approach to the identification of the assets eligible for relief measures is necessary to both prevent competitive distortions among Member States and within the Community banking sector, and limit incentives for cross border banks to engage in arbitrage among different national relief measures. To ensure consistency in the identification of eligible assets across Member States, categories of assets ('baskets') reflecting the extent of existing impairment should be developed. More detailed guidance on the definition of those categories is provided in Annex III. The use of such categories of assets would facilitate the comparison of banks and their risk profiles across the Community. Member States would then need to decide which category of assets could be covered and to what extent, subject to the Commission's review of the degree of impairment of the assets chosen.
34. A proportionate approach would need to be developed to allow a Member State whose banking sector is additionally affected by other factors of such magnitude as to jeopardise financial stability (such as the burst of a bubble in their own real estate market) to extend eligibility to well defined categories of assets corresponding to the systemic threat upon due justification, without quantitative restrictions.

⁽¹⁾ An 'unforeseeable circumstance' is a circumstance that could in no way be anticipated by the company's management when making its decision not to join the asset relief programme during the enrolment window and that is not a result of negligence or error on the part of the company's management or decisions of the group to which it belongs. An 'exceptional circumstance' is to be understood as exceptional beyond the current crisis. Member States wishing to invoke such circumstances shall notify all necessary information to the Commission.

⁽²⁾ This would seem the approach chosen in the US for Citigroup and Bank of America.

35. Additional flexibility could further be envisaged by allowing for the possibility for banks to be relieved of impaired assets outside the scope of eligibility set out in paragraphs 32, 33 and 34 without the necessity of a specific justification for a maximum of 10 20 % of the overall assets of a given bank covered by a relief mechanism in view of the diversity of circumstances of different Member States and banks. However, assets that cannot presently be considered impaired should not be covered by a relief programme. Asset relief should not provide an open ended insurance against future consequences of recession.
36. As a general principle, the wider the eligibility criteria, and the greater the proportion which the assets concerned represent in the portfolio of the bank, the more thorough the restructuring and the remedies to avoid undue distortions of competition will have to be. In any case, the Commission will not consider assets eligible for relief measures where they have entered the balance sheet of the beneficiary bank after a specified cut off date prior to the announcement of the relief programme ⁽¹⁾. To do otherwise could result in asset arbitrage and would give rise to inadmissible moral hazard by providing incentives for banks to abstain from properly assessing risks in future lending and other investments and thus repeat the very mistakes that have brought about the current crisis ⁽²⁾.

5.5. Valuation of assets eligible for relief and pricing

37. A correct and consistent approach to the valuation of assets, including assets that are more complex and less liquid, is of key importance to prevent undue distortions of competition and to avoid subsidy races between Member States. Valuation should follow a general methodology established at the Community level and should be closely coordinated *ex ante* by the Commission across the Member States in order to ensure maximum effectiveness of the asset relief measure and reduce the risk of distortions and damaging arbitrage, notably for cross border banks. Alternative methodologies may need to be employed to take account of specific circumstances relating to, for example, timely availability of relevant data, provided they attain equivalent transparency. In any case, eligible banks should value their portfolios on a daily basis and make regular and frequent disclosures to the national authorities and to their supervisory authorities.
38. Where the valuation of assets appears particularly complex, alternative approaches could be considered such as the creation of a 'good bank' whereby the State would purchase the good rather than the impaired assets. Public ownership of a bank (including nationalisation) could be an alternative option, with a view to carrying out the valuation over time in a restructuring or orderly winding up context, thus eliminating any uncertainty about the proper value of the assets concerned ⁽³⁾.
39. As a first stage, assets should be valued on the basis of their current market value, whenever possible. In general, any transfer of assets covered by a scheme at a valuation in excess of the market price will constitute State aid. The current market value may, however, be quite distant from the book value of those assets in the current circumstances, or non-existent in the absence of a market (for some assets the value may effectively be as low as zero).
40. As a second stage, the value attributed to impaired assets in the context of an asset relief program (the 'transfer value') will inevitably be above current market prices in order to achieve the relief effect. To ensure consistency in the assessment of the compatibility of aid, the Commission would consider a transfer value reflecting the underlying long term economic value (the 'real economic value') of the assets, on the basis of underlying cash flows and broader time horizons, an acceptable benchmark indicating the compatibility of the aid amount as the minimum necessary. Uniform hair cuts applicable to certain asset categories will have to be considered to approximate the real economic value of assets that are so complex that a reliable forecast of developments in the foreseeable future would appear impracticable.

⁽¹⁾ Generally, the Commission considers that a uniform and objective cut off date, such as the end of 2008, will ensure a level playing field among banks and Member States.

⁽²⁾ Where necessary, State support in relation to the risks of future assets can be tackled on the basis of the guarantee notice and the temporary framework.

⁽³⁾ This would be the case, for example, if the State swapped assets for government bonds in the amount of their nominal value but received contingent warrants on bank capital, the value of which depends on the eventual sales price of the impaired assets.

41. Consequently, the transfer value for asset purchase or asset insurance ⁽¹⁾ measures should be based on their real economic value. Moreover, adequate remuneration for the State must be secured. Where Member States deem it necessary — notably to avoid technical insolvency — to use a transfer value of the assets that exceeds their real economic value, the aid element contained in the measure is correspondingly larger. It can only be accepted if it is accompanied by far reaching restructuring and the introduction of conditions allowing the recovery of this additional aid at a later stage, for example through claw back mechanisms.
42. The valuation process both with regard to the market value and the real economic value, as well as the remuneration of the State, should follow the same guiding principles and processes listed in Annex IV.
43. When assessing the valuation methods put forward by Member States for asset relief measures, and their implementation in individual cases, the Commission will consult panels of valuation experts ⁽²⁾. The Commission will also build on the expertise of existing bodies organised at Community level in order to ensure the consistency of valuation methodologies.

5.6. Management of assets subject to relief measures

44. It is for Member States to choose the most appropriate model for relieving banks from assets, from the range of options set out in Section 3 and Annex II, in the light of the extent of the problem of impaired assets, the situation of the individual banks concerned and budgetary considerations. The objective of State aid control is to ensure that the features of the selected model are designed so as to ensure equal treatment and prevent undue distortions of competition.
45. While the specific pricing arrangements for an aid measure may vary, their distinctive features should not have an appreciable impact on the adequate burden sharing between the State and the beneficiary banks. On the basis of proper valuation, the overall financing mechanism of an asset management company, an insurance or a hybrid solution should ensure that the bank will have to assume the same proportion of losses. Claw back clauses can be considered in this context. In general, all schemes must ensure that the beneficiary banks bear the losses incurred in the transfer of assets (see further paragraph 50 and footnote 10).
46. Whatever the model, in order to facilitate the bank's focus on the restoration of viability and to prevent possible conflicts of interest, it is necessary to ensure clear functional and organisational separation between the beneficiary bank and its impaired assets, notably as to their management, staff and clientele.

5.7. Procedural aspects

47. Detailed guidance on the implications of these guidelines on State aid procedure with regard to both the initial notification of aid and the assessment of restructuring plans, where necessary, is provided in Annex V.

6. FOLLOW UP MEASURES RESTRUCTURING AND RETURN TO VIABILITY

48. The principles and conditions in Section 5 set the framework for designing asset relief measures in compliance with State aid rules. State aid rules aim, in the present context, at ensuring the minimum and least distortive support for a removal of risks related to a separate category of assets from the beneficiary banks in order to prepare a solid ground for return to long term viability without State support. While the treatment of impaired assets along the above principles is a necessary step for a return to viability for the banks, it is not in itself sufficient to achieve that goal. Depending on their particular situation and characteristics, banks will have to take appropriate measures in their own interest in order to avoid a recurrence of similar problems and to ensure sustainable profitability.

⁽¹⁾ In the case of an insurance measure, the transfer value is understood as insured amount.

⁽²⁾ The Commission will use the opinion of such panels of valuation experts in a manner similar to other State aid proceedings, where it may have recourse to external expertise.

49. Under State aid rules and notably those for rescue and restructuring aid, asset relief amounts to a structural operation and requires a careful assessment of three conditions: (i) adequate contribution of the beneficiary to the costs of the impaired assets programme; (ii) appropriate action to guarantee the return to viability; and (iii) necessary measures to remedy competition distortions.
50. The first condition should normally be achieved by fulfilling the requirements set out in the Section 5, notably disclosure, valuation, pricing and burden sharing. This should ensure a contribution by the beneficiary of at least the entirety of the losses incurred in the transfer of assets to the State. Where this is materially not possible, aid may still be authorised, by way of exception, subject to stricter requirements as to the other two conditions.
51. Requirements to return to viability and the need for remedies for competition distortion will be determined on a case by case basis. As regards the second condition, the need to return to long term viability, it should be noted that asset relief may contribute to that objective. The viability review should certify the actual and prospective capital adequacy of the bank after a complete assessment and consideration of the possible factors of risk ⁽¹⁾.
52. The Commission's assessment of the extent of necessary restructuring, following the initial authorisation of the asset relief measures, will be determined on the basis of the following criteria: criteria outlined in the Communication on the recapitalisation of financial institutions in the current financial crisis: *limitation of aid to the minimum necessary and safeguards against undue distortions of competition*, the proportion of the bank's assets subject to relief, the transfer price of such assets compared to the market price, the specific features of the impaired asset relief granted, the total size of State exposure relative to a bank's risk weighted assets, the nature and origin of the problems of the beneficiary bank, and the soundness of the bank's business model and investment strategy. It will also take into account any additional granting of State guarantee or State recapitalisation, in order to draw a complete picture of the situation of the beneficiary bank ⁽²⁾.
53. Long term viability requires that the bank is able to survive without any State support, which implies clear plans for redeeming any State capital received and renouncing State guarantees. Depending on the outcome of that assessment, restructuring will have to comprise an in depth review of the bank's strategy and activity, including, for example, focussing on core business, reorientation of business models, closure or divestment of business divisions/subsidiaries, changes in the asset liability management and other changes.
54. The need for in depth restructuring will be presumed where an appropriate valuation of impaired assets according to the principles set out in Section 5.5 and Annex IV would lead to negative equity/technical insolvency without State intervention. Repeated requests for aid and departure from the general principles set out in Section 5, will normally point to the need for such in depth restructuring.
55. In depth restructuring would also be required where the bank has already received State aid in what ever form that either contributes to coverage or avoidance of losses, or altogether exceeds 2 % of the total bank's risk weighted assets, while taking the specific features of the situation of each beneficiary in due consideration ⁽³⁾.
56. The timing of any required measures to restore viability will take account of the specific situation of the bank concerned, as well as the overall situation in the banking sector, without unduly delaying the necessary adjustments.
57. Thirdly, the extent of necessary compensatory measures should be examined, on the basis of distortions of competition resulting from the aid. This may involve downsizing or divestment of profitable business units or subsidiaries, or behavioural commitments to limit commercial expansion.

⁽¹⁾ Compliance with the criteria set in paragraph 40 of the Communication on the recapitalisation of financial institutions in the current financial crisis: *limitation of aid to the minimum necessary and safeguards against undue distortions of competition* would also need to be ensured as far as applicable.

⁽²⁾ For those banks already subject to the obligation of a restructuring plan, following the granting of previous State aid, such a plan would need to duly take into consideration the new aid and envisage all options from restructuring to orderly winding up.

⁽³⁾ Participation in an authorised credit guarantee scheme, without the guarantee having had to be invoked to cover losses, are not to be taken into consideration for the purposes of this paragraph.

58. The need for compensatory measures will be presumed if the beneficiary bank does not fulfil the conditions set out in Section 5 and notably those of disclosure, valuation, pricing and burden sharing.
59. The Commission will assess the scope of the compensatory measures required, depending on its assessment of competition distortions resulting from the aid, and notably on the basis of the following factors: total amount of aid, including from guarantee and recapitalisation measures, volume of impaired assets benefiting from the measure, proportion of losses resulting from the asset, general soundness of the bank, risk profile of the relieved assets, quality of risk management of the bank, level of solvency ratios in the absence of aid, market position of the beneficiary bank and distortions of competition from the bank's continued market activities, and impact of the aid on the structure of the banking sector.

7. FINAL PROVISION

60. The Commission applies this Communication from 25 February 2009, the date on which it agreed in principle its content, having regard to the financial and economic context which required immediate action.

ANNEX I

Eurosystem guidance on asset support measures for banks

The Eurosystem has identified seven guiding principles for bank asset support measures:

1. *eligibility of institutions*, which should be voluntary, with possible priority for institutions with large concentrations of impaired assets in case of constraints;
2. relatively broad *definition of assets* eligible for support;
3. *valuation of eligible assets* which is transparent, preferably based on a range of approaches and common criteria to be adopted across Member States, based on independent third party expert opinions, use of models which use micro level inputs to estimate the economic value of, and probabilities attached to, the expected losses, and of asset specific hair cuts on book values of assets when the assessment of market value is particularly challenging, or when the situation requires swift action;
4. an adequate degree of *risk sharing* as a necessary element of any scheme in order to limit the cost to the government, provide the right incentives to the participating institutions and maintain a level playing field across these institutions;
5. sufficiently long *duration* of the asset support schemes, possibly matching the maturity structure of the eligible assets;
6. *governance of institutions* which should continue to be run according to business principles, and favouring of schemes that envisage well defined exit strategies; and
7. *conditionality* of public support schemes to some measurable yardsticks, such as commitments to continue providing credit to appropriately meet demand according to commercial criteria.

ANNEX II

The different approaches to asset relief and experience with the use of bad bank solutions in the United States, Sweden, France, Italy, Germany, Switzerland and the Czech Republic**I. Possible approaches**

In principle, two broad approaches to managing assets subject to relief measures can be considered:

1. the segregation of impaired assets from good assets within a bank or in the banking sector as a whole. Several variants of this approach can be considered. An asset management company (bad bank or risk shield) could be created for each bank, whereby the impaired assets would be transferred to a separate legal entity, with the assets still managed by the ailing bank or a separate entity and possible losses shared between the good bank and the State. Alternatively, the State could establish a self standing institution (often called an 'aggregator bank') to purchase the impaired assets of either an individual banks or of the banking sector as a whole, thereby allowing banks to return to normal lending behaviour unencumbered by the risk of asset write downs. This approach could also involve prior nationalisation, whereby the State takes control of some or all banks in the sector before segregating their good and bad assets;
2. an asset insurance scheme whereby banks retain impaired assets on their balance sheets but are indemnified against losses by the State. In the case of asset insurance, the impaired assets remain on the balance sheet of banks, which are indemnified against some or all losses by the State. A specific issue concerning asset insurance is setting the appropriate premium for heterogeneous and complex assets, which should in principle reflect some combination of valuation and risk characteristics of the insured assets. Another issue is that insurance schemes are technically difficult to operate in a situation where the insured assets are spread across a large number of banks rather than concentrated in a few larger banks. Finally, the fact that the insured assets remain on the balance sheets of banks will allow for the possibility of conflicts of interest and remove the important psychological effect of clearly separating the good bank from the bad assets.

II. Experience with bad banks

In the United States, the Resolution Trust Corporation (RTC) was created as a government owned asset management company in 1989. The RTC was charged with liquidating assets (primarily real estate related assets, including mortgage loans) that had been assets of savings and loan associations ('S&Ls') declared insolvent by the Office of Thrift Supervision, as a consequence of the Savings and Loan crisis (1989 1992). The RTC also took over the insurance functions of the former Federal Home Loan Bank Board. Between 1989 and mid 1995, the Resolution Trust Corporation closed or otherwise resolved 747 thrifts with total assets of USD 394 billion. In 1995, its duties were transferred to the Savings Association Insurance Fund of the Federal Deposit Insurance Corporation. Overall, the cost to the taxpayers was estimated at USD 124 billion in 1995 dollars.

The RTC operated via so called 'equity partnership programs'. All equity partnerships involved a private sector partner acquiring a partial interest in a pool of assets. By retaining an interest in asset portfolios, the RTC was able to participate in the extremely strong returns being realized by portfolio investors. Additionally, the equity partnerships enabled the RTC to benefit from the management and liquidation efforts of their private sector partners, and the structure helped assure an alignment of incentives superior to that which typically exists in a principal/contractor relationship. The various forms of equity partnerships are the following: Multiple Investment Fund (limited and selected partnership, unidentified portfolio of assets), N series and S series Mortgage Trusts (competitive bid for identified portfolio of assets), Land fund (to take profit from longer term recovery and development of land), and JDC Partnership (selection of general partner on a 'beauty contest' basis for claims unsecured or of questionable value).

In Sweden, two bank asset management corporations (AMCs), *Securum* and *Retriva*, were set up to manage the non performing loans of financial institutions as part of the resolution policy for the financial crisis in 1992/1993. The assets of an ailing bank were split into 'good' and 'bad' assets, with the bad assets then transferred to one of the asset management corporations, mainly to *Securum*. An important feature of the Swedish programme was to force banks to disclose expected loan losses in full and assign realistic values to real estate and other assets. For this, the Financial Supervisory Authority tightened its rules for the definition of probable loan losses as well as for the valuation of real estate. In order to obtain uniform valuation of the real estate holdings of banks applying for support, the Authority set up a Valuation Board with real estate experts. The low market values assigned to the assets in the due diligence process, effectively helped setting a floor for asset values. As market participants did not expect prices to fall below that level, trading was

maintained⁽¹⁾. In the long run, the two bank asset management corporations turned out to be successful in the sense that the budgetary cost of supporting the financial system was roughly balanced by the revenues received by the bank asset management corporations from the liquidation of their asset holdings.

In France, a public body enjoying an institutional unlimited State guarantee was created in the 1990s to take over and liquidate over time the bad assets of Credit Lyonnais. The bad bank financed the acquisition of the assets by means of a loan from Credit Lyonnais. The latter, therefore, could avoid recording losses on the assets and free capital for an equivalent amount of risk weighted assets, as the loan to the bad bank could enjoy a 0 % risk weight in view of the State guarantee. The Commission approved the bad bank as restructuring aid. A feature of the model was the neat separation between the good and the bad bank in order to prevent conflicts of interest and the 'better fortunes clause' on the good bank's profit to the benefit of the State. After a few years, the bank was successfully privatised. However, transfer of the assets to the bad bank at book value sheltered the shareholders from responsibility for the losses and implied high cost for the State over time.

A few years later in Italy, Banco di Napoli was split into a bad bank and a good bank after the absorption of the losses by existing shareholders and a Treasury recapitalisation to the extent necessary to keep the bank afloat. Banco Napoli financed the bad bank's acquisition of the discounted but still impaired assets via a subsidised loan of the Central Bank counter guaranteed by the Treasury. The cleaned bank was privatised one year later. In neither the case of Credit Lyonnais nor that of Banco di Napoli was there an immediate budgetary outlay for the Treasury for the acquisition of the bad assets, over and above the provision of capital to the banks.

A soft form of bad bank has been recently used by Germany in dealing with the bad assets of their Landesbanken. In the SachsenLB case, the beneficiary was sold as a going concern after the bad assets of around EUR 17,5 billion were channelled into a special purpose vehicle (SPV) with the purpose to hold the assets until maturity. The former owners, the Land of Saxony, gave a loss guarantee for around 17 % of the nominal value, which was considered as the absolute maximum of possible losses in a stress test (the base case was estimated only at 2 %). The new owner took over most of the refinancing and covered the remaining risk. The aid amount was at least considered to go up to the worst case estimate of around 4 %. In the WestLB case, a portfolio of assets of EUR 23 billion was channelled into an SPV and equipped with a government guarantee of EUR 5 billion so as to cover eventual losses and protect the balance sheet of adjusting the value of the assets according to IFRS. This allowed WestLB to remove the market volatility of the assets from its balance sheet. A guarantee fee of 0,5 % was paid to the State. The risk shield is still in place and is considered to be State aid.

In Switzerland, the government has created a new fund to which UBS has transferred a portfolio of toxic assets that was valued by a third party prior to the transfer. To ensure financing of this fund, Switzerland first injected capital into UBS (in the form of notes convertible into UBS shares), which UBS immediately wrote off and transferred to the Fund. The remainder of the financing of the Fund was ensured by a loan from the Swiss National Bank.

In the late 1990s, the Czech banks' lending conditions to corporations were very loose. The Czech banks were severely damaged by that and they had to be bailed out in the late 1990s by the government. Major rounds of cleaning up banks' balance sheets were undertaken in order to establish a healthy banking industry.

In February 1991, the Czech government created a consolidation bank (Konsolidační banka, KOB), established in order to take on bad loans from the banking sector accumulated before 1991 — such as debts inherited from the centrally planned economy, especially those related to trading within the Soviet bloc. In September 2001, the special bank turned into an agency that also had to absorb bad loans connected to 'new innovative' loans (especially so called privatization loans, nonperforming loans and fraudulent loans).

Starting in 1991, larger banks were freed from bad loans and as of 1994 emphasis shifted to smaller banks. In particular, the failure of Kředitní banka in August 1996, and a subsequent partial run on Agrobanka, caused some strain on the Czech banking system. The programmes concerned led only to a temporary increase of State ownership in banking in 1995, and again in 1998, due to the revocation of the license of Agrobanka. Overall, the government share in banking rose to 32 % at the end of 1995 from 29 % in 1994.

Moreover, to support the small banks, another programme — the Stabilisation Programme — was approved in 1997. This essentially consisted of replacing poor quality assets with liquidity of up to 110 % of each participating bank's capital through the purchase of poor quality assets from the bank by a special company called Česká finanční, with subsequent repurchase of the residual amount of these assets within 5 to 7 year horizon. Six banks joined the programme, but five of these were excluded after failing to comply with its criteria and subsequently went out of business. Thus, the Stabilisation Programme was not successful and was halted.

⁽¹⁾ This is in sharp contrast to the Japanese policy setting too high values for 'bad' assets, thus freezing the real estate market for about a decade.

By the end of 1998, 63 banking licences had been granted (60 of these before the end of 1994). As of end September 2000, 41 banks and branches of foreign banks remained in business, 16 were under extraordinary regimes (8 in liquidation, 8 involved in bankruptcy proceedings), 4 had merged with other banks, and the licence of one foreign bank had been revoked because it had failed to start its operations. Out of the 41 remaining institutions (including CKA) 15 were domestically controlled banks and 27 foreign controlled banks, including foreign subsidiaries and foreign branches.

In May 2000, the amended Act on Bankruptcy and Settlement and the Act on Public Auctions became effective, which aimed at accelerating bankruptcy proceedings and balancing creditors' and debtors' rights by allowing specialised firms or legal persons to act as trustees in bankruptcy proceedings and by offering the possibility to negotiate out of court settlements.

ANNEX III

The definition of categories ('baskets') of eligible assets and full disclosure concerning the impaired assets as well as the entire business activities of a bank

I. The definition of categories ('baskets') of eligible assets

The definition of baskets of impaired financial assets of banks should be a common denominator based on categories that are already used for:

1. prudential reporting and valuation (Basel pillar 3 = CRD Annex XII; FINREP and COREP);
2. financial reporting and valuation (IAS 39 and IFRS 7 in particular);
3. Specialised *ad hoc* reporting on the credit crisis: IMF, FSF, Roubini and CEBS work on transparency.

Using a common denominator of existing reporting and valuation categories for defining asset baskets will:

1. prevent any additional reporting burden for banks;
2. make it possible to assess the basket of impaired assets of individual banks to Community and global estimates (which can be relevant for determining the 'economic value' at a point in time); and
3. provide objective (certified) starting points for the valuation of impaired assets.

Taking into account the above the Commission suggests the following baskets of financial assets as an entry point for determining the 'economic value' and the asset impairment relief:

Table 1

I. Structured finance/securitised products						
	Type of product	Accounting category	Valuation basis for the scheme			Comments
			Market value	Economic Value	Transfer Value	
1	RMBS	FVPL/AFS (*)				Further refined into: geographic area, seniority of tranches, ratings, sub prime or Alt A related, or other underlying assets, maturity/vintage, allowances and write offs
2	CMBS	FVPL/AFS				
3	CDO	FVPL/AFS				
4	ABS	FVPL/AFS				
5	Corporate debt	FVPL/AFS				
6	Other loans	FVPL/AFS				
Total						
II. Non securitised loans						
	Type of product	Accounting category	Valuation basis for the scheme			Comments
			Cost (**)	Economic Value	Transfer Value	
7	Corporate	HTM/L&R (*)	Cost (**)			Further refinement on: geographic area, counter party risk (PD) credit risk mitigation (collateral) and maturity structures; allowances and write offs.
8	Housing	HTM/L&R	Cost			
9	Other personal	HTM/L&R	Cost			
Total						

(*) FVPL Fair value through profit and loss trading portfolio + fair value option); AFS available for sale, HTM Held to Maturity, L&R loans and receivables.

(**) Cost means the carrying amount of the loans minus impairment.

II. Full disclosure concerning impaired assets and the related business activities

On the basis of the asset baskets shown in Table 1, the information provided on the impaired assets of a bank which should be covered by an asset relief measure should be presented with a further degree of granularity as suggested in the comment column of Table 1.

On the basis of good practices observed by the Committee of European Banking Supervisors ⁽¹⁾ (CEBS) for disclosures on activities affected by the market turmoil, information on the bank's activities related to the impaired assets that would feed into the viability review referred to in Section 5.1 could be structured as follows:

Table 2

CEBS observed good practices	Senior Supervisors Group (SSG): Leading Practice Disclosures
<p>Business model</p> <ul style="list-style-type: none"> — Description of the business model (i.e. of the reasons for engaging in activities and of the contribution to value creation process) and, if applicable of any changes made (e.g. as a result of crisis). — Description of strategies and objectives. — Description of importance of activities and contribution to business (including a discussion in quantitative terms). — Description on the type of activities including a description of the instruments as well as of their functioning and qualifying criteria that products/investments have to meet. — Description of the role and the extent of involvement of the institution, i.e. commitments and obligations. 	<ul style="list-style-type: none"> — Activities (SPE) (*). — Nature of exposure (sponsor, liquidity and/or credit enhancement provider) (SPE). — Qualitative discussion of policy (LF).
<p>Risks and risk management</p> <ul style="list-style-type: none"> — Description of the nature and extent of risks incurred in relation to the activities and instruments. — Description of risk management practices of relevance to the activities, of any identified weaknesses of any corrective measures that have been taken to address these. — In the current crisis, particular attention should be given to liquidity risk. 	
<p>Impact of the crisis on results</p> <ul style="list-style-type: none"> — Qualitative and quantitative description of results, with a focus on losses (where applicable) and write downs impacting the results. — Breakdown of the write downs/losses by types of products and instruments affected by the crisis (CMBS, RMBS, CDO, ABS and LBO further broken down by different criteria). — Description of the reasons and factors responsible for the impact incurred. — Comparison of (i) impacts between (relevant) periods; and of (ii) income statement balances before and after the impact of the crisis. — Distinction of write downs between realised and unrealised amounts. — Description of the influence the crisis had on the firm's share price. — Disclosure of maximum loss risk and description how the institution's situation could be affected by a further downturn or by a market recovery. — Disclosure of impact of credit spread movements for own liabilities on results and on the methods used to determine this impact. 	<ul style="list-style-type: none"> — Change in exposure from the prior period, including sales and write downs (CMB/LF)

⁽¹⁾ Source: CEBS (Committee of European Banking Supervisors) report on banks' transparency on activities and products affected by the recent market turmoil, 18 June 2008.

CEBS observed good practices	Senior Supervisors Group (SSG): Leading Practice Disclosures
<p>Exposure levels and types</p> <ul style="list-style-type: none"> — Nominal amount (or amortised cost) and fair values of outstanding exposures. — Information on credit protection (e.g. through credit default swaps) and its effect on exposures. — Information on the number of products — Granular disclosures of exposures with breakdowns provided by: <ul style="list-style-type: none"> — level of seniority of tranches, — level of credit quality (e.g. ratings, investment grade, vintages), — geographic origin, — whether exposures have been originated, retained, warehoused or purchased, — product characteristics: e.g. ratings, share of sub prime mortgages, discount rates, attachment points, spreads, funding, — characteristics of the underlying assets: e.g. vintages, loan to value ratios, information on liens, weighted average life of the underlying, prepayment speed assumptions, expected credit losses. — Movement schedules of exposures between relevant reporting periods and the underlying reasons (sales, disposals, purchases etc.). — Discussion of exposures that have not been consolidated (or that have been recognised in the course of the crisis) and the related reasons. — Exposure to monoline insurers and quality of insured assets: <ul style="list-style-type: none"> — nominal amounts (or amortized cost) of insured exposures as well as of the amount of credit protection bought, — fair values of the outstanding exposures as well as of the related credit protection, — amount of write downs and losses, differentiated into realised and unrealised amounts, — breakdowns of exposures by ratings or counterparty. 	<ul style="list-style-type: none"> — Size of vehicle versus firm's total exposure (SPE/CDO). — Collateral: type, tranches, credit rating, industry, geographic distribution, average maturity, vintage (SPE/CDO/CMB/LF). — Hedges, including exposures to monolines, other counterparties (CDO). Creditworthiness of hedge counterparties (CDO). — Whole loans, RMBS, derivatives, other (O). — Detail on credit quality (such as credit rating, loan to value ratios, performance measures) (O). — Change in exposure from the prior period, including sales and write downs (CMB/LF). — Distinction between consolidated and non consolidated vehicles. Reason for consolidation (if applicable) (SPE). — Funded exposure and unfunded commitments (LF).
<p>Accounting policies and valuation issues</p> <ul style="list-style-type: none"> — Classification of the transactions and structured products for accounting purposes and the related accounting treatment. — Consolidation of SPEs and other vehicles (such as VIEs) and a reconciliation of these to the structured products affected by the sub prime crisis. — Detailed disclosures on fair values of financial instruments: <ul style="list-style-type: none"> — financial instruments to which fair values are applied, — fair value hierarchy (a breakdown of all exposures measured at fair value by different levels of the fair value hierarchy and a breakdown between cash and derivative instruments as well as disclosures on migrations between the different levels), — treatment of day 1 profits (including quantitative information), — use of the fair value option (including its conditions for use) and related amounts (with appropriate breakdowns). — Disclosures on the modelling techniques used for the valuation of financial instruments, including discussions of the following: <ul style="list-style-type: none"> — description of modelling techniques and of the instruments to which they are applied, — description of valuation processes (including in particular discussions of assumptions and input factors the models rely on), — type of adjustments applied to reflect model risk and other valuation uncertainties, — sensitivity of fair values, and — stress scenarios. 	<ul style="list-style-type: none"> — Valuation methodologies and primary drivers (CDO). — Credit valuation adjustments for specific counterparties (CDO). — Sensitivity of valuation to changes in key assumptions and inputs (CDO).

CEBS observed good practices	Senior Supervisors Group (SSG): Leading Practice Disclosures
<p>Other disclosure aspects</p> <p>— Description of disclosure policies and of the principles that are used for disclosures and financial reporting.</p>	
<p>Presentation issues</p> <p>— Relevant disclosures for the understanding of an institution's involvement in a certain activity should as far as possible be provided in one place.</p> <p>— Where information is spread between different parts or sources clear cross references should be provided to allow the interested reader to navigate between the parts.</p> <p>— Narrative disclosures should to the largest extent possible be supplemented with illustrative tables and overviews to improve the clarity.</p> <p>— Institutions should ensure that the terminology used to describe complex financial instruments and transactions is accompanied by clear and adequate explanations.</p>	
<p>(*) In the SSG Report, each feature refers to an specific type of SPE, or to all of them as a whole, being SPE (Special Purpose Entities in general), LF (Leveraged Finance), CMB (Commercial Mortgage-Backed Securities), O (Other sub-prime and Alt-A Exposures), CDO (Collateralised Debt Obligations)</p>	

ANNEX IV

Valuation and pricing principles and processes**I. Valuation methodology and procedure**

For the purposes of asset relief measures, assets should be classified along the lines of the illustrative tables 1 and 2 in Annex III.

The determination of the real economic value for the purposes of this Communication (see Section 5.5) should be based on observable market inputs and realistic and prudent assumptions about future cash flows.

The valuation method to be applied to eligible assets should be agreed at the Community level and could vary with the individual assets or baskets of assets concerned. Whenever possible, such valuation should be re assessed in reference to the market at regular intervals over the life of the asset.

In the past, several valuation options have been applied more or less successfully. Simple reverse auction procedures proved useful in the case of categories of assets where market values are reasonably certain. However, this approach failed in valuing more complex assets in the United States. More sophisticated auction procedures are more adapted where there is less certainty about market values and a more exact method of price discovery of each asset would be needed. Unfortunately, their design is not straightforward. The alternative of model based calculations for complex assets presents the drawback of being sensitive to the underlying assumptions ⁽¹⁾.

The option of applying uniform valuation haircuts to all complex assets simplifies the process of valuation overall, although it results in less accurate pricing of individual assets. Central banks have substantial experience regarding possible criteria and parameters for collateral pledged for refinancing, which could serve as a useful reference.

Whatever the model chosen, the valuation process and particularly the assessment of the likelihood of future losses should be based on rigorous stress testing against a scenario of protracted global recession.

The valuation must be based on internationally recognised standards and benchmarks. A common valuation methodology agreed at the Community level and consistently implemented by Member States could greatly contribute to mitigating concerns regarding threats to a level playing field resulting from potentially significant implications of discrepant valuation systems. When assessing the valuation methods put forward by Member States for asset relief measures, the Commission will, in principle, consult panels of valuation experts ⁽²⁾.

II. The pricing of State support on the basis of valuation

The valuation of assets must be distinguished from the pricing of a support measure. A purchase or insurance on the basis of the established current market value or the 'real economic value', factoring in future cash flow projections on a hold to maturity basis, will in practice often exceed the present capacities of beneficiary banks for burden sharing ⁽³⁾. The objective of the pricing must be based on a transfer value as close to the identified real economic value as possible. While implying an advantage as compared to the current market value and thus State aid, pricing on the basis of the 'real economic value' can be perceived as counterbalancing current market exaggerations fuelled by current crisis conditions which have led to the deterioration or even collapse of certain markets. The greater any deviation of the transfer value from the 'real economic value', and thus the amount of aid, the greater the need for remedial measures to ensure accurate pricing over time (for example, through better fortune clauses) and for more in depth restructuring. The admissible deviation from the result of valuation should be more restricted for assets the value of which can be established on the basis of reliable market input than for those for which markets are illiquid. Non compliance with these principles would represent a strong indicator for the necessity of far reaching restructuring and compensatory measures or even an orderly winding up.

In any event, any pricing of asset relief must include remuneration for the State that adequately takes account of the risks of future losses exceeding those that are projected in the determination of the 'real economic value' and any additional risk stemming from a transfer value above the real economic value.

Such remuneration may be provided by setting the transfer price of assets at below the 'real economic value' to a sufficient extent so as to provide for adequate compensation for the risk in the form of a commensurate upside, or by adapting the guarantee fee accordingly.

⁽¹⁾ In any case, an auction would only be possible for homogeneous classes of assets and where there exist a sufficiently large number of potential sellers. In addition a reserve price would need to be introduced to ensure the protection of the interest of the State and claw back mechanism in case the final losses would exceed the reserve price, so as to ensure a sufficient contribution by the beneficiary bank. In order to assess such mechanisms, comparative scenarios with alternatives guarantee/purchase schemes will have to be submitted, including stress tests, in order to guarantee their global financial equivalence.

⁽²⁾ The Commission will use the opinion of such panels of valuation experts in a manner similar to other State aid proceedings, where it may have recourse to external expertise.

⁽³⁾ See Section 5.2.

Identifying the necessary target return could be 'inspired' by the remuneration that would have been required for recapitalisation measures to the extent of the capital effect of the proposed asset relief. This should be in line with the Commission Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, while taking into account the specific features of asset relief measures and particularly the fact that they may involve higher exposure than capital injections ⁽¹⁾.

The pricing system could also include warrants for shares in the banks equal in value to the assets (implying that a higher price paid will result in a higher potential equity stake). One model for such a pricing system could be an asset purchase scenario, in which such warrants will be returned to the bank once the assets are sold by the bad bank and if they have earned the necessary target return. If the assets do not yield such a return, the bank should pay the difference in cash to reach the target return. If the bank does not pay the cash, the Member State will sell the warrants to achieve the target return.

In an asset guarantee scenario, the guarantee fee could be paid in the form of shares with a fixed cumulative interest representing the target return. Where the guarantee needs to be drawn upon, the Member State could use the warrants to acquire shares corresponding to the amounts that had to be covered by the guarantee.

Any pricing system would have to ensure that the overall contribution of beneficiary banks reduces the extent of net State intervention to the minimum necessary.

⁽¹⁾ In an asset guarantee scenario, it would also have to be taken into consideration that in contrast to recapitalisation measures, no liquidity is provided.

ANNEX V

State aid procedure

Member States notifying asset relief measures must provide the Commission with comprehensive and detailed information on all the elements of relevance for the assessment of the public support measures under the State aid rules as set out in this Communication ⁽¹⁾. This includes notably the detailed description of the valuation methodology and its intended implementation involving independent third party expertise ⁽²⁾. Commission approval will be granted for a period of 6 months, and conditional on the commitment to present either a restructuring plan or a viability review for each beneficiary institution within 3 months from its accession to the asset relief programme.

Where a bank is granted aid either as an individual measure or under an approved asset relief scheme, the Member State must provide the Commission, at the latest in the individual notification concerning the restructuring plan or viability review, with detailed information regarding the assets covered and its valuation at the time such individual aid is granted, as well as the certified and validated results of the disclosure of impairments concerning the assets covered by the relief measure ⁽³⁾. The full review of the bank's activities and balance sheet should be provided as soon as possible to initiate discussions on the appropriate nature and extent of restructuring well in advance of the formal presentation of a restructuring plan with a view to accelerating this process and providing clarity and legal certainty as quickly as possible.

For banks that have already benefited from other forms of State aid, whether under approved guarantee, asset swaps or recapitalisation schemes or individual measures, any assistance granted under the asset relief scheme must be reported first under existing reporting obligations so that the Commission has a complete picture of multiple State aid measures benefiting an individual aid recipient and can better appreciate the effectiveness of the previous measures and the contribution that the Member State proposes to introduce in a global assessment.

The Commission will reassess the aid granted under temporary approval in the light of the adequacy of the proposed restructuring and the remedial measures ⁽⁴⁾, and will take a view on its compatibility for longer than 6 months through a new decision.

Member States must also provide a report to the Commission every six months on the functioning of the asset relief programmes and on the development of the banks' restructuring plans. Where the Member State is already subject to a reporting requirement for other forms of aid to its banks, such a report must be complemented with the necessary information concerning the asset relief measures and the banks' restructuring plans.

⁽¹⁾ Pre-notification contact is encouraged.

⁽²⁾ See Section 5.5 and Annex IV.

⁽³⁾ A letter from the head of the supervisory authority certifying the detailed results must be provided.

⁽⁴⁾ In order to facilitate the work of the Member States and the Commission, the Commission will be prepared to examine grouped notifications of similar restructuring/winding-up cases. The Commission may consider that there is no need to submit a plan for the pure winding up of an institution, or where the size of the institution is negligible.

Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules

(Text with EEA relevance)

(2009/C 195/04)

1. INTRODUCTION

1. At its meetings on 20 March 2009 and on 18 and 19 June 2009, the European Council confirmed its commitment to restoring confidence and the proper functioning of the financial market, which is an indispensable precondition for recovery from the current financial and economic crisis. In view of the systemic nature of the crisis and the interconnectivity of the financial sector, a number of actions have been initiated at Community level to restore confidence in the financial system, preserve the internal market and secure lending to the economy ⁽¹⁾.
2. Those initiatives need to be complemented by action at the level of individual financial institutions to enable them to withstand the current crisis and return to long-term viability without reliance on State support in order to perform their lending function on a sounder basis. The Commission is already dealing with a number of State aid cases resulting from interventions by Member States to avoid liquidity, solvency or lending problems. The Commission has provided guidance, in three successive communications, on the design and implementation of State aid in favour of banks ⁽²⁾. Those communications recognised that the severity of the crisis justified the granting of aid, which can be considered compatible pursuant to Article 87(3)(b) of the Treaty establishing the European Community, and provided a framework for the coherent provision of public guarantees, recapitalisation and impaired asset relief measures by Member States. The primary rationale of those rules is to ensure that rescue measures can fully attain the objectives of financial stability and maintenance of credit flows, while also ensuring a level playing-field between banks ⁽³⁾ located in different Member States as well as between banks which receive public support and those which do not, avoiding harmful subsidy races, limiting moral hazard and ensuring the competitiveness and efficiency of European banks in Community and international markets.
3. State aid rules provide a tool to ensure the coherence of measures taken by those Member States which have decided to act. However, the decision whether to use public funds, for example to shelter banks from impaired assets, remains with the Member States. In some instances, financial institutions will be in a position to handle the current crisis without major adjustment or additional aid. In other cases, State aid may be necessary, in the form of guarantees, recapitalization or impaired asset relief.
4. Where a financial institution has received State aid, the Member State should submit a viability plan or a more fundamental restructuring plan, in order to confirm or re-establish individual banks' long-term viability without reliance on State support. Criteria have already been established to delineate the conditions under which a bank may need to be subject to more substantial restructuring, and when measures are needed to cater for distortions of competition resulting from the aid ⁽⁴⁾. This Communication does not alter those criteria. It complements them, with a view to enhancing predictability and ensuring a coherent approach, by explaining how the Commission will assess

⁽¹⁾ In its Communication to the European Council of 4 March 2009 on 'Driving the European Recovery' COM(2009) 114 final, the Commission announced a reform programme to address more general weaknesses in the regulatory framework applicable to financial institutions which operate in the Community.

⁽²⁾ See the Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('the Banking Communication') (OJ C 270, 25.10.2008, p. 8), the Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('the Recapitalisation Communication') (OJ C 10, 15.1.2009, p. 2) and the Communication from the Commission on the Treatment of Impaired assets in the Community Banking Sector ('the Impaired Assets Communication') (OJ C 72, 26.3.2009, p. 1). For an overview of the Commission's decision-making practice, see State aid Scoreboard — Spring 2009 Update, Special edition on State aid interventions in the current financial and economic crisis, COM(2009) 164 final of 8 April 2009.

⁽³⁾ The application of this Communication is limited to financial institutions as referred to in the Banking Communication. Guidance provided in this Communication refers to banks for ease of reference. However it applies, *mutatis mutandis*, to other financial institutions where appropriate.

⁽⁴⁾ The criteria and specific circumstances which trigger the obligation to present a restructuring plan have been explained in the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication. They refer in particular, but not exclusively, to situations where a distressed bank has been recapitalised by the State, or where a bank benefiting from asset relief has already received State aid in whatever form that contributes to coverage or avoidance of losses (except participation in a guarantee scheme) which altogether exceeds 2 % of the total bank's risk weighted assets. The degree of restructuring will depend on the seriousness of the problems of each bank. By contrast, in line with those Communications (in particular point 40 of the Recapitalisation Communication and Annex V to the Impaired Assets Communication), where a limited amount of aid has been given to banks which are fundamentally sound, Member States are required to submit a report to the Commission on the use of State funds comprising all the information necessary to evaluate the bank's viability, the use of the capital received and the path towards exit from reliance on State support. The viability review should demonstrate the risk profile and prospective capital adequacy of these banks and evaluate their business plans.

the compatibility of restructuring aid ⁽¹⁾ granted by Member States to financial institutions in the current circumstances of systemic crisis, under Article 87(3)(b) of the Treaty.

5. The Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication recall the basic principles set out in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁾. Those principles require, first and foremost, that restructuring aid should lead to the restoration of viability of the undertaking in the longer term without State aid. They also require restructuring aid to be accompanied, to the extent possible, by adequate burden sharing and by measures to minimise distortions of competition, which would in the longer term fundamentally weaken the structure and the functioning of the relevant market.
6. The integrity of the internal market and the development of banks throughout the Community must be a key consideration in the application of those principles; fragmentation and market partitioning should be avoided. European banks should be in a strong global position on the basis of the single European financial market, once the current crisis has been overcome. The Commission also reaffirms the need to anticipate and manage change in a socially responsible way and underlines the need to comply with national legislation implementing Community Directives on information and consultation of workers that apply under such circumstances ⁽³⁾.

⁽¹⁾ That is to say, aid which was temporarily authorised by the Commission as rescue aid under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2) or aid temporarily authorised under Article 87(3)(b) of the Treaty, as well as any new aid that may be notified as needed for restructuring. This Communication will therefore be applied instead of the Guidelines on State aid for rescuing and restructuring firms in difficulty for the assessment of restructuring aid to banks in the current circumstances of systemic crisis.

⁽²⁾ In the past, the Commission has adopted a number of decisions relating to restructuring aid (compatible under Article 87(3)(c) of the Treaty) to ailing banks, on the basis of a comprehensive restructuring process which allowed the beneficiaries to regain their long-term viability without the aid unduly harming competitors. Typical restructuring strategies included reorientation of business models, closure or divestments of businesses divisions, subsidiaries or branches, changes in the asset-liabilities management, sale as a going concern or break-up and sale of different parts of business to viable competitors. See for instance Commission Decision 98/490/EC of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais group (OJ L 221, 8.8.1998, p. 28), Commission Decision 2005/345/EC of 18 February 2004 on restructuring aid implemented by Germany for Bankgesellschaft Berlin AG (OJ L 116, 4.5.2005, p. 1), Commission Decision 2009/341/EC of 4 June 2008 on State aid C 9/2008 (ex NN 8/2008, CP 244/07) implemented by Germany for Sachsen LB (OJ L 104, 24.4.2009, p. 34) and the autumn 2006 State Aid Scoreboard, COM(2006) 761 final, p. 28 (http://ec.europa.eu/comm/competition/state_aid/studies_reports/2006_autumn_en.pdf), with a special survey on rescue and restructuring aid.

⁽³⁾ See also: Communication on 'Restructuring and Employment' of 31 March 2005 (COM(2005) 120 final of 31 March 2005) and the good practice on restructuring agreed by the European social partners in November 2003.

7. This Communication explains how the Commission will examine aid for the restructuring of banks in the current crisis, taking into account the need to modulate past practice in the light of the nature and the global scale of the crisis, the systemic role of the banking sector for the whole economy, and the systemic effects which may arise from the need of a number of banks to restructure within the same period:

— The restructuring plan will need to include a thorough *diagnosis* of the bank's problems. In order to devise sustainable strategies for the restoration of viability, banks will therefore be required to stress test their business. This first step in the restoration of viability should be based on common parameters which will build to the extent possible on appropriate methodologies agreed at Community level. Banks will also be required, where applicable, to disclose impaired assets ⁽⁴⁾.

— Given the overriding goal of financial stability and the prevailing difficult economic outlook throughout the Community, special attention will be given to the design of a restructuring plan, and in particular to ensuring a sufficiently flexible and realistic timing of the necessary implementation steps. Where the immediate implementation of structural measures is not possible due to market circumstances, intermediate behavioural safeguards should be considered.

— The Commission will apply the basic principle of appropriate burden sharing between Member States and the beneficiary banks with the overall situation of the financial sector in mind. Where significant burden sharing is not immediately possible due to market circumstances at the time of the rescue, this should be addressed at a later stage of the implementation of the restructuring plan.

— Measures to limit distortion of competition by a rescued bank in the same Member State or in other Member States should be designed in a way that limits any disadvantage to other banks while taking into account the fact that the systemic nature of the current crisis has required very widespread State intervention in the sector.

⁽⁴⁾ In accordance with the Impaired Assets Communication.

- Provision of additional aid during the restructuring period should remain a possibility if justified by reasons of financial stability. Any additional aid should remain limited to the minimum necessary to ensure viability.
8. Section 2 applies to cases where the Member State is under an obligation to notify a restructuring plan ⁽¹⁾. The principles underlying section 2 apply by analogy to cases where the Member State is not under a formal obligation to notify a restructuring plan, but is nonetheless required to demonstrate viability ⁽²⁾ of the beneficiary bank. In the latter case, and save situations where there are doubts, the Commission will normally request less detailed information ⁽³⁾. In case of doubt, the Commission will, in particular, seek evidence of adequate stress testing, in accordance with point 13, and of validation of the results of the stress testing by the competent national authority. Sections 3, 4 and 5 only apply to cases where the Member State is under an obligation to notify a restructuring plan. Section 6 deals with the temporal scope of this Communication and applies both to Member States required to notify a restructuring plan for the aid beneficiary and to Member States required only to demonstrate the viability of aid beneficiaries.

2. RESTORING LONG-TERM VIABILITY

9. Where, on the basis of previous Commission guidance or decisions, a Member State is under an obligation to submit a restructuring plan ⁽⁴⁾ that plan should be comprehensive, detailed and based on a coherent concept. It should demonstrate how the bank will restore long-term viability without State aid as soon as possible ⁽⁵⁾. The notification of any restructuring plan should include a comparison with alternative options, including a break-up, or absorption by another bank, in order to allow the Commission to assess ⁽⁶⁾ whether more market oriented, less costly or less distortive solutions are available consistent with maintaining financial stability. In the event that the bank cannot be restored to viability, the restructuring plan should indicate how it can be wound up in an orderly fashion.

⁽¹⁾ In accordance with the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication. See point 4 of this Communication.

⁽²⁾ In accordance with the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication, where a limited amount of aid is granted to fundamentally sound banks, Member States are required to submit a viability review to the Commission.

⁽³⁾ In accordance, in particular, with point 40 of the Recapitalisation Communication and Annex V to the Impaired Assets Communication.

⁽⁴⁾ As explained in point 8 of this Communication, where section 2 refers to a restructuring plan, the principles underlying section 2 apply by analogy also to viability reviews.

⁽⁵⁾ An indicative model for a restructuring plan is reproduced in the Annex.

⁽⁶⁾ Where appropriate the Commission will ask for the advice of an external consultant to examine the notified restructuring plans in order to assess viability, burden sharing and minimising competition distortions. It may also request certification of various elements by supervisors.

10. The restructuring plan should identify the causes of the bank's difficulties and the bank's own weaknesses and outline how the proposed restructuring measures remedy the bank's underlying problems.
11. The restructuring plan should provide information on the business model of the beneficiary, including in particular its organisational structure, funding (demonstrating viability of the short and long term funding structure ⁽⁷⁾), corporate governance (demonstrating prevention of conflicts of interest as well as necessary management changes ⁽⁸⁾), risk management (including disclosure of impaired assets and prudent provisioning for expected non-performing assets), and asset-liability management, cash-flow generation (which should reach sufficient levels without State support), off-balance sheet commitments (demonstrating their sustainability and consolidation when the bank bears a significant exposure ⁽⁹⁾), leveraging, current and prospective capital adequacy in line with applicable supervisory regulation (based on prudent valuation and adequate provisioning), and the remuneration incentive structure ⁽¹⁰⁾, (demonstrating how it promotes the beneficiary's long-term profitability).
12. The viability of each business activity and centre of profit should be analysed, with the necessary breakdown. The return to viability of the bank should mainly derive from internal measures. It may be based on external factors such as variations in prices and demand over which the undertaking has no great influence, but only if the market assumptions made are generally acknowledged. Restructuring requires a withdrawal from activities which would remain structurally loss making in the medium term.
13. Long-term viability is achieved when a bank is able to cover all its costs including depreciation and financial charges and provide an appropriate return on equity, taking into account the risk profile of the bank. The restructured bank should be able to compete in the marketplace for capital on its own merits in compliance with relevant regulatory requirements. The expected results of the planned restructuring need to be demonstrated under a base case scenario as well as under 'stress' scenarios. For this, restructuring plans need to take account, inter alia, of the current state and future prospects of the financial markets, reflecting base-case and worst-case assumptions. Stress testing should consider a range of scenarios, including a combination of stress events and a protracted global recession. Assumptions should be compared with appropriate sector-wide benchmarks, adequately amended to take account of the new elements of the current crisis in financial markets. The plan should include measures to

⁽⁷⁾ See for instance, Commission Decision of 2 April 2008 in case NN 1/2008 *Northern Rock* (OJ C 135, 3.6.2008, p. 21), and Decision 2009/341/EC in Case C 9/2008 *Sachsen LB*.

⁽⁸⁾ See Decision 2009/341/EC in Case C 9/2008 *Sachsen LB*.

⁽⁹⁾ Except in duly justified circumstances. See Commission Decision of 21 October 2008 in case C 10/2008 *IKB*, not yet published.

⁽¹⁰⁾ In accordance with Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector (OJ L 120, 15.5.2009, p. 22).

address possible requirements emerging from stress testing. The stress testing should, to the extent possible, be based on common parameters agreed at Community level (such as a methodology developed by the Committee of European Banking Supervisors) and, where appropriate, adapted to cater for country- and bank-specific circumstances.

14. In the current crisis governments have recapitalised banks on terms chosen primarily for reasons of financial stability rather than for a return which would have been acceptable to a private investor. Long-term viability therefore requires that any State aid received is either redeemed over time, as anticipated at the time the aid is granted, or is remunerated according to normal market conditions, thereby ensuring that any form of additional State aid is terminated. As the Treaty is neutral as to the ownership of property, State aid rules apply irrespective of whether a bank is in private or public ownership.

15. While the restructuring period should be as short as possible so as to restore viability quickly, the Commission will take into account the current crisis conditions and may therefore allow some structural measures to be completed within a longer time horizon than is usually the case, notably to avoid depressing markets through fire sales⁽¹⁾. However, restructuring should be implemented as soon as possible and should not last more than five years⁽²⁾ to be effective and allow for a credible return to viability of the restructured bank.

16. Should further aid not initially foreseen in the notified restructuring plan be necessary during the restructuring period for the restoration of viability, this will be subject to individual *ex ante* notification and any such further aid will be taken into account in the Commission's final decision.

Viability through sale of a bank

17. The sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank, and may help to restore market confidence. It may also contribute to the consolidation of the financial sector. To this end, the purchaser should demonstrate that the integrated entity will be viable.

⁽¹⁾ Understood as selling large quantities of assets at current low market prices which could lower the prices further.

⁽²⁾ The Commission practice has been to accept two to three years as the duration of a restructuring plan.

In the case of a sale, the requirements of viability, own contribution and limitations of distortions of competition also need to be respected.

18. A transparent, objective, unconditional and non-discriminatory competitive sale process should generally be ensured to offer equal opportunities to all potential bidders⁽³⁾.

19. Furthermore, without prejudice to the merger control system that may be applicable, and while recognising that the sale of an aided ailing bank to a competitor can both contribute to the restoration of long-term viability and result in increased consolidation of the financial sector, where such a sale would result *prima facie* in a significant impediment of effective competition, it should not be allowed unless the distortions of competition are addressed by appropriate remedies accompanying the aid.

20. The sale of a bank may also involve State aid to the buyer and/or to the sold activity⁽⁴⁾. If the sale is organised via an open and unconditional competitive tender and the assets go to the highest bidder, the sale price is considered to be the market price and aid to the buyer can be excluded⁽⁵⁾. A negative sale price (or financial support to compensate for such a negative price) may exceptionally be accepted as not involving State aid if the seller would have to bear higher costs in the event of liquidation⁽⁶⁾. For the calculation of the cost of liquidation in such circumstances, the Commission will only take account of those liabilities which would have been entered into by a market economy investor⁽⁷⁾. This excludes liabilities stemming from State aid⁽⁸⁾.

21. An orderly winding-up or the auctioning off of a failed bank should always be considered where a bank cannot credibly return to long-term viability. Governments should encourage the exit of non-viable players, while allowing for the exit process to take place within an appropriate time frame that preserves financial stability. The Banking Communication provides for a procedure in the

⁽³⁾ See also point 20.

⁽⁴⁾ See for example Decision 2009/341/EC in Case C 9/2008 *Sachsen LB*.

⁽⁵⁾ The absence of the tender as such does not automatically mean that there is State aid to the buyer.

⁽⁶⁾ This would normally result in an aid to the sold economic activity.

⁽⁷⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Hytasa* [1994] ECR I-4103, paragraph 22.

⁽⁸⁾ See Case C-334/99 *Gröditzer Stahlwerke* [2003] ECR I-1139, paragraph 134 *et seq.* and Commission Decision 2008/719/EC of 30 April 2008 on State aid C 56/2006 (ex NN 77/2006) *Bank Burgenland* (OJ L 239, 6.9.2008, p. 32).

framework of which such orderly winding up should take place⁽¹⁾. Acquisition of the 'good' assets and liabilities of a bank in difficulty may also be an option for a healthy bank as it could be a cost effective way to expand deposits and build relationships with reliable borrowers. Moreover, the creation of an autonomous 'good bank' from a combination of the 'good' assets and liabilities of an existing bank may also be an acceptable path to viability, provided this new entity is not in a position to unduly distort competition.

3. OWN CONTRIBUTION BY THE BENEFICIARY (BURDEN SHARING)

22. In order to limit distortions of competition and address moral hazard, aid should be limited to the minimum necessary and an appropriate own contribution to restructuring costs should be provided by the aid beneficiary. The bank and its capital holders should contribute to the restructuring as much as possible with their own resources. This is necessary to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour.

Limitation of restructuring costs

23. Restructuring aid should be limited to covering costs which are necessary for the restoration of viability. This means that an undertaking should not be endowed with public resources which could be used to finance market-distorting activities not linked to the restructuring process. For example, acquisitions of shares in other undertakings or new investments cannot be financed through State aid unless this is essential for restoring an undertaking's viability⁽²⁾.

Limitation of the amount of aid, significant own contribution

24. In order to limit the aid amount to the minimum necessary, banks should first use their own resources to finance restructuring. This may involve, for instance, the sale of assets. State support should be granted on terms which represent an adequate burden-sharing of the costs⁽³⁾.

This means that the costs associated with the restructuring are not only borne by the State but also by those who invested in the bank, by absorbing losses with available capital and by paying an adequate remuneration for State interventions⁽⁴⁾. Nonetheless, the Commission considers that it is not appropriate to fix thresholds concerning burden-sharing *ex ante* in the context of the current systemic crisis, having regard to the objective of facilitating access to private capital and a return to normal market conditions.

25. Any derogation from an adequate burden-sharing *ex ante* which may have been exceptionally granted in the rescue phase for reasons of financial stability must be compensated by a further contribution at a later stage of the restructuring, for example in the form of claw-back clauses and/or by farther-reaching restructuring including additional measures to limit distortions of competition⁽⁵⁾.

26. Banks should be able to remunerate capital, including in the form of dividends and coupons on outstanding subordinated debt, out of profits generated by their activities. However, banks should not use State aid to remunerate own funds (equity and subordinated debt) when those activities do not generate sufficient profits. Therefore, in a restructuring context, the discretionary offset of losses (for example by releasing reserves or reducing equity) by beneficiary banks in order to guarantee the payment of dividends and coupons on outstanding subordinated debt, is in principle not compatible with the objective of burden sharing⁽⁶⁾. This may need to be balanced with ensuring the refinancing capability of the bank and the exit incentives⁽⁷⁾. In the interests of promoting refinancing by the beneficiary bank, the Commission may favourably regard the payment of coupons on newly issued hybrid capital instruments with

⁽¹⁾ See points 43 to 50 of the Banking Communication. In order to enable such orderly exit, liquidation aid may be considered compatible, when for instance needed for a temporary recapitalisation of a bridge bank or structure or satisfying claims of certain creditor classes if justified by reasons of financial stability. For examples of such aid and conditions under which it was found compatible, see Commission Decision of 1 October 2008 in case NN 41/2008 UK, *Rescue aid to Bradford&Bingley* (OJ C 290, 13.11.2008, p. 2) and the Commission Decision of 5 November 2008 in case NN 39/2008 DK, *Aid for liquidation of Roskilde Bank* (OJ C 12, 17.1.2009, p. 3).

⁽²⁾ See Case T-17/03 Schmitz-Gotha [2006] ECR II-1139.

⁽³⁾ As already developed in previous Commission Communications, in particular the Impaired Assets Communication, see points 21 *et seq.*

⁽⁴⁾ The Commission has provided detailed guidance regarding the pricing of State guarantees, recapitalisations and asset relief measures respectively in the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication. To the extent that such a price is being paid, the shareholders of the bank see their position diluted in a financial sense.

⁽⁵⁾ Impaired Asset Communication, points 24 and 25. See also Section 4 of this Communication.

⁽⁶⁾ See Commission Decision of 18 December 2008 in case N 615/2008 *Bayern LB* (OJ C 80, 3.4.2009, p. 4). However, this does not prevent the bank from making coupon payments when it is under a binding legal obligation to do so.

⁽⁷⁾ See Impaired Asset Communication, point 31, and the nuanced approach to dividend restrictions in the Recapitalisation Communication, points 33, 34 and 45, reflecting that although temporary dividend or coupon bans may retain capital within the bank and increase the capital cushion and hence improve the solvency of the bank, they may equally impede the bank's access to private finance sources, or at least increase the cost of new future financing.

greater seniority over existing subordinated debt. In any case, banks should not normally be allowed to purchase their own shares during the restructuring phase.

27. Provision of additional aid during the restructuring period should remain a possibility if justified by reasons of financial stability. Any additional aid should remain limited to the minimum necessary to ensure viability.

4. LIMITING DISTORTIONS OF COMPETITION AND ENSURING A COMPETITIVE BANKING SECTOR

Types of distortion

28. Whilst State aid can support financial stability in times of systemic crisis, with wider positive spillovers, it can nevertheless create distortions of competition in various ways. Where banks compete on the merits of their products and services, those which accumulate excessive risk and/or rely on unsustainable business models will ultimately lose market share and, possibly, exit the market while more efficient competitors expand on or enter the markets concerned. State aid prolongs past distortions of competition created by excessive risk-taking and unsustainable business models by artificially supporting the market power of beneficiaries. In this way it may create a moral hazard for the beneficiaries, while weakening the incentives for non-beneficiaries to compete, invest and innovate. Finally, State aid may undermine the single market by shifting an unfair share of the burden of structural adjustment and the attendant social and economic problems to other Member States, whilst at the same time creating entry barriers and undermining incentives for cross-border activities.
29. Financial stability remains the overriding objective of aid to the financial sector in a systemic crisis, but safeguarding systemic stability in the short-term should not result in longer-term damage to the level playing field and competitive markets. In this context, measures to limit distortions of competition due to State aid play an important role, inter alia for the following reasons. First, banks across the Community have been hit by the crisis to a very varying degree and State aid to rescue and restructure distressed banks may harm the position of banks that have remained fundamentally sound, with possible negative effects for financial stability. In a situation of financial, economic and budgetary crisis, differences between Member States in terms of resources available for State intervention become even more pronounced, and harm the level-playing field in the single market. Second, national interventions in the current crisis will, by their very nature, tend to focus on the national

markets and hence seriously risk leading to retrenchment behind national borders and to a fragmentation of the single market. Market presence of aid beneficiaries needs to be assessed with a view to ensuring effective competition and preventing market power, entry barriers and disincentives for cross-border activities to the detriment of European businesses and consumers. Third, the current scale of the public intervention necessary for financial stability and the possible limits to normal burden sharing are bound to create even greater moral hazard that needs to be properly corrected to prevent perverse incentives and excessively risky behaviour from reoccurring in the future and to pave the way for a rapid return to normal market conditions without State support.

Applying effective and proportionate measures limiting distortions of competition

30. Measures to limit the distortion of competition should be tailor-made to address the distortions identified on the markets where the beneficiary bank operates following its return to viability post restructuring, while at the same time adhering to a common policy and principles. The Commission takes as a starting point for its assessment of the need for such measures, the size, scale and scope of the activities that the bank in question would have upon implementation of a credible restructuring plan as foreseen in section 2. Depending on the nature of the distortion of competition, it may be addressed through measures in respect of liabilities and/or in respect of assets⁽¹⁾. The nature and form of such measures will depend on two criteria: first, the amount of the aid and the conditions and circumstances under which it was granted and, second, the characteristics of the market or markets on which the beneficiary bank will operate.
31. As regards the first criterion, measures limiting distortions will vary significantly according to the amount of the aid as well as the degree of burden sharing and the level of pricing. In this context, the amount of State aid will be assessed both in absolute terms (amount of capital received, aid element in guarantees and asset relief measures) and in relation to the bank's risk-weighted assets. The Commission will consider the total amount of aid granted to the beneficiary including any kind of rescue aid. In the same vein, the Commission will take into account the extent of the beneficiary's own contribution and burden sharing over the restructuring period. Generally speaking, where there is greater burden sharing and the own contribution is higher, there are fewer negative consequences resulting from moral hazard. Therefore, the need for further measures is reduced⁽²⁾.

⁽¹⁾ See point 21.

⁽²⁾ If the Commission has, pursuant to Banking Communication, the Recapitalisation Communication or the Impaired Assets Communication, exceptionally accepted aid that departed from the principles required by those communications, the resulting additional distortion of competition will require additional structural or behavioural safeguards; see point 58 of the Impaired Assets Communication.

32. As regards the second criterion, the Commission will analyse the likely effects of the aid on the markets where the beneficiary bank operates after the restructuring. First of all, the size and the relative importance of the bank on its market or markets, once it is made viable, will be examined. If the restructured bank has limited remaining market presence, additional constraints, in the form of divestments or behavioural commitments, are less likely to be needed. The measures will be tailored to market characteristics⁽¹⁾ to make sure that effective competition is preserved. In some areas, divestments may generate adverse consequences and may not be necessary in order to achieve the desired outcomes, in which case the limitation of organic growth may be preferred to divestments. In other areas, especially those involving national markets with high entry barriers, divestments may be needed to enable entry or expansion of competitors. Measures limiting distortions of competition should not compromise the prospects of the bank's return to viability.

33. Finally, the Commission will pay attention to the risk that restructuring measures may undermine internal market and will view positively measures that help to ensure that national markets remain open and contestable. While aid is granted to maintain financial stability and lending to the real economy in the granting Member State, where such aid is also conditional upon the beneficiary bank respecting certain lending targets in Member States other than the State which grants the aid, this may be regarded as an important additional positive effect of the aid. This will particularly be the case where the lending targets are substantial relative to a credible counterfactual, where achievement of such targets is subject to adequate monitoring (for example, through cooperation between the home and host State supervisors), where the banking system of the host State is dominated by banks with headquarters abroad and where such lending commitments have been coordinated at Community level (for example, in the framework of liquidity assistance negotiations).

Setting the appropriate price for State aid

34. Adequate remuneration of any State intervention generally is one of the most appropriate limitations of distortions of competition, as it limits the amount of aid. Where the entry price has been set at a level significantly below the market price for reasons of financial stability, it should be ensured that the terms of the financial support are revised in the restructuring plan⁽²⁾ so as to reduce the distortive effect of the subsidy.

⁽¹⁾ In particular, concentration levels, capacity constraints, the level of profitability, barriers to entry and to expansion will be taken into account.

⁽²⁾ For example by favouring early redemption of State aid.

Structural measures — divestiture and reduction of business activities

35. On the basis of an assessment in accordance with the criteria of this Section, banks benefiting from State aid may be required to divest subsidiaries or branches, portfolios of customers or business units, or to undertake other such measures⁽³⁾, including on the domestic retail market of the aid beneficiary. In order for such measures to increase competition and contribute to the internal market, they should favour the entry of competitors and cross-border activity⁽⁴⁾. In line with the requirement of restoration of viability, the Commission will take a positive view of such structural measures if they are undertaken without discrimination between businesses in different Member States, thus contributing to the preservation of an internal market in financial services.

36. A limit on the bank's expansion in certain business or geographical areas may also be required, for instance via market-oriented remedies such as specific capital requirements, where competition in the market would be weakened by direct restrictions on expansion or to limit moral hazard. At the same time, the Commission will pay particular attention to the need to avoid retrenchment within national borders and a fragmentation of the single market.

37. Where finding a buyer for subsidiaries or other activities or assets appears objectively difficult, the Commission will extend the time period for the implementation of those measures, if a binding timetable for scaling down businesses (including segregation of business lines) is provided. However, the time period for implementing those measures should not exceed five years.

38. In assessing the scope of structural remedies required to overcome distortions of competition in a given case, and with due regard to the principle of equal treatment, the Commission will take into account the measures provided for in cases relating to the same markets or market segments at the same time.

⁽³⁾ See for example Commission Decision of 21 October 2008 in Case C 10/2008 *IKB*, not yet published and Commission Decision of 7 May 2009 in case N 244/2009 *Capital injection into Commerzbank* (OJ C 147, 27.6.2009, p. 4).

⁽⁴⁾ It should be noted that balance-sheet reductions due to asset write-offs, which are partly compensated with State aid, do not reduce the bank's actual market presence and cannot therefore be taken into account when assessing the need for structural measures.

Avoiding the use of State aid to fund anti-competitive behaviour

39. State aid must not be used to the detriment of competitors which do not enjoy similar public support ⁽¹⁾.
40. Subject to point 41, banks should not use State aid for the acquisition of competing businesses ⁽²⁾. This condition should apply for at least three years and may continue until the end of the restructuring period, depending on the scope, size and duration of the aid.
41. In exceptional circumstances and upon notification, acquisitions may be authorised by the Commission where they are part of a consolidation process necessary to restore financial stability or to ensure effective competition. The acquisition process should respect the principles of equal opportunity for all potential acquirers and the outcome should ensure conditions of effective competition in the relevant markets.
42. Where the imposition of divestitures and/or the prohibition of acquisitions are not appropriate, the Commission may accept the imposition by the Member State of a claw-back mechanism, for example in the form of a levy on the aid recipients. This would allow recovery of part of the aid from the bank after it has returned to viability.
43. Where banks receiving State support are requested to fulfil certain requirements as to lending to the real economy, the credit provided by the bank must be on commercial terms ⁽³⁾.
44. State aid cannot be used to offer terms (for example as regards rates or collateral) which cannot be matched by competitors which are not in receipt of State aid.

⁽¹⁾ See for example Commission Decision of 19 November 2008 in case NN 49/2008, NN 50/2008 and NN 45/2008 *Guarantees to Dexia* (not yet published), point 73, Commission Decision of 19 November 2008 in case N 574/2008 *Guarantees to Fortis Bank* (OJ C 38, 17.2.2009, p. 2), point 58 and Commission Decision of 3 December 2008 in case NN 42/2008, NN 46/2008 and NN 53/A/2008 *Restructuring aid to Fortis Bank and Fortis Bank Luxembourg* (OJ C 80, 3.4.2009, p. 7), paragraph 94. For instance a bank may, in certain circumstances, be prohibited from proposing the highest interest rates offered on the market to retail depositors.

⁽²⁾ It is recalled that restructuring costs have to be limited to the minimum necessary for the restoration of viability. See point 23.

⁽³⁾ Credit provided on non-commercial terms might constitute State aid and might be authorised by the Commission, upon notification, if it is compatible with the common market, for example under the Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

However, in cases where limitations on the pricing behaviour of the beneficiary may not be appropriate, for example because they may result in a reduction of effective competition, Member States should propose other, more suitable, remedies to ensure effective competition, such as measures that favour entry. In the same vein, banks must not invoke State support as a competitive advantage when marketing their financial offers ⁽⁴⁾. These restrictions should remain in place, depending on the scope, size and duration of the aid, for a period ranging between three years and the entire duration of the restructuring period. They would then also serve as a clear incentive to repay the State as soon as possible.

45. The Commission will also examine the degree of market opening and the capacity of the sector to deal with bank failures. In its overall assessment the Commission may consider possible commitments by the beneficiary or commitments from the Member State concerning the adoption of measures ⁽⁵⁾ that would promote more sound and competitive markets, for instance by favouring entry and exit. Such initiatives could, in appropriate circumstances, accompany the other structural or behavioural measures that would normally be required of the beneficiary. The Member State's commitment to introduce mechanisms to deal with bank difficulties at an early stage may be regarded positively by the Commission as an element promoting sound and competitive markets.

5. MONITORING AND PROCEDURAL ISSUES

46. In order to verify that the restructuring plan is being implemented properly, the Commission will request regular detailed reports. The first report will normally have to be submitted to the Commission not later than six months after approval of the restructuring plan.
47. Upon notification of the restructuring plan the Commission has to assess whether the plan is likely to restore long term viability and to limit distortions of competition adequately. Where it has serious doubts as to the compliance of the restructuring plan with the relevant requirements, the Commission is required to open a formal investigation procedure, giving third parties the possibility to comment on the measure and thereby ensuring a transparent and coherent approach while respecting the confidentiality rules applicable in State aid proceedings ⁽⁶⁾.

⁽⁴⁾ Commission Decision of 12 November 2008 in Case N 528/2008 *ING* (OJ C 328, 23.12.2008, p. 10), point 35.

⁽⁵⁾ See for example Commission Decision 2005/418/EC of 7 July 2004 on the aid measures implemented by France for Alstom (OJ L 150, 10.6.2005, p. 24), point 204.

⁽⁶⁾ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions (OJ C 297, 9.12.2003, p. 6).

48. Nevertheless the Commission does not have to open formal proceedings where the restructuring plan is complete and the measures suggested are such that the Commission has no further doubts as to compatibility in the sense of Article 4(4) of Council Regulation EC No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹⁾. This might, in particular, be the case where a Member State has notified the Commission of an aid accompanied by a restructuring plan which meets all of the conditions set out in this Communication, in order to obtain legal certainty as to the necessary follow-up. In such cases the Commission might adopt a final decision stating that rescue aid as well as restructuring aid is compatible under Article 87(3)(b) of the Treaty.

6. TEMPORARY SCOPE OF THE COMMUNICATION

49. This Communication is justified by the current exceptional financial sector crisis and should therefore only be applied

for a limited period. For the assessment of restructuring aid notified to the Commission on or before 31 December 2010, the Commission will apply this Communication. As regards non-notified aid, the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid⁽²⁾ will apply. The Commission will therefore apply this Communication when assessing the compatibility of non-notified aid granted on or before 31 December 2010.

50. Bearing in mind that this Communication is based on Article 87(3)(b) of the Treaty, the Commission may review its content and duration according to the development of market conditions, the experience gathered in the treatment of cases and the overriding interest in maintenance of financial stability.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 119, 22.5.2002, p. 22.

ANNEX

Model restructuring plan**Indicative table of contents for restructuring plan ⁽¹⁾**

1. Information on the financial institution (description of its structure etc.)

(NB: Information previously submitted may be reproduced but shall be integrated into this document and where necessary updated)
2. Market description and market shares
 - 2.1. Description of the main relevant product markets (distinction at least between: retail, wholesale, capital markets etc.)
 - 2.2. Calculations of market shares (e.g. national and European wide, depending on the geographical scope of the relevant markets)
3. Analysis of the reasons why the institution run into difficulty (internal factors)
4. Description of the State intervention and assessment of State aid
 - 4.1. Information on whether the financial institution or its subsidiaries have already received a rescue or restructuring aid in the past
 - 4.2. Information on form and amount of the State support or financial advantage related to support. Information should contain all State aid received as individual aid or under a scheme during the restructuring period

(NB: All aid needs to be justified within the restructuring plan as indicated in the following)
 - 4.3. Assessment of State support under the State aid rules and quantification of aid amount
5. Restoration of viability
 - 5.1. Presentation of the different market assumptions
 - 5.1.1. Initial situation in the main product markets
 - 5.1.2. Expected market development in the main product markets
 - 5.2. Presentation of the scenario without the measure
 - 5.2.1. Required adjustment to the initial business plan
 - 5.2.2. Past, current and future capital ratios (tier 1, tier 2)
 - 5.3. Presentation of the proposed future strategy for the financial institution and how this will lead to viability
 - 5.3.1. Starting position and overall framework
 - 5.3.2. Individual frameworks per business line of the financial institution
 - 5.3.3. Adoptions to changes in regulatory environment (enhancement of risk management, increased capital buffers, etc.)
 - 5.3.4. Confirmation regarding full disclosure of impaired assets
 - 5.3.5. If adequate, change in ownership structure

⁽¹⁾ Information required for the viability assessment may comprise bank's internal data and reports as well as reports prepared by/for the Member State's authorities, including the regulatory authorities.

- 5.4. Description and overview of the different measures planned to restore viability, their costs and their impact on the P&L/balance sheet
 - 5.4.1. Measures at group level
 - 5.4.2. Measures per business lines
 - 5.4.3. Impact of each measure on the P&L/balance sheet
- 5.5. Description of effect of the different measures to limit distortions of competition (cf. point 7) in view of their costs and their impact on the P&L/balance sheet
 - 5.5.1. Measures at group level
 - 5.5.2. Measures in the fields of business
 - 5.5.3. Impact of each measure on the P&L/balance sheet
- 5.6. Comparison with alternative options and brief comparative evaluation of the economic and social effects on the regional, national and Community level (elaboration is mainly required where bank may not meet prudential requirements in the absence of aid)
 - 5.6.1. Alternative options: orderly winding up, break up, or absorption by another bank and resulting effects
 - 5.6.2. General Economic Effects
- 5.7. Timetable for the implementation of the different measures and the final deadline for implementation of the restructuring plan in its entirety (please indicate issues of confidentiality)
- 5.8. Description of the repayment plan of the State aid
 - 5.8.1. Underlying assumptions to the exit planning
 - 5.8.2. Description of the State's exit incentives
 - 5.8.3. Exit or repayment planning until full repayment/exit
- 5.9. Profit and loss accounts/balance sheets for the last three and next five years including key financial ratios and sensitivity study based on best/worst case
 - 5.9.1. Base case
 - 5.9.1.1. Profit and Loss Statement/balance sheet group level
 - 5.9.1.2. Key Financial ratios on group level (RAROC as a benchmark for internal criteria for risk adjusted profitability, CIR, ROE, etc.)
 - 5.9.1.3. Profit and Loss Statement/balance sheet per business unit
 - 5.9.1.4. Key Financial ratios per business unit (RAROC as a benchmark for internal criteria for risk adjusted profitability, CIR, ROE, etc.)
 - 5.9.2. Best case scenario
 - 5.9.2.1. Underlying assumptions
 - 5.9.2.2. Profit and Loss Statement/balance sheet group level
 - 5.9.2.3. Key Financial ratios on group level (RAROC as a benchmark for internal criteria for risk adjusted profitability, CIR, ROE, etc.)

- 5.9.3. Worst case scenario — where a stress test has been performed and/or validated by the national supervisory authorities, the methodologies, the parameters, and the results of such a test will have to be provided ⁽¹⁾
 - 5.9.3.1. Underlying assumptions
 - 5.9.3.2. Profit and Loss Statement/balance sheet group level
 - 5.9.3.3. Key Financial ratios on group level (RAROC as a benchmark for internal criteria for risk adjusted profitability, CIR, ROE, etc.)
 6. Burden sharing — contribution to restructuring by the financial institution itself and other shareholders (accounting and economic value of holdings)
 - 6.1. Limitation of restructuring costs to those necessary for restoring viability
 - 6.2. Limitation of the amount of aid (including information on eventual provisions for limiting dividends and interest payments on subordinated debt)
 - 6.3. Provision of significant own contribution (including information on the size of contribution from shareholders or subordinated creditors)
 7. Measures to limit distortion of competition
 - 7.1. Justification of scope of measures in view of the size and effect of the State aid
 - 7.2. Structural measures, including proposal on timing and milestones for divestments of assets or subsidiaries/branches or other remedies
 - 7.3. Behavioral commitments, including to refrain from mass marketing invoking State aid as an advantage in competitive terms
 8. Monitoring (possible arrangement of a trustee)
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⁽¹⁾ The stress testing should to the extent possible be based on common parameters agreed at Community level (such as a methodology developed by the Committee of European Banking Supervisors) and where appropriate adapted to cater for country- and bank-specific circumstances. Where appropriate, reverse stress tests or other equivalent exercises could also be considered.

Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis

(Text with EEA relevance)

(2010/C 329/07)

1. INTRODUCTION

1. Since the beginning of the global financial crisis in the autumn of 2008, the Commission has issued four communications which provided detailed guidance on the criteria for the compatibility of State support to financial institutions⁽¹⁾ with the requirements of Article 107(3)(b) of the Treaty on the Functioning of the European Union. The communications in question are the Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis⁽²⁾ (the Banking Communication); the Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition⁽³⁾ (the Recapitalisation Communication); the Communication from the Commission on the treatment of impaired assets in the Community banking sector⁽⁴⁾ (the Impaired Assets Communication) and the Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules⁽⁵⁾ (the Restructuring Communication). Three of those four communications, the Banking, Recapitalisation and Impaired Assets Communications, set out the prerequisites for the compatibility of the main types of assistance granted by Member States — guarantees on liabilities, recapitalisations and asset relief measures — while the Restructuring Communication details the particular features that a restructuring plan (or a viability plan) has to display in the specific context of crisis-related State aid granted to financial institutions on the basis of Article 107(3)(b) of the Treaty.

2. All four communications highlight the temporary nature of the acceptability of such aid measures; each states that any such aid measure can only be justified as an emergency response to the unprecedented stress in financial markets and only as long as those exceptional circumstances prevail. The Restructuring Communication is valid for restructuring aid notified by 31 December 2010 whilst the other communications do not have an expiry date.

3. This communication sets out the parameters for the temporary acceptability of crisis-related assistance to banks as from 1 January 2011.

⁽¹⁾ For the convenience of the reader, financial institutions are referred to simply as 'banks' in this document.

⁽²⁾ OJ C 270, 25.10.2008, p. 8.

⁽³⁾ OJ C 10, 15.1.2009, p. 2.

⁽⁴⁾ OJ C 72, 26.3.2009, p. 1.

⁽⁵⁾ OJ C 195, 19.8.2009, p. 9.

2. THE CONTINUED APPLICABILITY OF ARTICLE 107(3)(b) OF THE TREATY AND THE EXTENSION OF THE RESTRUCTURING COMMUNICATION

4. The Commission communications on crisis-related aid to banks, as well as all individual decisions on aid measures and schemes falling within the scope of those Communications, are adopted on the legal basis of Article 107(3)(b) of the Treaty, which exceptionally allows for aid to remedy a serious disturbance in the economy of a Member State. In the most acute stage of the crisis, the condition of a serious disturbance was unquestionably met across the Union in view of the extraordinary stress in financial markets, later combined with an exceptionally severe contraction in the real economy.

5. The economic recovery, which has slowly taken hold since the beginning of 2010, has been proceeding at a somewhat faster pace than expected earlier this year. While recovery is still fragile and uneven across the Union, some Member States are showing modest or even more robust growth rates. In addition, despite some pockets of vulnerability, in broad terms, the health of the banking sector has improved compared with the situation one year ago. As a result, the existence of a serious disturbance in the economy of all Member States is no longer as self-evident as in earlier stages of the crisis. While it is aware of those developments, the Commission still considers that the requirements for State aid to be approved pursuant to Article 107(3)(b) of the Treaty are fulfilled in view of the recent reappearance of stress in financial markets and the risk of wider negative spillover effects, for the reasons set out in this communication.

6. The re-emergence of tensions in sovereign debt markets forcefully illustrates the continued volatility in financial markets. The high level of interconnectedness and interdependence within the financial sector in the Union has given rise to market concerns about contagion. The high volatility of financial markets and the uncertainty about the economic outlook justifies maintaining, as a safety net, the possibility for Member States to argue the need to have recourse to crisis-related support measures on the basis of Article 107(3)(b) of the Treaty.

7. Therefore, the Banking, Recapitalisation and Impaired Assets Communications, which provide guidance on the criteria for the compatibility of crisis-related aid to banks on the basis of Article 107(3)(b) of the Treaty — most

notably in the form of government guarantees, recapitalisations and asset relief measures — need to stay in place beyond 31 December 2010. In the same vein, the Restructuring Communication, which addresses the follow-up to such support measures, also has to remain applicable beyond that date. The temporal scope of the Restructuring Communication — the only one of the four communications with a specified expiry date, 31 December 2010 — should therefore be extended to restructuring aid notified by 31 December 2011.

8. The communications, however, need to be adapted with a view to preparing the transition to the post-crisis regime. In parallel, new, permanent State aid rules for bank rescue and restructuring in normal market conditions will have to be drawn up and should, market conditions permitting, apply as of 1 January 2012. The possible continued need for crisis-induced extraordinary State aid to the financial sector has to be evaluated with that objective in mind. It must be addressed by setting the requirements for the compatibility of such assistance in a way that best prepares for the new regime for the rescue and restructuring of banks based on Article 107(3)(c) of the Treaty.

3. THE ADVANCEMENT OF THE EXIT PROCESS

9. The continued availability of aid measures pursuant to Article 107(3)(b) of the Treaty in the face of exceptional market conditions should not obstruct the process of disengagement from temporary extraordinary support measures for banks. At its meeting on 2 December 2009, the Economic and Financial Affairs Council concluded on the necessity to design a strategy for the phasing out of support measures which should be transparent and duly coordinated among Member States to avoid negative spill-over effects but take into account the different specific circumstances across Member States⁽¹⁾. The conclusions further set out that, in principle, the phasing-out process concerning the various forms of assistance to banks should start with the unwinding of government guarantee schemes, encouraging the exit of sound banks and inducing other banks to address their weaknesses.

10. Since 1 July 2010, the Commission has applied tighter conditions for the compatibility of government guarantees

⁽¹⁾ These conclusions were endorsed by the European Council at its meeting on 11 December 2009. In the same vein, the European Parliament insisted in its Resolution of 9 March 2010 on the Report on Competition Policy 2008 (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0050>) that State support to financial institutions should not be unduly prolonged and that exit strategies should be elaborated as soon as possible.

under Article 107(3)(b) of the Treaty⁽²⁾ by introducing an increased guarantee fee and the new requirement of a viability plan for beneficiaries that have recourse to new guarantees and exceed a certain threshold of total outstanding guaranteed liabilities both in absolute terms and in relation to total liabilities⁽³⁾. The Commission expressly limited the scope of such modified guarantee schemes to the second half of 2010. Considering the current market situation and given the limited time since the introduction of the new pricing conditions, no further adjustment of those conditions appears necessary at present. Government guarantee schemes for which State aid approval expires at the end of 2010 can therefore be authorised for another six months until 30 June 2011 on the basis of the conditions introduced as of July 2010⁽⁴⁾. In line with previous practice, the Commission will reassess the conditions for the compatibility of State guarantees beyond 30 June 2011 in the first half of 2011.

11. In the following paragraphs, the Commission will set out the steps of a gradual phasing out with regard to recapitalisation and impaired asset measures, as, for those measures, no such steps have yet been taken beyond the exit incentives already present through pricing.

4. REMOVAL OF THE DISTINCTION BETWEEN SOUND AND DISTRESSED BANKS FOR THE PURPOSES OF SUBMITTING A RESTRUCTURING PLAN

12. At the beginning of the crisis, the Commission established a distinction between unsound/distressed financial institutions and fundamentally sound financial institutions, that is to say, financial institutions suffering from endogenous, structural problems linked, for instance, to their particular business model or investment strategy and financial institutions whose problems merely and largely had to do with the extreme situation in the financial crisis rather than with the soundness of their business model, inefficiency or excessive risk taking. The distinction is defined in particular on the basis of a number of indicators set out in the Recapitalisation Communication: capital adequacy, current credit default swap (CDs) spreads, current rating of the bank and its outlook as well as, inter alia, the relative size of the recapitalisation. Regarding the latter, the Commission deems aid received under the form of recapitalisation and asset relief measures of more than

⁽²⁾ See Directorate-General for Competition staff working document of 30 April 2010 on the application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010 (http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf)

⁽³⁾ With a flexibility clause permitting a reassessment of the situation and appropriate remedies in the event of a severe new shock to the financial markets across the Union or in one or more Member States. None of the Member States that have notified an extension of their guarantee schemes until the end of 2010 have invoked this flexibility clause.

⁽⁴⁾ The same applies for liquidity schemes.

2 % of the bank's risk weighted assets to be an indicator to distinguish between fundamentally sound and distressed banks. The recapitalisation of a distressed bank triggers the requirement to submit a restructuring plan to the Commission, while the recapitalisation of a sound bank triggers the requirement to submit a viability plan.

13. The original rationale for establishing that distinction and for setting a range of indicators, including a threshold of 2 % of the bank's risk weighted assets, was the fear that capital needs resulting from impairments, higher expectations of the markets as to the capital levels of banks and temporary difficulties in raising capital on markets would otherwise lead to sound banks diminishing their lending to the real economy in order to avoid having to submit a restructuring plan when having recourse to State resources. At present, however, the banking sector overall faces fewer difficulties in raising capital on the markets or, inter alia, through retained earnings⁽¹⁾ and can therefore meet their capital needs without recourse to State aid⁽²⁾. The amount of capital raised by financial institutions on the market has significantly increased over the course of 2009 and 2010, demonstrating renewed access for financial institutions to capital markets as well as anticipation of new regulatory requirements⁽³⁾.

14. The distinction between sound and distressed banks therefore no longer seems relevant in order to determine which banks should enter into a discussion about their

⁽¹⁾ In order to increase capital buffers, banks have decided to sell non-strategic assets such as industrial participations, or to focus on specific geographical sectors. See on this point European Central Bank, *EU Banking Sector Stability, September 2010*.

⁽²⁾ According to the European Central Bank, banks' overall solvency ratio increased substantially in the course of 2009 in all Member States. In addition, information for a sample of large banks in the Union suggests that the improvement in capital ratios continued into the first half of 2010, supported by an increase in retained earnings as well as by further private capital raising and public capital injections for some banks. See European Central Bank: *EU Banking Sector Stability, September 2010*.

⁽³⁾ The future regulatory environment drawn up by the Basel Committee on Banking Supervision (BCBS), so-called Basel III, sets a path for the implementation of the new capital rules which should allow banks to meet the new capital needs over time. In this context, it is interesting to note that, first, most of the largest banks in the Union have reinforced their capital buffers over the last two years to increase their loss absorption capacity and, second, the other banks in the Union should have sufficient time (up to 2019) to build up their capital buffer using, inter alia, retained earnings. It should also be noted that the 'transitional arrangements' provided by the new regulatory framework have established a 'grandfathering period' until 1 January 2018 for existing public sector capital injections. Moreover, a quantitative impact assessment done by the Basel Committee, confirmed by Commission calculations, points to a rather moderate impact on bank lending. Therefore, the new capital requirements are not expected to impact the proposal outlined in this communication.

restructuring with the Commission. As a result, banks which still have recourse to the State in 2011 for raising capital or for impaired assets measures should be required to submit to the Commission a restructuring plan showing the bank's determination to undertake the necessary restructuring efforts and return to viability without undue delay. Thus, as of 1 January 2011, a restructuring plan will be required from every beneficiary of a new recapitalisation or an impaired asset measure⁽⁴⁾.

15. In assessing the restructuring needs of banks, the Commission will take into consideration the specific situation of each institution, the degree to which such a restructuring is necessary to restore viability without further State support as well as prior reliance on State aid. As a general rule, the more significant the reliance on State aid, the stronger the indication of a need to undergo in-depth restructuring in order to ensure long-term viability. In addition, the individual assessment will take account of any specific situation on the markets and will apply the restructuring framework in an appropriately flexible manner in the event of a severe shock endangering financial stability in one or more Member States.

16. Requiring a restructuring plan for banks benefiting from structural aid (that is to say, recapitalisation and/or impaired asset measures) — while at the same time accepting that the mere use of refinancing guarantees would still not trigger the requirement to submit a restructuring plan⁽⁵⁾ — conveys the signal that banks have to prepare for a return to normal market mechanisms without State support as the financial sector gradually emerges from crisis conditions. It provides an incentive for individual institutions that still need aid to accelerate the necessary restructuring. At the same time, it affords sufficient flexibility to duly take account of potentially diverse circumstances affecting the situation of different banks or national financial markets. It also caters for the possibility of an overall or country-specific deterioration in relation to financial stability, which cannot be excluded at present, given the residual fragility in the situation of financial markets.

⁽⁴⁾ This will apply to all recapitalisation or impaired asset measures, irrespective of whether they are designed as individual measures or granted in the context of a scheme.

⁽⁵⁾ However, the Directorate-General for competition staff working document on the application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010 sets a threshold of 5 % of outstanding guaranteed liabilities over total liabilities and at a total amount of guaranteed debt of EUR 500 million above which a viability review is required.

5. TEMPORAL SCOPE, GENERAL OUTLOOK

17. The continued applicability of Article 107(3)(b) of the Treaty and the extension of the Restructuring Communication will be for one year until 31 December 2011 ⁽¹⁾. This extension under changed conditions should also be seen in the context of a gradual transition to a more permanent regime of State aid guidelines for the rescue and restructuring of banks based on Article 107(3)(c) of the Treaty which should, market conditions permitting, apply as of 1 January 2012.

⁽¹⁾ Consistent with the Commission's previous practice, existing or new bank support schemes (irrespective of the support instruments they contain: guarantee, recapitalisation, liquidity, asset relief, other) will only be prolonged/approved for a duration of six months to allow for further adjustments, if necessary, in mid-2011.

E. HORIZONTAL RULES



PART III.1

SUPPLEMENTARY INFORMATION SHEET ON SME AID

This supplementary information sheet must be used for the notification of any individual aid pursuant to Article 6 of Regulation (EC) 70/2001 ⁽¹⁾ in its modified form ⁽²⁾. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

1. Type of individual aid or scheme

Does the individual aid or scheme relate to:

- 1.1. investment aid
- 1.2. consultancy and other services and activities including participation in fairs
- 1.3. R&D expenditure
- yes:
- for notifications of R&D aid to SMEs please complete:
 - supplementary information sheet for R&D 6 a for aid schemes
 - supplementary information sheet for R & D 6 b for individual aid

2. Initial Investment Aid

2.1. Does the aid cover investment in fixed capital relating to:

- the setting-up of a new establishment ?
- the extension of an existing establishment ?
- the starting-up of a new activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)?
- the purchase of an establishment, which has closed, or which would have closed had it not been purchased?

Is replacement investment excluded?

- yes no

2.2. Is the aid calculated as percentage of:

- the investment's eligible costs
- the wage costs of employment created by the investment (aid to job creation)

2.3. a) investment in tangible assets:

Is the value of the investment established as a percentage on the basis of :

- land ?
- buildings ?
- plant/machinery (equipment)?

Please provide a short description:

.....

If the undertaking has its main economic activity in the transport sector, are transport means and transport equipment excluded from the eligible costs (except for railway rolling stock)?

- yes no

⁽¹⁾ Commission Regulation (EC) N° 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.

⁽²⁾ OJ L 63, 28.2.2004, p. 22.

▼ B

If no, please specify the transport means or equipment that are eligible:

.....

- b) purchasing price for the take over of an establishment which has closed or which would have closed had it not been purchased
 c) intangible investment

The eligible costs of intangible investment shall be the costs of acquisition of the technology:

- patents' rights
 operating or patented know-how licences
 unpatented know-how (technical knowledge)

Please provide a short description ⁽¹⁾

- d) wage costs:

Is the amount of the aid expressed as a percentage of the wage costs over a period of two years relating to the employment created?

yes no

2.4. Intensity of the aid

2.4.1 Investment projects situated outside of assisted regions under Article 87(3)(c) and under Article 87(3)(a) for:

small enterprises medium sized enterprises

2.4.2 What are the intensities of the aid for investment projects expressed in gross terms?

Please specify:.....

Investment projects situated inside of assisted regions under Article 87(3)(c) and under Article 87(3)(a):

small enterprises medium sized enterprises

What are the intensities of the aid for investment projects expressed in gross terms? Please specify:

.....

3. **Cumulation of the aid**

3.1. What is the maximum ceiling for cumulated aid?

Please specify:

4. **Specific conditions for aid for job creation**

4.1. Does the aid provide for guarantees that the aid for job creation is linked to the carrying-out of an initial investment project in tangible or intangible assets?

yes no

4.2. Does the aid provide for guarantees that the aid for job creation is created within three years of the investment's completion?

yes no

⁽¹⁾ This description should reflect how the authorities intend to ensure consistency with point 4,6 of the Guidelines of National Regional Aid, OJ 74, 10,3,1998, p. 9, as amended by the community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty, OJ C 288, 9.10.1999, p. 2, and the subsequent Amendments to the Guidelines on National Regional Aid, OJ C 258, 9.9.2000, p.5.

▼ B

Should one of the two previous questions be answered in the negative, please explain how the authorities intend to comply with these requirements:

4.3. Does the employment created represent a net increase in the number of employees in the establishment concerned, compared with the average over the past 12 months?

yes no

4.4. Does the aid provide for guarantees that the employment within the qualified region will be maintained for a minimum period of five years?

yes no

If yes, what are the guarantees for that?

4.5. Does the aid provide for guarantees that the jobs lost during the period of reference are being deducted from the apparent number of jobs created during the same period?

yes no

5. Specific Conditions for Investment Project in assisted areas with higher regional aid

5.1. Does the aid include a clause stipulating that the recipient has made a minimum contribution of at least 25% of the total investment and that this contribution will be exempted of any aid?

yes no

5.2. What are the guarantees that the aid for initial investment (both material and intangible investment) is made conditional on the maintenance of the investment for a minimum period of five years?

6. Aid to consultancy and other service activities

6.1. Are eligible costs limited to:

costs for services provided by outside consultants and other services providers?
 Please specify if such services are not a continuous or periodic activity nor relate to the enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal service or advertising

costs of firms participating in fairs and exhibitions? Please specify if the aid is related to the additional costs incurred for renting, setting up and running the stand:

Is the participation limited to the first participation in a fair or exhibition?

yes no

Other costs (in particular cases where aid is awarded directly to the service(s) provider or consultant(s) Please specify under which conditions:

6.2. Please indicate the maximum aid intensity expressed in gross terms:

If the aid intensity exceeds 50 % gross please indicate in detail why this aid intensity should be necessary:

6.3. Please indicate the maximum ceiling for cumulated aid:

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission — Criteria for the analysis of the compatibility of State aid for training subject to individual notification

(2009/C 188/01)

1. INTRODUCTION

1. The Lisbon European Council in March 2000 set a strategic goal for the European Union to become the most competitive and dynamic knowledge-based economy in the world. The Lisbon conclusions stressed the central role of education and training as the main instruments to increase human capital and its impact on growth, productivity and employment. Training usually has positive external effects for society as a whole since it increases the pool of skilled workers from which undertakings can draw and it improves the competitiveness of the economy and promotes a knowledge society capable of embracing a more innovative development path.
2. Undertakings may, however, provide less than a socially optimal level of training if employees are free to change employers and other undertakings can benefit from recruiting employees trained by them. This is particularly true of training targeted at skills that are transferable between undertakings. State aid may help to create additional incentives for employers to provide training at a level that is socially desirable.
3. This Communication sets out guidance as to the criteria the Commission will apply for the assessment of training aid measures. This guidance is intended to make the Commission's reasoning transparent and to create predictability and legal certainty. Pursuant to Article 6(1)(g) of 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) ⁽¹⁾ any individual training aid, whether granted ad hoc or on the basis of a scheme, will be subject to this guidance when its grant equivalent exceeds EUR 2 million per training project.
4. The criteria set out in this guidance will not be applied mechanically. The level of the Commission's assessment and the kind of information it may require will be proportional to the risk of distortion of competition. The scope of the analysis will depend on the nature of the case.

2. POSITIVE EFFECTS OF THE AID

2.1. Existence of market failures

5. Skilled workers contribute to increasing the productivity and competitiveness of undertakings. Nevertheless, employers and employees may under-invest in training for a number of reasons. Employees

⁽¹⁾ OJ L 214, 9.8.2008, p. 3. For ad-hoc training aid to a large undertaking below the threshold of EUR 2 million, the Commission will *mutatis mutandis* apply the principles as outlined in this Communication, though in a less detailed manner.

may limit their investment in training if they are risk averse, suffer from financial constraints or have difficulties signalling the level of their acquired knowledge to future employers.

6. Undertakings may refrain from training their workforce at the level that would be optimal for society as a whole. This is due to the market failure linked with the positive externalities of training and to difficulties in appropriating the rents if employees are free to change employers. Undertakings may invest less into training, if they are concerned that once trained, an employee will leave before the undertaking has recouped its investment. Undertakings may be reluctant to provide sufficient training to their workers unless training pays off quickly or is rather specific to the needs of the undertaking concerned, or unless contractual clauses can prevent the trained employee from leaving the undertaking before the training cost have been amortised or (part of) the training expenses have been reimbursed.
7. Underinvestment in training may even occur if the undertaking can fully recoup its investment but its private benefits are smaller than the benefits for society as a whole. Such positive externalities of training may arise in particular if training improves transferable skills; that is to say, skills that can be used in more than one undertaking. In contrast, specific training only yields productivity gains in a specific undertaking and can be easily appropriated by undertakings⁽¹⁾. Thus the scope for positive externalities of specific training is less pronounced than the scope for such externalities of general training.
8. Where undertakings are faced with higher costs and uncertain benefits for training disadvantaged or disabled workers⁽²⁾ there may be an incentive to provide less training to those groups. However, training disadvantaged or disabled workers can usually be expected to produce positive externalities for society as a whole⁽³⁾.
9. Member States should demonstrate that there is a market failure justifying the aid. In its analysis, the Commission will, among other things, consider the following elements:
 1. The nature of the training — whether it is specific or general within the meaning of Article 38 of Regulation (EC) No 800/2008; a single training project can comprise both general and specific elements; general training will produce more positive externalities.
 2. The transferability of the skills acquired during the training; the more transferable the skills the higher the likelihood of positive externalities training will be considered to provide transferable skills if, for example:
 - (a) training is jointly organised by several independent undertakings, or if employees of different undertakings may benefit from the training;
 - (b) training is certified, leads to a recognised diploma or is validated by public authorities or institutions;
 - (c) training targets the categories of employees that are characterised by a high turnover in the undertaking and in the sector concerned;
 - (d) training could be valuable for the employee beyond his current job (future occupations in another undertaking, social life, well-being etc.).
 3. The participants in the training; the inclusion of disabled or disadvantaged workers may increase the positive externalities of the training.

⁽¹⁾ However, externalities of general training can also be appropriated by the undertakings through special clauses in contracts requiring the trained employee to remain in the undertaking for a defined period of time after he had received such training.

⁽²⁾ Disabled and disadvantaged workers are defined in Article 2 of Regulation (EC) No 800/2008.

⁽³⁾ For example, society will attach more value to training received by young and low skilled workers than an undertaking will do due to a perceived or real lower productivity.

2.2. State aid as an appropriate policy instrument

10. State aid is not the only policy instrument available to Member States to encourage training. Most training is provided through education systems (for example, universities, schools, vocational training carried out or sponsored by state authorities). Training can also be undertaken by the individuals themselves, with or without the support of their employers.
11. Where the Member State has considered other policy options, and the advantages of using a selective instrument such as State aid for a specific undertaking are established, the measures concerned are considered to constitute an appropriate instrument. The Commission will in particular take account of any impact assessment of the proposed measure the Member State may have made.

2.3. Incentive effect and necessity of the aid

12. State aid for training must result in the aid beneficiary changing its behaviour so that it provides more and/or better training than would have been the case without the aid. If such an increase in the quantity or quality of planned training activities does not take place, the aid is considered not to have an incentive effect.
13. Incentive effect is identified by counterfactual analysis, comparing the levels of intended training with aid and without aid. Most employers find it necessary to train their workforce in order to ensure the proper functioning of their undertakings. It cannot be presumed that State aid for training, especially for specific training, is always needed.
14. Member States should demonstrate to the Commission the existence of the incentive effect and the necessity of the aid. First, the beneficiary must have submitted an application for the aid to the Member State concerned before it started the training project. Second, the Member State must demonstrate that the State aid leads to an increase, by comparison to the situation without aid, in the size, quality, scope or targeted participants of the training project. The additional amount of training offered with aid can be shown, for example, by higher number of training hours or courses, higher numbers of participants, shifting from undertaking-specific to general training, or increasing the participation of certain categories of disadvantaged or disabled workers.
15. In its analysis, the Commission will consider, among other things, the following elements:
 - (a) internal documents of the aid beneficiary on training costs, budgets, participants, content and scheduling for two scenarios: training with aid and training without aid;
 - (b) the existence of a legal obligation for employers to provide a certain type of training (for example, safety): if such an obligation exists, the Commission will normally conclude that there is no incentive effect;
 - (c) the credibility of the project submitted, for example, by referring to and comparing it with training budgets for previous years;
 - (d) the relationship between the training programme and the business activities of the aid beneficiary: the closer the relationship, the less likely the incentive effect. For example, training on the introduction of a new technology in a specific sector is unlikely to have an incentive effect since undertakings have no choice but to train their workforce on the newly introduced technology.

2.4. Proportionality of the aid

16. The Member State must demonstrate that the aid is necessary and the amount is kept to the minimum in order to achieve the objective of the aid.

Eligible costs must be calculated in accordance with Article 39 of Regulation (EC) No 800/2008 and be limited to the costs arising from training activities which would not be undertaken without aid.

Member States should provide evidence that the aid amount does not exceed the part of the eligible costs that cannot be appropriated by the undertaking ⁽¹⁾. In any case, aid intensities must never exceed those laid down in Article 39 of Regulation (EC) No 800/2008 and will be applied to the eligible costs ⁽²⁾.

3. NEGATIVE EFFECTS OF THE AID

17. If the aid is proportionate to achieve the objective of the aid the negative effects of the aid are likely to be limited and an analysis of the negative effects may not be necessary ⁽³⁾. However, in some cases, even where aid is necessary and proportionate for a specific undertaking to increase the amount of training provided, the aid may result in a change in the behaviour of the beneficiary which significantly distorts competition. In those cases the Commission will conduct a thorough analysis of the distortion of competition. The extent of the distortion of competition caused by the aid can vary depending on the characteristics of the aid and of the markets affected ⁽⁴⁾.
18. The aid characteristics that may affect the likelihood and the extent of the distortion are:
- (a) selectivity;
 - (b) the size of the aid;
 - (c) the repetition and duration of the aid;
 - (d) the effect of the aid on the undertaking's costs.
19. For example, a training scheme used to encourage undertakings in general in a Member State to undertake more training is likely to have a different effect on the market than a large amount of aid given to a single undertaking to enable it to increase its training. The latter is likely to distort competition more significantly as the aid beneficiary's competitors become less able to compete ⁽⁵⁾. The distortion will be even greater if the training costs in the beneficiary's business represent a high share of the total costs.
20. In assessing the market characteristics, which can give a much more accurate picture of the likely impact of an aid, the Commission will among other things consider:
- (a) the structure of the market; and
 - (b) the characteristics of the sector or industry.
21. The structure of the market will be assessed through the concentration of the market, the size of undertakings ⁽⁶⁾, importance of product differentiation ⁽⁷⁾ and barriers to entry and exit. Market shares and concentration ratios will be calculated once the relevant market has been defined. In general, the fewer undertakings there are, the larger their share of the market, and the less competition one would expect to observe ⁽⁸⁾. If the affected market is concentrated with high barriers to entry ⁽⁹⁾ and the aid beneficiary is a major player on it then it is more likely that competitors will have to alter their behaviour in response to the aid.

⁽¹⁾ This equals the part of the extra costs of the training that the undertaking cannot recover by benefiting directly from the skills acquired by its employees during the training.

⁽²⁾ See also current case practice, for example, C 35/2007, Training aid to Volvo Cars in Gent, Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle airport (OJ L 346, 23.12.2008, p. 1) and Commission Decision 2007/612/EC of 4 April 2007 on State aid C 14/06 which Belgium is planning to implement for General Motors Belgium in Antwerp (OJ L 243, 18.9.2007, p. 71).

⁽³⁾ In addition, if the labour market functioned perfectly, employees could always extract a larger salary for their better skills due to the training received and internalise positive externalities of the training.

⁽⁴⁾ A number of markets can be affected by the aid, because the impact of the aid may not be restricted to the markets where the aid beneficiary is active but it can extend to other markets, for example input markets.

⁽⁵⁾ It should be noted however, that training aid given to a whole sector in one Member State may lead to a distortion on trade between Member States.

⁽⁶⁾ Size of the undertaking can be expressed in the terms of market shares as well as turnover and/or employment.

⁽⁷⁾ The lower the degree of product differentiation, the greater the effect of the aid on competitors' profits will be.

⁽⁸⁾ It is important to note however, that some markets are competitive despite there being few undertakings present.

⁽⁹⁾ It should be noted however, that sometimes granting of an aid helps to overcome entry barriers and allows new undertakings to enter a market.

22. While examining the characteristics of the sector the Commission will look among other things at the importance of the trained workforce for the business, the existence of overcapacity, whether the markets in the industry are growing, mature or declining, financing strategies of competitors for training (State aid, employees, employers). For example, training aid in a declining industry may increase the risk of a distortion of competition by keeping an inefficient undertaking afloat.
23. Training aid may, in particular cases, lead to distortions of competition in respect of market entry and exit, effect on trade flows and crowding out of training investment.

Market entry and exit

24. In a competitive market undertakings sell products that generate profits. By altering costs, State aid alters profitability, and can therefore affect the undertaking's decision to offer a product or not. For example, State aid that would reduce the ongoing costs of production such as training for staff would make entry more appealing and enable undertakings with otherwise poor commercial prospects to enter a market or introduce new products to the detriment of more efficient competitors.
25. The availability of State aid may also affect an undertaking's decision to leave a market where it is already operating. State aid for training could reduce the size of losses and enable an undertaking to stay in the market for longer — which may mean that other, more efficient undertakings that do not get aid are forced to exit instead.

Effect on trade flows

26. State aid for training may result in some territories benefiting from more favourable production conditions than others. This may result in the displacement of trade flows in favour of the regions where such aid is given.

Crowding out of training investment

27. To survive in the marketplace and maximize profits, undertakings have incentives to invest in training of staff. The amount of investment in training which each undertaking is willing to make also depends on how much its competitors invest. Undertakings which are subsidised by the state may reduce their own investment. Alternatively, if the aid induces the aid beneficiary to invest more, competitors may react by reducing their own expenditure in training. If, to achieve the same objective, aid beneficiaries or their competitors spend less in the presence of the aid than in its absence, their private investment in training of staff is crowded out by the aid.

4. BALANCING AND DECISION

28. The last step in the analysis is to evaluate the extent to which the positive effects of the aid outweigh its negative effects. This will be done on a case-by-case basis. In order to balance the positive and the negative effects, the Commission will assess them and make an overall assessment of their impact on producers and consumers in each of the markets affected. Unless quantitative information is readily available the Commission will use qualitative information for the purposes of the assessment.
29. The Commission is likely to take a more positive stance and therefore accept a higher degree of distortion of competition, if the aid is necessary, well targeted and proportionate for a specific undertaking to increase its training activities and society benefits from the extra training provided more than the aid beneficiary.

ANNEX I

'PART III.2

SUPPLEMENTARY INFORMATION SHEET ON STATE AID FOR TRAINING

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(g) of Commission Regulation (EC) No 800/2008 ⁽¹⁾ and covered by the Criteria for the compatibility analysis of training State aid cases subject to individual notification (hereinafter "Criteria for the compatibility analysis") ⁽²⁾. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT

Aid for training may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid for training do not distort competition to an extent contrary to the common interest, but rather contribute to the common interest. This happens when the benefits of State aid in terms of positive knowledge spill over outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

Characteristics of the notified measure

1. Please provide a brief description of the measure specifying objective(s) of the measure, aid instrument, structure/organisation of the training, beneficiaries, budget, aid amount, payment schedule, aid intensity, and eligible costs.

2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?

yes no

3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?

yes no

4. Is the aid foreseen for the maritime transport sector?

yes no

If yes, please answer the following questions:

(a) Is the trainee not an active member of the crew but a supernumerary on board?

yes no

(b) Shall the training be carried out on board of ships entered into Community registers?

yes no

5. Does the notified measure relate to:

Specific training ⁽³⁾:

yes no

⁽¹⁾ 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) (OJ L 214, 9.8.2008, p. 3).

⁽²⁾ OJ C 188, 11.8.2009, p. 1.

⁽³⁾ As defined in Article 38 of Regulation (EC) No 800/2008.

General training ⁽³⁾:

yes no

A combination of general and specific training:

yes no

Training aid given to disabled or disadvantaged workers ⁽⁴⁾:

yes no

6. Please provide a detailed description of the training project including programme, skills to be acquired, timing, number of hours, participants, organisers, budget, etc.
7. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, annual turnover, number of employees and business activities.
8. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
9. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

Objective of the aid

10. Please give a detailed description of the objectives of common interest pursued by the notified measure.

Existence of positive externalities ⁽⁵⁾

11. Please demonstrate that the training will generate positive externalities and provide the supporting documents.

The following elements may be used for the purposes of demonstrating positive externalities. Please specify those relevant for the notified measure, and provide supporting documents:

- Nature of the training
- Transferability of the skills acquired during the training
- Participants to the training

Appropriate instrument ⁽⁶⁾

12. Please explain to what extent the notified measure represents an appropriate instrument to increase training activities and provide the supporting documents.

Incentive effect and necessity of the aid ⁽⁷⁾

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State in order to prove that without the aid, i.e. in the counterfactual situation, the quantity or quality of the training activities would be smaller.

13. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary.

14. If no, specify the relevant dates:

The training project will start on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

⁽³⁾ As defined in Article 38 of Regulation (EC) No 800/2008.

⁽⁴⁾ As defined in Article 2 of Regulation (EC) No 800/2008.

⁽⁵⁾ Cf. Criteria for the compatibility analysis, Section 2.1.

⁽⁶⁾ Cf. Criteria for the compatibility analysis, Section 2.2.

⁽⁷⁾ Cf. Criteria for the compatibility analysis, Section 2.3.

15. Please provide the beneficiary's internal documents on training costs, participants, content and scheduling for two scenarios: training project with aid and training project without aid. Please explain, on the basis of this information, how State aid increases the quantity and/or quality of the planned training activities.
16. Please confirm that there is no legal obligation for the employers to provide the training type covered by the notified measure.
17. Please provide with the beneficiary's training budgets for previous years.
18. Please explain the relationship between the training programme and business activities of the aid beneficiary.

Proportionality of the aid ⁽⁸⁾

Eligible costs

Eligible costs must be calculated following Article 39 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve an increase of training activities.

19. Please specify the eligible costs foreseen for the measure
- trainers' personnel costs
 - trainers' and trainees' travel expenses, including accommodation costs
 - other current expenses such as materials and supplies directly related to the project
 - depreciation of tools and equipment, to the extent that they are used exclusively for the training project
 - cost of guidance and counselling services with regard to the training project
 - indirect costs (administrative, rent, overheads), transport and tuition costs for participants) up to the amount of the total of the other eligible costs referred to above
 - trainees' personnel costs ⁽⁹⁾.
20. Please provide a detailed calculation of the eligible costs of the notified measure ensuring that the eligible costs are limited to the part of **extra costs** necessary to achieve an increase of quality or quantity of training activities.
21. Please provide evidence that the aid is limited to the minimum, i.e. to the part of the extra costs of the training that the company cannot recover by benefiting directly from the skills acquired by its employees during the training.

Aid intensities for general training

22. Please specify the aid intensity applicable to the notified measure.
23. Is the general training under the notified measure given to disabled or disadvantaged workers?
- yes no

24. Nature of the beneficiary:

- | | | | | |
|-------------------------|--------------------------|-----|--------------------------|----|
| Large enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Medium sized enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Small enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |

Aid intensities for specific training

25. Please specify the aid intensity applicable to the notified measure.
26. Is the specific training under the notified measure given to disabled or disadvantaged workers?
- yes no

⁽⁸⁾ Cf. Criteria for the compatibility analysis, Section 2.4.

⁽⁹⁾ 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.

27. Nature of the beneficiary

Large enterprise yes no

Medium sized enterprise yes no

Small enterprise yes no

Analysis of the distortion of competition and trade ⁽¹⁰⁾

28. Please specify whether the beneficiary received training aid in the past and provide details on the previous aid (dates, amount of aid, and duration of training projects).
29. Please specify the annual training costs of the beneficiary (total training budget for the last three years, proportion of training costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of annual training costs and total costs covered by the aid, etc.).
30. Please specify the relevant product and geographic markets on which the beneficiary is active and on which the aid is likely to have an impact.
31. For each of these markets please provide:
- market concentration ratio,
 - market share of the beneficiary,
 - market shares of the other companies present in these markets.
32. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).
33. Please describe the features of the sector where the beneficiary is active (e.g. importance of the trained workforce for the business, existence of overcapacity, financing strategies of training for competitors, etc.).
34. If relevant, please provide information on the effects on trade (shift of trade flows).

CUMULATION

35. Is the aid granted under the notified measure combined with other aid?

yes no

If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

OTHER INFORMATION

36. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.

⁽¹⁰⁾ This section does not apply to measures of less than EUR 2 provided the question 10.3 in Part I of this Annex is duly completed.

Communication from the Commission — Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification

(2009/C 188/02)

1. INTRODUCTION

1. The promotion of employment and social cohesion is a central aim of the economic and social policies of the Community and of its Member States. Unemployment and, in particular, structural unemployment, remains a significant problem in some parts of the Community, and certain categories of workers still encounter difficulties in entering the labour market. State aid in the form of subsidies to wage costs, where 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; and (b) the compulsory contributions, such as social security charges; and (c) child care and parent care costs ('wage subsidies') can provide additional incentives to undertakings to increase their levels of employment of disadvantaged and disabled workers. The objective of such aid is thus to encourage the recruitment of the targeted categories of worker.
2. This Communication sets out guidance as to the criteria the Commission will apply for the assessment of State aid in the form of wage subsidies that needs to be notified individually pursuant to Article 6(1)(h) and (i) of the 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⁽¹⁾). This guidance is intended to make the Commission's reasoning transparent and to create predictability and legal certainty.
3. This guidance applies to State aid in the form of wage subsidies for disadvantaged workers, severely disadvantaged workers and disabled workers within the meaning of Article 2(18), (19) and (20) of Regulation (EC) No 800/2008. Any individual measure, whether granted ad hoc or on the basis of a scheme, will be subject to this guidance when its grant equivalent exceeds EUR 5 million per undertaking per year for the employment of disadvantaged workers and severely disadvantaged workers (hereinafter referred to together as 'disadvantaged workers') and EUR 10 million per undertaking per year for the employment of disabled workers⁽²⁾.
4. The criteria set out in this guidance will not be applied mechanically. The level of the Commission's assessment and the kind of information it may require will be proportional to the risk of distortion of competition. The scope of the analysis will depend on the nature of the case.

2. POSITIVE EFFECTS OF THE AID

2.1. Existence of an objective of common interest

5. Certain categories of worker experience particular difficulty in finding jobs, because employers consider them to be less productive or have prejudices against them. This perceived or real lower productivity may be due either to lack of recent experience in employment (for example, young workers or long-term unemployed) or to a permanent disability. Because of their perceived or real lower productivity the workers are likely to be excluded from the labour market unless employers are offered compensation for their employment.
6. It is socially desirable that all categories of workers are integrated in the labour market. This means that a share of the domestic income may be redistributed to the categories of workers concerned by the

⁽¹⁾ OJ L 214, 9.8.2008, p. 3.

⁽²⁾ Due to their specific nature, individual measures applying to the compensation for the additional cost of employing disabled workers and additional costs incurred by social enterprises of which the grant equivalent exceeds EUR 10 million per undertaking per year will be assessed on the basis of Article 87(3)(c) of the Treaty establishing the European Community. For ad-hoc aid for the employment of disadvantaged workers below EUR 5 million and ad-hoc aid to large undertakings for the employment of disabled workers below EUR 10 million, the Commission will *mutatis mutandis* apply the principles as outlined in this guidance, though in a less detailed manner.

measures. State aid may help disadvantaged and disabled workers to enter the labour market or stay in the labour market by covering the extra costs resulting from their perceived or real lower productivity.

7. Member States should demonstrate that the aid will address the objective of common interest. In its analysis, the Commission will, among other things, consider the following elements:
 - (a) the number and categories of workers concerned by the measure;
 - (b) employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking or undertakings concerned;
 - (c) unemployment rates for the categories of workers concerned by the measure on the national and/or regional level;
 - (d) particularly marginalised sub-groups within the broader categories of disabled and disadvantaged workers.

2.2. State aid as an appropriate policy instrument

8. State aid in the form of wage subsidies is not the only policy instrument available to Member States to encourage employment of disadvantaged and disabled workers. Member States can also use general measures such as reduction of the taxation of labour and social costs, boosting investment in education and training, measures to provide guidance and counselling, assistance and training for the unemployed and improvements in labour law.
9. Where the Member State has considered other policy options, and the advantages of using a selective instrument such as State aid for a specific undertaking are established, the measures concerned are considered to constitute an appropriate instrument. The Commission will in particular take account of any impact assessment of the proposed measure the Member State may have made.

2.3. Incentive effect and necessity of the aid

10. State aid for the employment of disadvantaged and disabled workers must result in the aid beneficiary changing its behaviour so that the aid results in a net increase in the number of disadvantaged or disabled employees in the undertaking concerned. Newly recruited disadvantaged or disabled employees should only fill newly created posts or posts that have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct. Posts resulting from redundancy are not to be filled with subsidised disadvantaged or disabled workers. Thus State aid cannot be used to replace workers in respect of whom the undertaking no longer receives a subsidy and who have consequently been dismissed.
11. Member States should demonstrate to the Commission the existence of the incentive effect and the necessity of the aid. First, the beneficiary must have submitted an application for the aid to the Member State concerned before the categories of workers concerned by the measures were employed. Second, the Member State must demonstrate that the aid is paid in respect of a disadvantaged or disabled worker in an undertaking, where the recruitment would have not occurred without the aid.
12. In its analysis, the Commission will consider, among other things, the following elements:
 - (a) internal documents of the aid beneficiary on employment costs in relation to the categories of workers concerned by the measure for two scenarios: with aid and without aid;

- (b) existing or past wage subsidies in the undertaking concerned; categories and number of workers subject to subsidies;
- (c) annual turnover of the categories of workers concerned by the measure.

2.4. Proportionality of the aid

13. The Member State must demonstrate that the aid is necessary and the amount is kept to the minimum in order to achieve the objective of the aid.

Member States should provide evidence that the aid amount does not exceed the net additional costs of employing the categories of workers concerned by the measure compared to the costs of employing workers who are not disadvantaged or disabled ⁽¹⁾.

In any case, aid intensities must never exceed those laid down in Articles 40 ⁽²⁾ and 41 ⁽³⁾ of Regulation (EC) No 800/2008. Eligible costs, to which aid intensities are to be applied, must be calculated in accordance with Articles 40 ⁽⁴⁾ and 41 ⁽⁵⁾ of Regulation (EC) No 800/2008.

3. NEGATIVE EFFECTS OF THE AID

14. If the aid is proportionate to achieve the objective of the aid, the negative effects of the aid are likely to be limited and an analysis of the negative effects may not be necessary. However, in some cases, even where the aid is necessary and proportionate for a specific undertaking to increase the employment of categories of workers concerned by the measure, the aid may result in a change in the behaviour of the beneficiary which significantly distorts competition. In those cases the Commission will conduct an analysis of the distortion of competition. The extent of the distortion of competition caused by the aid can vary depending on the characteristics of the aid and of the markets affected ⁽⁶⁾.
15. The aid characteristics that may affect the likelihood and the extent of the distortion are:
- (a) selectivity;
 - (b) the size of the aid;
 - (c) the repetition and duration of the aid;
 - (d) the effect of the aid on the undertaking's costs.
16. For example, an aid scheme used to encourage undertakings in general in a Member State to employ more disadvantaged or disabled workers is likely to have a different effect on the market than a large amount of aid given ad hoc to a single undertaking to enable it to increase its employment of a certain category of workers. The latter is likely to distort competition more significantly as the aid beneficiary's competitors become less able to compete. The distortion will be even greater if the labour costs in the beneficiary's business represent a high share of the total costs.

⁽¹⁾ Net additional costs take into account the costs corresponding to the employment of the targeted categories of disadvantaged or disabled workers (for example, due to lower productivity) and benefits, which the aid beneficiary extracts from this employment (for example, due to an improvement of the image of the undertaking).

⁽²⁾ The aid intensity for disadvantaged workers must not exceed 50 % of the eligible costs.

⁽³⁾ The aid intensity for disabled workers must not exceed 75 % of the eligible costs.

⁽⁴⁾ For the employment of disadvantaged workers eligible costs are the wage costs over a maximum period of 12 months following recruitment. However, where the worker concerned is a severely disadvantaged worker, eligible costs are the wage costs over a maximum period of 24 months following recruitment.

⁽⁵⁾ For the employment of disabled workers eligible costs are the wage costs over any given duration during which the disabled worker is being employed.

⁽⁶⁾ A number of markets can be affected by the aid, because the impact of the aid may not be restricted to the markets where the aid beneficiary is active but can extend to other markets, for example input markets.

17. In assessing the market characteristics, which can give a much more accurate picture of the likely impact of an aid, the Commission will among other things consider:
- (a) the structure of the market;
 - (b) the characteristics of the sector or industry;
 - (c) the situation on the national/regional labour market.
18. The structure of the market will be assessed through the concentration of the market, the size of undertakings ⁽¹⁾, importance of product differentiation ⁽²⁾, and barriers to entry and exit. Market shares and concentration ratios will be calculated once the relevant market has been defined. In general, the fewer undertakings there are, the larger their share of the market, and the less competition one would expect to observe ⁽³⁾. If the affected market is concentrated with high barriers to entry ⁽⁴⁾ and the aid beneficiary is a major player on it then it is more likely that competitors will have to alter their behaviour in response to the aid, for example postpone or abandon the introduction of a new product or technology or exit the market all together.
19. The Commission will also look at the characteristics of the sector, such as the existence of overcapacity and whether the markets in the industry are growing ⁽⁵⁾, mature or declining. For example, the presence of overcapacity or of mature markets in an industry may increase the risk of aid leading to inefficiency and displacement of output among undertakings which do not have subsidised workers.
20. Finally, the measure will be placed in the context of the situation on the labour market, that is to say, unemployment and employment rates, wage levels, and labour law.
21. Wage subsidies may in particular cases lead to the distortions of competition discussed in paragraphs 22 to 27.

Substitution and displacement effect

22. The substitution effect relates to the situation where jobs given to a certain category of workers simply replace jobs for other categories. A wage subsidy which targets a specific subgroup of workers splits the labour force into subsidised workers and unsubsidised workers, and may induce undertakings to replace unsubsidised workers with subsidised workers. This occurs because relative wage costs for subsidised and unsubsidised workers are changed ⁽⁶⁾.
23. Since undertakings which employ subsidised workers, compete in the same markets for goods or services as those which do not employ subsidised workers, wage subsidies can contribute to the reduction of jobs elsewhere in the economy. Such a situation occurs when an undertaking employing subsidised workers increases output, but displaces output among undertakings who do not employ subsidised workers and, as a result, the aid crowds-out unsubsidised employment.

Market entry and exit

24. Employment costs form part of the normal operating costs of any undertaking. It is therefore particularly important that aid should have a positive effect on employment and should not merely enable undertakings to reduce costs which they would otherwise bear. For example, wage subsidies reduce the ongoing costs of production and thus would make entry more appealing and enable undertakings with otherwise poor commercial prospects to enter a market or introduce new products to the detriment of more efficient competitors.

⁽¹⁾ Size of the undertaking can be expressed in the terms of market shares as well as turnover and/or employment.

⁽²⁾ The lower the degree of product differentiation, the greater the effect of the aid on competitors' profits will be.

⁽³⁾ However, some markets are competitive despite there being few undertakings present.

⁽⁴⁾ However, granting aid sometimes helps to overcome entry barriers and allows new undertakings to enter a market.

⁽⁵⁾ The existence of growing markets will usually lead to a less pronounced effect of the aid on competitors.

⁽⁶⁾ Such substitution effect depends on the elasticity of demand for labour, both for subsidised and unsubsidised workers.

25. The availability of State aid may also affect an undertaking's decision to leave a market where it is already operating. Wage subsidies could reduce the size of losses and enable an undertaking to stay in the market for longer — which may mean that other, more efficient undertakings that do not receive aid are forced to exit instead.

Investment incentives

26. In the markets where wage subsidies are granted undertakings are discouraged from competing and may reduce their investments and attempts to increase efficiency and innovation. There may be a delay in the introduction of new less labour intensive technologies by the aid beneficiary due to the change in relative costs for labour intensive and technology intensive production methods. Manufacturers of competing or complementary products may also decrease or delay their investment. As a consequence, the overall investment level in the industry concerned will decline.

Effect on trade flows

27. Wage subsidies within a particular region may result in some territories benefiting from more favourable production conditions than others. This may result in the displacement of trade flows in favour of the regions where such aid is given.

4. BALANCING AND DECISION

28. The last step in the analysis is to evaluate the extent to which the positive effects of the aid outweigh its negative effects. This will be done on a case-by-case basis for all individual measures. In order to balance the positive and the negative effects, the Commission will assess them and make an overall assessment of their impact on producers and consumers in each of the markets affected. Unless quantitative information is readily available the Commission will use qualitative information for the purposes of the assessment.
29. The Commission is likely to take a more positive stance and therefore accept a higher degree of distortion of competition if the aid is necessary and well targeted to achieve the objective of the aid and is limited to the net extra costs of compensating for the lower productivity of the categories of workers concerned by the measure.

ANNEX II

PART III.3

SUPPLEMENTARY INFORMATION SHEET ON STATE AID TO DISADVANTAGED AND DISABLED WORKERS

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(h) to (i) of Regulation (EC) No 800/2008 and covered by the Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification (hereinafter "Criteria for the compatibility analysis") ⁽¹⁾. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT

Aid to disadvantaged and disabled workers may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid to disadvantaged and disabled workers do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of the increased net employment of targeted disabled and disadvantaged workers outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

Characteristics of the notified measure

1. Please provide a brief description of the notified measure specifying objective of the aid, aid instrument, beneficiaries, categories of workers concerned, aid amount, payment schedule, duration, aid intensity, and eligible costs.
2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?
 yes no
3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?
 yes no
4. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, turnover, number of employees and business activities.
5. Does the notified measure relate to:
 - Recruitment of disadvantaged workers ⁽²⁾:
 yes no
 - Recruitment of severely disadvantaged workers ⁽³⁾:
 yes no
 - Recruitment of disabled workers ⁽⁴⁾:
 yes no

⁽¹⁾ OJ C 188, 11.8.2009, p. 6.

⁽²⁾ As defined in Article 2(18) of Regulation (EC) No 800/2008.

⁽³⁾ As defined in Article 2(19) of Regulation (EC) No 800/2008.

⁽⁴⁾ As defined in Article 2(20) of Regulation (EC) No 800/2008.

6. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
7. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

Objective of the aid

8. Please give a detailed description of the objectives of common interest pursued by the notified measure.
- Equity objective of common interest ⁽⁵⁾
9. Please demonstrate that the notified measure will lead to a net increase of employment of the targeted disabled and disadvantaged workers and quantify the increase.
10. The following elements may be used for the purposes to demonstrate that the notified measure contributes to an equity objective of common interest. Please specify those relevant for the notified measure, and provide supporting documents:
- Number and categories of workers concerned by the measure
 - Employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking(s) concerned
 - Unemployment rates for the categories of workers concerned by the measure on the national and/or regional level.

Appropriate instrument ⁽⁶⁾

11. Please explain to what extent the notified measure represents an appropriate instrument to increase the employment of disadvantaged and/or disabled workers and provide the supporting documents.

Incentive effect and necessity of the aid ⁽⁷⁾

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State proving that the wage subsidy is only paid for a disadvantaged or disabled worker in a firm, where the recruitment would have not occurred without the aid.

12. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?
- yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary to increase a net employment of disabled or disadvantaged workers.

13. If no, specify the relevant dates:

The employment commenced on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

14. Does the recruitment lead to an increase, by comparison to a situation without aid, of number of disadvantaged or disabled workers in the undertaking(s) concerned?
- yes no
15. If not, have the post or posts 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?
- yes no

⁽⁵⁾ Cf. Criteria for the compatibility analysis, Section 2.1.

⁽⁶⁾ Cf. Criteria for the compatibility analysis, Section 2.2.

⁽⁷⁾ Cf. Criteria for the compatibility analysis, Section 2.3.

16. Please describe any existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies.

Proportionality of the aid ⁽⁸⁾

Eligible costs

Eligible costs must be calculated following Articles 40 and 41 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve a net increase of disadvantaged or disabled workers employed.

17. Which are the eligible costs foreseen under the notified measure?

- gross wage, before tax
- compulsory contributions, such as social security charges
- child care and parent care costs.

18. Please provide a detailed calculation of the eligible costs and the period covered ⁽⁹⁾ by the notified measure ensuring that the eligible costs are limited to the costs necessary to achieve a net increase of employment of the targeted categories of disadvantaged or disabled workers.

19. Please provide evidence that the aid is limited to the minimum, i.e. the aid amount does not exceed the net additional costs of employing the targeted categories of disadvantaged or disabled workers compared to the costs of employing workers who are not disadvantaged/disabled.

Aid intensities for disadvantaged workers

20. Please specify the aid intensity applicable to the notified measure.

Aid intensities for disabled workers

21. Please specify the aid intensity applicable to the notified measure.

Analysis of the distortion of competition and trade ⁽¹⁰⁾

22. Please provide information on the aid amount, payment schedule and aid instrument.

23. Please specify whether the beneficiary received aid for disadvantaged or disabled workers in the past and provide details on the previous aid measures (dates, amount of aid, categories and number of workers concerned, and duration of wage subsidies).

24. Please specify the employment costs of the beneficiary (total employment costs, employment costs of targeted disabled and disadvantaged workers, proportion of employment costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of employment costs and total costs covered by the aid).

25. Please specify the relevant product and geographic markets on which the beneficiary is active and the aid is likely to have an impact.

26. For each of these markets please provide:

- market concentration ratio,
- market share of the beneficiary,
- market shares of the other companies present in these markets.

27. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).

⁽⁸⁾ Cf. Criteria for the compatibility analysis, Section 2.4.

⁽⁹⁾ For employment of disadvantaged workers eligible costs shall be the wage costs over a maximum period of 12 months (or 24 months for severely disadvantaged worker) following recruitment. For employment of disabled workers eligible costs shall be the wage costs over any given duration during which the disabled worker is being employed.

⁽¹⁰⁾ This section does not apply to measures of less than EUR 5 million for the employment of disadvantaged workers and of less than EUR 10 million for the employment of disabled workers provided the question 10.3 in Part I of this Annex is duly completed.

28. Please describe the features of the sector where the beneficiary is present (e.g. importance of the labour costs for the sector, existence of overcapacity, etc.).
29. Please describe the situation on the national/regional labour market (e.g. unemployment and employment rates, wage levels, labour law, etc.).
30. If relevant, please provide information on the effects on trade (shift of trade flows).

CUMULATION

31. Is the aid granted under the notified measure combined with other aid?

yes no

32. If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

OTHER INFORMATION

33. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.'

ANNEX III

1. Question 2.3 of Part III.7a of Annex I to Regulation (EC) No 794/2004 is replaced by the following:
- '2.3. Will the aid under the scheme be linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm?'
2. Question 2.3 of Part III.7b of Annex I to Regulation (EC) No 794/2004 is replaced by the following:
- '2.3. Is the aid linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm?'

GUIDELINES ON NATIONAL REGIONAL AID FOR 2007-2013

(2006/C 54/08)

(Text with EEA relevance)

1. Introduction

1. On the basis of Article 87(3)(a) and (c) of the Treaty, State aid granted to promote the economic development of certain disadvantaged areas within the European Union may be considered to be compatible with the common market by the Commission. This kind of State aid is known as national regional aid. National regional aid consists of aid for investment granted to large companies, or in certain limited circumstances, operating aid, which in both cases are targeted on specific regions in order to redress regional disparities. Increased levels of investment aid granted to small and medium-sized enterprises located within the disadvantaged regions over and above what is allowed in other areas are also considered as regional aid.
2. By addressing the handicaps of the disadvantaged regions, national regional aid promotes the economic, social and territorial cohesion of Member States and the European Union as a whole. This geographical specificity distinguishes regional aid from other forms of horizontal aid, such as aid for research, development and innovation, employment, training or the environment, which pursue other objectives of common interest in accordance with Article 87(3) of the Treaty, albeit sometimes with higher rates of aid in the disadvantaged areas in recognition of the specific difficulties which they face ⁽¹⁾.
3. National regional investment aid is designed to assist the development of the most disadvantaged regions by supporting investment and job creation. It promotes the expansion and diversification of the economic activities of enterprises located in the less-favoured regions, in particular by encouraging firms to set up new establishments there.
4. The criteria applied by the Commission when examining the compatibility of national regional aid with the common market under Articles 87(3)(a) and 87(3)(c) of the EC Treaty have been codified in the 1998 guidelines on national regional aid ⁽²⁾ which cover the period 2000-2006 ⁽³⁾. The specific rules governing aid for large investment projects have been codified in the 2002 Multisectoral Framework ⁽⁴⁾. However, important political and economic developments since 1998, including the enlargement of the European Union on 1 May 2004, the anticipated accession of Bulgaria and Romania and the accelerated process of integration following the introduction of the single currency, have created the need for a comprehensive review in order to prepare new guidelines which will apply from 2007 to 2013.
5. Regional aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union. In particular the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned. Furthermore, the advantages of the aid in terms of the development of a less-favoured region must outweigh the resulting distortions of competition ⁽⁵⁾. The weight given to the advantages of the aid is likely to vary according to the derogation applied, so that a greater distortion of competition can be accepted in the case of the most disadvantaged regions covered by Article 87(3)(a) than in those covered by Article 87(3)(c) ⁽⁶⁾.

⁽¹⁾ Regional top-ups for aid granted for such purposes are therefore not considered as regional aid.

⁽²⁾ OJ C 74 10.3.1998, p. 9, modified in OJ C 288 9.10.1999, p. 2, and OJ C 285 9.9.2000, p. 5.

⁽³⁾ Point 4.4 of the regional aid guidelines was amended by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

⁽⁴⁾ OJ C 70, 19.3.2002, p. 8, as amended in OJ C 263, 1.11.2003, p. 3.

⁽⁵⁾ See in this respect the judgment of the Court of Justice in Case 730/79, *Philip Morris* [1980], ECR 2671, paragraph 17 and in Case C-169/95, *Spain v Commission* [1997], ECR I-135, paragraph 20.

⁽⁶⁾ See in this respect the judgment of the Court of First Instance in T-380/94, *AIUFFASS and AKT* [1996], ECR II-2169, paragraph 54.

6. In certain very limited, well-defined cases, the structural handicaps of a region may be so severe that regional investment aid, together with a comprehensive horizontal aid regime may not be sufficient to trigger a process of regional development. Only in such cases may regional investment aid be supplemented by regional operating aid.
7. An increasing body of evidence suggests that there are significant barriers to the formation of new enterprises in the Community which are more acute inside the disadvantaged regions. The Commission has therefore decided to introduce a new aid instrument in these guidelines to encourage small business start-ups in disadvantaged regions with differentiated aid ceilings according to the regions concerned.

2. Scope

8. The Commission will apply these Guidelines to regional aid granted in every sector of the economy apart from the fisheries sector and the coal industry ⁽⁷⁾ which are subject to special rules laid down by specific legal instruments.

In the agricultural sector, these guidelines do not apply to the production of agricultural products listed in Annex I of the Treaty. They do apply to the processing and marketing of such products, but only to the extent laid down in the Community guidelines for State aid in the agriculture sector ⁽⁸⁾, or any replacement Guidelines.

In addition, some other sectors are also subject to specific rules which take account of the particular situation of the sectors concerned and which may totally or partially derogate from these guidelines ⁽⁹⁾.

As regards the steel industry, in accordance with its long-established practice, the Commission considers that regional aid to the steel industry as defined in Annex I is not compatible with the common market. This incompatibility also applies to large individual aid grants made in this sector to small and medium-sized enterprises within the meaning of Article 6 of Regulation (EC) No 70/2001 ⁽¹⁰⁾, or any successor regulation, which are not exempted by the same Regulation.

In addition, due to its specific characteristics, no regional investment aid may be granted in the synthetic fibres sector as defined in Annex II.

9. Aid may only be granted to firms in difficulties within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹¹⁾ in accordance with the latter guidelines. ⁽¹²⁾
10. As a general rule, regional aid should be granted under a multi-sectoral aid scheme which forms an integral part of a regional development strategy with clearly defined objectives. Such a scheme may also enable the competent authorities to prioritise investment projects according to their interest for the region concerned. Where, exceptionally, it is envisaged to grant individual ad hoc aid to a single firm, or aid confined to one area of activity, it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy and that, having

⁽⁷⁾ For the purposes of these guidelines 'coal' means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe.

⁽⁸⁾ OJ C 28 of 1.2.2000, p.2. Corrigendum OJ C 232 12.8.2000, p. 17.

⁽⁹⁾ The sectors covered by special rules over and above those set out here are currently: transport and shipbuilding.

⁽¹⁰⁾ OJ L 10, 13.1.2001, p. 33. Regulation as amended by Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22).

⁽¹¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹²⁾ In particular, aid granted to large or medium-sized enterprises during the restructuring period must always be notified individually to the Commission, even if it is granted as part of an approved scheme.

regard to the nature and size of the project, it will not result in unacceptable distortions of competition. If aid granted under a scheme appears to be unduly concentrated on a particular sector of activity, the Commission may review the scheme pursuant to Article 17 of Regulation (EC) No 659/1999 of 22 March 1999 on modalities for the application of Article 93 of the EC Treaty ⁽¹³⁾ and may propose, in line with Article 18 (c) of this Regulation, to abolish the scheme.

11. Member States do not have to notify national regional aid schemes which fulfil all the conditions laid down in the group exemption Regulations adopted by the Commission pursuant to Article 1 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the EC Treaty establishing the European Community to certain categories of horizontal State aid ⁽¹⁴⁾.

3. Demarcation of regions

3.1. Population coverage eligible for regional aid, 2007-2013

12. In the light of the principle of the exceptional nature of regional aid, the Commission considers that the total population coverage of assisted regions in the Community must be substantially less than that of unassisted regions.
13. Having regard to the conclusions of different European Councils calling for a reduction in overall levels of State aid, and in view of the widely shared concerns about the distortive effects of investment aid for large companies, the Commission considers that the overall population coverage of the regional aid guidelines for 2007-2013 should be limited to that which is necessary to allow coverage of the most disadvantaged regions, as well as a limited number of regions which are disadvantaged in relation to the national average in the Member State concerned. Accordingly, it has decided to fix the limit for the overall population coverage to 42 % of the population of the current Community of 25 Member States, which is similar to the limit fixed on the basis of a Community of 15 members in 1998. This limit will provide for an appropriate level of concentration of regional aid in EU-25, while allowing a sufficient degree of flexibility for the accession of Bulgaria and Romania, the entire territory of which will normally be eligible for regional aid ⁽¹⁵⁾.
14. This notwithstanding, in order to ensure a sufficient degree of continuity for the existing Member States, the Commission has also decided to apply an additional safety net to ensure that no Member State loses more than 50 % of the coverage of its population covered during the period 2000-2006 ⁽¹⁶⁾.

3.2. The derogation in Article 87(3)(a)

15. Article 87(3)(a) provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the common market. As the Court of Justice of the European Communities has held, 'the use of the words "abnormally" and "serious" in the exemption contained in [Article 87(3)(a)] shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole' ⁽¹⁷⁾.

⁽¹³⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁴⁾ OJ L 142, 14.5.1998, p. 1.

⁽¹⁵⁾ This 42 % limit is estimated to rise to 45,5 % on an EU-27 basis following the Accession of Bulgaria and Romania.

⁽¹⁶⁾ Application of the safety net will lead to a total population coverage of about 43.1 % on an EU-25 basis, or 46,6 % on an EU-27 basis.

⁽¹⁷⁾ Case 248/84, *Germany v Commission* [1987, ECR 4013, paragraph 19].

16. The Commission accordingly considers that the conditions laid down are fulfilled if the region, being a NUTS ⁽¹⁸⁾ level II geographical unit, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75 % of the Community average ⁽¹⁹⁾. The GDP per capita ⁽²⁰⁾ of each region and the Community average to be used in the analysis are determined by the Statistical Office of the European Communities. In the interest of ensuring the maximum possible coherence between the designation of regions eligible for the derogation under Article 87(3)(a) under the regional aid guidelines, and the regions eligible for the convergence objective under the structural fund regulations, the Commission has used the same GDP per capita data to designate the Article 87(3)(a) regions as that used to designate the convergence regions under the structural fund regulations ⁽²¹⁾.
17. In recognition of the special handicaps which they face by reason of their remoteness and specific constraints in integrating into the internal market, the Commission considers that regional aid for the outermost regions covered by Article 299(2) of the Treaty ⁽²²⁾ also falls within the scope of the derogation in Article 87(3)(a), whether or not the regions concerned have a GDP per capita of less than 75 % of the Community average.

3.3. Phasing out arrangements for the 'statistical effect' regions

18. For certain regions, the GDP per capita exceeds 75 % of the Community average solely because of the statistical effect of enlargement. These are regions at NUTS II level which have a GDP per capita of more than 75 % of the EU-25 average, but less than 75 % of the EU-15 average ⁽²³⁾ ⁽²⁴⁾.
19. In order to ensure that the past progress of these regions is not undermined by too rapid change, in terms of aid intensities and the availability of operating aid, the Commission considers that they should continue to remain eligible for the derogation in Article 87(3)(a) on a transitional basis until 31 December 2010.
20. In 2010 the Commission will review the position of these regions on the basis of the three-year average of the most recent GDP data available from Eurostat. If the relative GDP per capita of any of the regions has declined below 75 % of the EU-25 average, the regions concerned will continue to be eligible for the derogation under Article 87(3)(a). Otherwise the statistical effect regions will become eligible for aid under the derogation of Article 87(3)(c) from 1 January 2011.

3.4. The derogation in Article 87(3)(c)

21. The Court of Justice, in Case 248/84 ⁽²⁵⁾, has expressed its views on the range of problems covered by this derogation and the reference framework for the analysis as follows: 'The exemption in [Article 87(3)(c)], on the other hand, is wider in scope inasmuch as it permits the development of certain areas without being restricted by the economic conditions laid down in [Article 87(3)(a)], provided such aid "does not adversely affect trading conditions to an extent contrary to the common interest". That provision gives the Commission power to authorize aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average'.

⁽¹⁸⁾ Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) OJ L 154, 21.6.2003, p. 1. The NUTS nomenclature is used by EUROSTAT as a reference for the collection, development and harmonisation of EU regional statistics and for socio-economic analyses of the regions.

⁽¹⁹⁾ The underlying assumption being that the GDP indicator is capable of reflecting synthetically both the phenomena mentioned.

⁽²⁰⁾ In this, and all subsequent references to GDP per capita in these guidelines, GDP is measured in terms of purchasing power standards.

⁽²¹⁾ The data cover the period 2000-2002.

⁽²²⁾ Azores, Madeira, Canary Islands, Guadeloupe, Martinique, Réunion and French Guyana.

⁽²³⁾ In practice, 75 % of the average EU-15 GDP per capita corresponds to 82,2 % of the average EU-25 GDP per capita.

⁽²⁴⁾ These regions are subsequently referred to as the 'statistical effect' regions.

⁽²⁵⁾ Footnote 17, supra.

22. The regional aid covered by the derogation in Article 87(3)(c) must, however, form part of a well-defined regional policy of the Member State and adhere to the principle of geographical concentration. Inasmuch as it is intended for regions which are less disadvantaged than those to which Article 87(3)(a) relates, both the geographic scope of the exception and the aid intensity allowed must be strictly limited. This being so, only a small part of the national territory of a Member State may normally qualify for the aid in question.
23. So as to afford national authorities sufficient latitude when it comes to choosing eligible regions without jeopardizing the effectiveness of the system of checks and balances operated by the Commission in respect of this type of aid and the equal treatment of all Member States, the selection of the regions eligible under the derogation in question should be undertaken by a two-step process which consists, first, of the determination by the Commission of the maximum population coverage for each Member State ⁽²⁶⁾ for such aid, and, secondly, of the selection of eligible regions.

3.4.1. Determination of eligible national population coverage

24. As a first step, the determination of the national population coverage eligible for aid under the derogation in Article 87(3)(c) must be made by a method which is objective, fair and transparent. Furthermore, the final outcome must remain within the overall limit for coverage of regional aid determined by the Commission under section 3.1, taking account also of the safety net. In order to achieve this, the Commission determines the population ceiling for each Member State on the basis of the following method.
25. First, Member States automatically receive an allocation equivalent to the population of any regions which were eligible for aid under the derogation in Article 87(3)(a) of the Treaty but which no longer meet the conditions for eligibility under that Article and which are not covered by the arrangements for the statistical effect regions described in section 3.3. These are the regions which had a GDP per capita of less than 75 % on an EU-15 basis when the 1998 regional aid guidelines were adopted, but which as a result of their economic development no longer meet that condition on an EU-15 basis. Since these regions ⁽²⁷⁾ have previously benefited from a relatively high level of aid, the Commission considers it necessary to allow Member States the flexibility, if they so wish, to continue to support these regions for the duration of these guidelines, under the derogation in Article 87(3)(c) ⁽²⁸⁾.
26. Second, in order to allow for the continued support of low population density regions, the Member States concerned also receive an allocation based on the population of low population density regions ⁽²⁹⁾.
27. After deducting the population coverage resulting from the application of the objective criteria set out in sections 3.2 and 3.3, as well as the allocations referred to in the two preceding paragraphs from the upper limit of 42 % of EU-25 population determined in section 3.1, the balance is available for distribution between the Member States using a distribution key that takes account of variations in GDP per capita and unemployment between the regions, both in a national and a Community context. The detailed formula is set out in Annex IV ⁽³⁰⁾.
28. Finally, as indicated in section 3.1, a safety net is applied to ensure that no Member State loses more than 50 % of the coverage of its population under the 1998 guidelines.

⁽²⁶⁾ With the exception of Member States whose entire territory is eligible for the derogation under Article 87(3)(a).

⁽²⁷⁾ Subsequently referred to as the 'economic development' regions.

⁽²⁸⁾ Although it was not eligible for aid pursuant to Article 87(3)(a), Northern Ireland has in fact benefited during the period 2000-2006 from the same aid intensities as many of the Article 87(3)(a) regions. Accordingly, Northern Ireland should also be considered as an economic development region for the purposes of these Guidelines.

⁽²⁹⁾ Calculated on the basis of the NUTS III option of paragraph 30(b) of these guidelines.

⁽³⁰⁾ The same method was used by the Commission in its 1998 Guidelines on national regional aid: Annex 3, paragraphs 4-7.

29. The resulting allocations are set out in Annex V, together with the lists of regions eligible for support under Article 87(3)(a), the statistical effect regions and the economic development regions.

3.4.2. Selection of eligible regions ⁽³¹⁾

30. The eligibility criteria for the selection of regions by the Member States must be sufficiently flexible to allow for the wide diversity of situations in which the granting of national regional aid may potentially be justified but at the same time they must be transparent and provide sufficient safeguards that the award of regional aid will not distort trade and competition to an extent contrary to the common interest. Accordingly, the Commission considers that the following regions may be eligible for selection by the Member States concerned for the award of regional investment aid pursuant to the derogation under Article 87(3)(c) ⁽³²⁾:
- (a) the 'economic development' regions;
 - (b) the low population density regions: such areas are made up essentially of NUTS-II geographic regions with a population density of less than 8 inhabitants per km², or NUTS-III geographic regions with a population density of less than 12.5 inhabitants per km² ⁽³³⁾. However, a certain flexibility is allowed in the selection of these areas, subject to the following limitations:
 - flexibility in the selection of areas must not mean an increase in the population covered;
 - the NUTS III parts qualifying for flexibility must have a population density of less than 12.5 inhabitants per square kilometer;
 - they must be contiguous with NUTS III regions which satisfy the low population density test;
 - (c) regions which form contiguous zones with a minimum population of at least 100 000 and which are located within either NUTS-II or NUTS-III regions which have either a GDP per capita of less than the EU-25 average, **or** which have an unemployment rate which is higher than 115 % of the national average, (both calculated on the average of the most recent 3 years of Eurostat data);
 - (d) NUTS-III regions with less than 100 000 population which have either a GDP per capita of less than the EU-25 average **or** which have an unemployment rate which is higher than 115 % of the national average, (both calculated on the average of the most recent three years of Eurostat data);
 - (e) islands and other regions categorised by similar geographical isolation ⁽³⁴⁾ which have either a GDP per capita of less than the EU-25 average, **or** which have an unemployment rate which is higher than 115 % of the national average, (both calculated on the average of the most recent three years of Eurostat data);
 - (f) islands with fewer than 5 000 inhabitants and other communities with fewer than 5 000 inhabitants categorised by similar geographical isolation;

⁽³¹⁾ Those statistical effect regions which from 1 January 2011 are not eligible for the derogation under Article 87(3)(a) are automatically eligible under Article 87(3)(c).

⁽³²⁾ Taking account of their small size, for Cyprus and Luxembourg it is sufficient that the regions designated have either a GDP per capita which is less than the EU average, or an unemployment rate which is higher than 115 % of the national average, and have a minimum population of 10 000 inhabitants.

⁽³³⁾ In order to prevent double counting, this criterion should be applied on a residual basis, after taking account of the relative wealth of the regions concerned.

⁽³⁴⁾ For example peninsulas and mountainous regions.

- (g) NUTS-III regions or parts thereof adjacent to a region which is eligible for support under Article 87(3)(a) as well as NUTS-III regions or parts thereof which share a land border, or a sea border of less than 30 kilometres with a country which is not a Member State of the European Economic Area or EFTA.
- (h) In duly justified cases, Member States may also designate other regions which form contiguous zones with a minimum population of at least 50 000 which are undergoing major structural change, or are in serious relative decline, when compared with other comparable regions. It will be the task of Member States which wish to use this possibility to demonstrate that the award of regional investment aid in the region concerned is justified, using recognised economic indicators and comparisons with the situation at Community level.
31. In addition, in order to allow Member States greater flexibility to target very localised regional disparities, below the NUTS-III level, Member States may also designate other smaller areas which do not meet the conditions described above provided they have a minimum population of 20 000 ⁽³⁵⁾. It will be the task of Member States which wish to use this possibility to demonstrate that the areas proposed are relatively more in need of economic development than other areas in that region, using recognised economic indicators such as GDP per capita, employment or unemployment levels, local productivity or skills indicators. Regional aid will be approved by the Commission in these areas for SMEs, and the relevant SME bonus will also apply. However, because of the potential distortion of competition resulting from the spill-over effect into the more prosperous surrounding regions, the Commission will not approve aid for investments by large companies in these areas, or aids for investments with eligible expenses exceeding EUR 25 million.
32. Compliance with the total coverage allowed for each Member State will be determined by the actual population of the regions concerned, on the basis of the most recent recognised statistical information available.

4. Regional investment aid

4.1. Form of aid and aid ceilings

4.1.1. Form of aid

33. Regional investment aid is aid awarded for an initial investment project.
34. *Initial investment* means an investment in material and immaterial 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;
 - a fundamental change in the overall production process of an existing establishment.

'Material assets' means assets relating to land, buildings and plant/machinery. In case of acquisition of an establishment, only the costs of buying assets from third parties should be taken into consideration, provided the transaction has taken place under market conditions.

'Immaterial assets' means assets entailed by the transfer of technology through the acquisition of patent rights, licences, know-how or unpatented technical knowledge.

⁽³⁵⁾ This minimum limit may be reduced in the case of islands and other areas categorised by similar geographical isolation.

Replacement investment which does not meet any of these conditions is thus excluded from the concept ⁽³⁶⁾.

35. The acquisition of the assets directly linked to an establishment may also be regarded as initial investment provided the establishment has closed or would have closed had it not been purchased, and is bought by an independent investor ⁽³⁷⁾.
36. Regional investment aid is calculated either in reference to material and immaterial investment costs resulting from the initial investment project or to (estimated) wage costs for jobs directly created by the investment project ⁽³⁸⁾.
37. The form of the aid is variable. It may, for example, take the form of grants, low-interest loans or interest rebates, state guarantees, the purchase of a share-holding or an alternative provision of capital on favourable terms, exemptions or reductions in taxes, social security or other compulsory charges, or the supply of land, goods or services at favourable prices.
38. It is important to ensure that regional aid produces a real incentive effect to undertake investments which would not otherwise be made in the assisted areas. Therefore aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing ⁽³⁹⁾ that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of work on the project ⁽⁴⁰⁾. An express reference to both conditions must also be included in all aid schemes ⁽⁴¹⁾. In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project. If work begins before the conditions laid down in this paragraph are fulfilled, the whole project will not be eligible for aid.
39. Where the aid is calculated on the basis of material or immaterial investment costs, or of acquisition costs in the case referred to in paragraph 35, to ensure that the investment is viable and sound and respecting the applicable aid ceilings, 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 ⁽⁴²⁾.
40. Furthermore, in order to ensure that the investment makes a real and sustained contribution to regional development, aid must be made conditional, through the conditions attached to the aid, or its method of payment, on the maintenance of the investment in question in the region concerned for a minimum period of at least five years after its completion ⁽⁴³⁾. In addition, where the aid is calculated on the basis of wage costs, the posts must be filled within three years of the completion of the works. Each of the jobs created through the investment must be maintained within the region concerned for a period of five years from the date the post was first filled. In the case of SMEs, Member States may reduce these five-year periods for the maintenance of an investment or jobs created to a minimum of three years.

⁽³⁶⁾ Replacement investment may however qualify as operating aid under certain conditions as set out in section 5.

⁽³⁷⁾ Consequently, the sole acquisition of the shares of the legal entity of an enterprise does not qualify as initial investment.

⁽³⁸⁾ A job is deemed to be directly created by an investment project if it concerns the activity to which the investment relates and is created within three years of completion of the investment, including jobs created following an increase in the utilisation rate of the capacity created by the investment.

⁽³⁹⁾ In the case of aid which is subject to individual notification to and approval by the Commission, confirmation of eligibility must be made conditional on the Commission decision approving the aid.

⁽⁴⁰⁾ 'Start of work' means either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies.

⁽⁴¹⁾ The only exception to these rules is in the case of approved tax aid schemes where a tax exemption or reduction is granted automatically to qualifying expenditure without any discretion on the part of the authorities.

⁽⁴²⁾ This is for example not the case for a subsidised loan, public equity-capital loans or public participations which do not meet the market economy investor principle, state guarantees containing elements of aid, as well as public support granted within the scope of the *de minimis* rule.

⁽⁴³⁾ This rule shall not prevent the replacement of plant or equipment which has become out-dated within this five year period due to rapid technological change, provided the economic activity is retained in the region concerned for the minimum period.

41. The level of the aid is defined in terms of intensity compared with reference costs. All aid intensities must be calculated in terms of gross grant equivalents (GGE) ⁽⁴⁴⁾. The aid intensity in gross grant equivalent is the discounted value of the aid expressed as a percentage of the discounted value of the eligible costs. For aid which is individually notified to the Commission, the gross grant equivalent is calculated at the moment of notification. In other cases, the eligible investment costs are discounted to their value at the moment of the granting of the aid. Aid payable in several instalments shall be discounted to its value at the moment of its being notified or granted, as appropriate. The interest rate to be used for discounting purposes and to calculate the aid amount in a soft loan is the reference rate applicable at the time of grant. In cases where aid is awarded by means of tax exemptions or reductions on future taxes due, discounting of aid tranches takes place on the basis of the reference rates applicable at the various times the tax advantages become effective.

4.1.2. Aid ceilings (maximum aid intensities) for aid to large companies

42. The intensity of the aid must be adapted to take account of the nature and intensity of the regional problems that are being addressed. This means that the admissible aid intensities are from the outset less high in regions qualifying for exemption under Article 87(3)(c) than in those qualifying under Article 87(3)(a).
43. The Commission must also take account of the fact that following recent enlargements the disparities in the relative wealth of the regions qualifying under Article 87(3)(a) have increased substantially. In fact, a significant number of regions and indeed entire Member States now have a per capita GDP of below 45 % of the EU-25 average, which was not the case in 1998. The existence of these greater disparities of wealth within the Community requires the Commission to introduce a greater categorisation of the regions concerned.
44. In the case of regions falling under Article 87(3)(a), the Commission thus considers that the intensity of regional aid must not exceed:
- 30 % GGE for regions with less than 75 % of average EU-25 GDP per capita, for outermost regions with higher GDP per capita and until 1 January 2011 statistical effect regions;
 - 40 % GGE for regions with less than 60 % of average EU-25 GDP per capita;
 - 50 % GGE for regions with less than 45 % of average EU-25 GDP per capita.
45. In recognition of their specific handicaps, the outermost regions will be eligible for a further bonus of 20 % GGE if their GDP per capita falls below 75 % of the EU-25 average and 10 % GGE in other cases.
46. The statistical effect regions which fall under the derogation under Article 87(3)(c) from 1 January 2011 will be eligible for an aid intensity of 20 %.
47. In the other Article 87(3)(c) regions, the ceiling on regional aid must not exceed 15 % GGE. This is reduced to 10 % GGE in the case of regions with both more than 100 % of average EU-25 GDP per capita and a lower unemployment rate than the EU-25 average, measured at NUTS-III level (based on averages for the last three years, using Eurostat data) ⁽⁴⁵⁾.

⁽⁴⁴⁾ The Commission is discontinuing its former practice of converting regional aid notified by Member States into net grant equivalents in order to take account of the judgment of the Court of First Instance of 15 June 2000 in Case T-298/97, *Alzetta*. In that case the Court of First Instance ruled: 'The Commission is not empowered, under the State aid monitoring system established by the Treaty, to take into consideration the incidence of tax on the amount of financial aid allocated when it assesses whether it is compatible with the Treaty. Such charges are not levied specifically on the aid itself but are levied downstream, and apply to the aid in question in the same way as to any income received. They cannot therefore be relevant when assessing the specific effect of the aid on trade and competition and, in particular, when estimating the benefit obtained by the recipients of such aid by comparison with competing undertakings which have not received such aid and whose income is also liable to tax.' Furthermore, the Commission considers that the use of GGEs, which are also used to calculate the intensities of other types of State aid, will contribute to increasing the simplicity and transparency of the State aid control system, and also takes account of the increased proportion of State aid which is awarded in the form of tax exemptions.

⁽⁴⁵⁾ By way of exception, a higher aid intensity may be permitted in the case of a NUTS-III region, or smaller, adjacent to an Article 87(3)(a) region if this is necessary to ensure that the differential between the two regions does not exceed 20 percentage points.

48. However, the low population density regions and regions (corresponding to NUTS-III level or smaller) adjoining a region with Article 87(3)(a) status selected by Member States for coverage under Article 87(3)(c), as well as NUTS-III regions or parts thereof which share a land border with a country which is not a Member State of the European Economic Area or EFTA, are always eligible for an aid intensity of 15 % GGE.

4.1.3. Bonuses for small and medium-sized enterprises

49. In the case of aid awarded to small and medium-sized enterprises ⁽⁴⁶⁾, the ceilings in section 4.1.2 may be increased by 20 % GGE for aid granted to small enterprises and by 10 % GGE for aid granted to medium-sized enterprises ⁽⁴⁷⁾.

4.2. *Eligible expenses*

4.2.1. Aid calculated on the basis of investment costs

50. Expenditures on land, buildings and plant/machinery ⁽⁴⁸⁾ are eligible for aid for initial investment.
51. For SMEs, the costs of preparatory studies and consultancy costs linked to the investment may also be taken into account up to an aid intensity of 50 % of the actual costs incurred.
52. In the event of an acquisition of the type referred to in paragraph 35, only the costs of buying assets ⁽⁴⁹⁾ from third parties should be taken into consideration ⁽⁵⁰⁾. The transaction must take place under market conditions.
53. Costs related to the acquisition of assets other than land and buildings under lease can only be taken into consideration 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 for large companies, and three years for SMEs.
54. Except in the case of SMEs and takeovers, the assets acquired should be new. In the case of takeovers, assets for whose acquisition aid has already been granted prior to the purchase should be deducted.
55. For SMEs, the full costs of investments in intangible assets by the transfer of technology through the acquisition of patent rights, licences, know-how or unpatented technical knowledge may always be taken into consideration. For large companies, such costs are eligible only up to a limit of 50 % of the total eligible investment expenditure for the project.
56. In all cases, eligible intangible assets will be subject to the necessary conditions for ensuring that they remain associated with the recipient region eligible for the regional aid and, consequently, that they are not the subject of a transfer benefiting other regions, especially other regions not eligible for regional aid. To this end, eligible intangible assets will have to satisfy the following conditions in particular:
- they must be used exclusively in the establishment receiving the regional aid;
 - they must be regarded as amortizable assets;

⁽⁴⁶⁾ Annex I of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001, OJ L 63, 28.2.2004, p. 22, or any successor regulation.

⁽⁴⁷⁾ These bonuses do not apply to aid awarded in the transport sector.

⁽⁴⁸⁾ In the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment.

⁽⁴⁹⁾ Where the acquisition is accompanied by other initial investment, the expenditure relating to the latter should be added to the cost of the purchase.

⁽⁵⁰⁾ In exceptional cases, the aid may alternatively be calculated by reference to the (estimated) wage costs for the jobs safeguarded or newly created by the acquisition. These cases have to be individually notified to the Commission.

- they must be purchased from third parties under market conditions;
- they must be included in the assets of the firm and remain in the establishment receiving the regional aid for at least five years (three years for SMEs).

4.2.2. Aid calculated on the basis of wage costs

57. As was indicated in section 4.1.1, regional aid may also be calculated by reference to the expected wage costs ⁽⁵¹⁾ arising from job creation as a result of an initial investment project.
58. *Job creation* means a *net* increase in the number of employees ⁽⁵²⁾ directly employed in a particular establishment compared with the average over the previous 12 months. Any jobs lost during that 12 month period must therefore be deducted from the apparent number of jobs created during the same period ⁽⁵³⁾.
59. The amount of aid must not exceed a certain percentage of the wage cost of the person hired, calculated over a period of two years. The percentage is equal to the intensity allowed for investment aid in the area in question.

4.3. *Aid for large investment projects*

60. For the purpose of these guidelines, a '*large investment project*' is an '*initial investment*' as defined by these guidelines with an eligible expenditure above EUR 50 million ⁽⁵⁴⁾. In order to prevent that a large investment project being artificially divided into sub-projects in order to escape the provisions of these guidelines, a large investment project will be considered to be a single investment project when the initial investment is undertaken in a period of three years by one or more companies and consists of fixed assets combined in an economically indivisible way ⁽⁵⁵⁾.
61. To calculate whether the eligible expenditure for large investment projects reaches the various thresholds in these guidelines, the eligible expenditure to be taken into account is either the traditional investment costs or the wage cost, whichever is the higher.
62. In two successive Multisectoral frameworks on regional aid for large investment projects in 1998 ⁽⁵⁶⁾ and 2002 ⁽⁵⁷⁾, the Commission reduced the maximum aid intensities for large investment projects to limit distortions of competition. In the interests of simplification and transparency, the Commission has decided to integrate the provisions of the 2002 Multisectoral framework (MSF-2002) into the Regional aid guidelines for the period 2007-13.

⁽⁵¹⁾ The wage cost means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising the gross wage, before tax, and the compulsory social security contributions.

⁽⁵²⁾ The number of employees means the number of annual labour units, namely the number of persons employed full time in one year, part-time and seasonal work being ALU fractions.

⁽⁵³⁾ Such a definition holds true as much for an existing establishment as for a new establishment.

⁽⁵⁴⁾ The EUR 50 million must be calculated at prices and exchange rates on the date when the aid is granted, or in the case of large investment projects where individual notification is required, at prices and exchange rates at the date of the notification.

⁽⁵⁵⁾ To assess whether an initial investment is economically indivisible, the Commission will take into account the technical, functional and strategic links and the immediate geographical proximity. The economic indivisibility will be assessed independently from ownership. This implies 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 undertakings 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).

⁽⁵⁶⁾ OJ C 107, 7.4.1998, p. 7.

⁽⁵⁷⁾ OJ C 70, 19.3.2002, p. 8 as amended by OJ C 263, 1.11.2003, p. 1.

63. MSF-2002 will therefore cease to apply to aid awarded or notified ⁽⁵⁸⁾ after 31 December 2006 and will be replaced by these guidelines ⁽⁵⁹⁾.

4.3.1. Increased transparency and monitoring of large investment projects

64. Member States are required to notify individually to the Commission any aid to be awarded to investment projects under an existing aid scheme if the aid proposed from all sources is more than the maximum allowable amount of aid that an investment with eligible expenditure EUR 100 million can receive under the scale and the rules laid down in paragraph 67 ⁽⁶⁰⁾.

The notification thresholds for different regions with the most commonly encountered aid intensities under these guidelines are summarised in the table below.

Aid intensity	10 %	15 %	20 %	30 %	40 %	50 %
Notification threshold	EUR 7,5 million	EUR 11,25 million	EUR 15,0 million	EUR 22,5 million	EUR 30,0 million	EUR 37,5 million

65. Whenever regional aid is granted on the basis of existing aid schemes for non-notifiable large investments projects, Member States must, within 20 working days starting from the granting of the aid by the competent authority, provide the Commission with the information requested in the standard form laid down in Annex III. The Commission will make summary information available to the public through its website (<http://europa.eu.int/comm/competition/>).
66. Member States must maintain detailed records regarding the granting of aid for all large investment projects. Such records, which must contain all information necessary to establish that the maximum allowable aid intensity has been observed, must be maintained for 10 years from the date on which the aid was granted.

4.3.2. Rules for the assessment of large investment projects

67. Regional investment aid for large investment projects is subject to an adjusted regional aid ceiling ⁽⁶¹⁾, on the basis of the following scale:

Eligible expenditure	Adjusted aid ceiling
Up to EUR 50 million	100 % of regional ceiling
For the part between EUR 50 million and EUR 100 million	50 % of regional ceiling
For the part exceeding EUR 100 million	34 % of regional ceiling

Thus, the allowable aid amount for a large investment project will be calculated according to the following formula: maximum aid amount = $R \times (50 + 0,50 \times B + 0,34 \times C)$, where R is the unadjusted regional aid ceiling, B is the eligible expenditure between EUR 50 million and EUR 100 million, and C is the eligible expenditure above EUR 100 million. This is calculated on the basis of the official exchange rates prevailing on the date of the grant of aid, or in the case of aid subject to individual notification, on the date of notification.

⁽⁵⁸⁾ Individually notifiable investment projects will be assessed in accordance with the rules in force at the time of notification.

⁽⁵⁹⁾ Given the wide general scope of these guidelines, the Commission decided that it is not technically feasible to proceed with the establishment of a list of sectors where serious structural difficulties prevail.

⁽⁶⁰⁾ Ad hoc individual aid must always be notified to the Commission. Because of its clear effect on the conditions of trade and competition, the need for a specific justification for the link with regional development applies with greater force to ad hoc individual aid for large individual investment projects.

⁽⁶¹⁾ The starting point for the calculation of the adjusted aid ceiling is always the maximum aid intensity allowed for aid for large enterprises in accordance with section 4.1.2 above. No SME bonuses may be granted to large investment projects.

68. Where the total amount of aid from all sources exceeds 75 % of the maximum amount of aid an investment with eligible expenditure of EUR 100 million could receive, applying the standard aid ceiling in force for large enterprises in the approved regional aid map on the date the aid is to be granted, and where
- (a) the aid beneficiary accounts for more than 25 % of the sales of the product(s) concerned on the market(s) concerned before the investment or will account for more than 25 % after the investment, or
 - (b) the production capacity created by the project is more than 5 % of the market measured using apparent consumption data ⁽⁶²⁾ for the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Area's GDP,
- the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 88(2) of the Treaty, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States ⁽⁶³⁾.
69. The product concerned is normally the product covered by the investment project ⁽⁶⁴⁾. When the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned may be the downstream product. The relevant product market includes the product concerned and its substitutes considered to be such either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations).
70. The burden of proof that the situations to which paragraphs 68(a) and (b) refer do not apply, lies with the Member State ⁽⁶⁵⁾. For the purpose of applying points (a) and (b), sales and apparent consumption will be defined at the appropriate level of the Prodcom classification ⁽⁶⁶⁾, normally in the EEA, or, if such information is not available or relevant, on the basis of any other generally accepted market segmentation for which statistical data are readily available.

4.4. Rules on the cumulation of aid

71. The aid intensity ceilings laid down in sections 4.1 and 4.3 above apply to the total aid:
- where assistance is granted concurrently under several regional schemes or in combination with ad hoc aid;
 - whether the aid comes from local, regional, national or Community sources.
72. Where aid calculated on the basis of material or immaterial investment costs is combined with aid calculated on the basis of wage costs, the intensity ceiling laid down for the region concerned must be respected ⁽⁶⁷⁾.
73. Where the expenditure eligible for regional aid is eligible in whole or in part for aid for other purposes, the common portion will be subject to the most favourable ceiling under the applicable rules.

⁽⁶²⁾ Apparent consumption of the product concerned is production plus imports minus exports.

⁽⁶³⁾ Before the entry into force of these guidelines the Commission will draw up further guidance on the criteria it will take into account during this assessment.

⁽⁶⁴⁾ Where an investment project involves the production of several different products, each of the products needs to be considered.

⁽⁶⁵⁾ If the Member State demonstrates that the aid beneficiary creates a new product market, the tests laid down in paragraph 68 (a) and (b) do not need to be carried out, and the aid will be authorised under the scale in paragraph 67.

⁽⁶⁶⁾ Council Regulation (EEC) No 3924/91 of 19 December 1991 on the establishment of a Community survey of industrial production (OJ L 374, 31.12.1991, p. 1).

⁽⁶⁷⁾ This condition is deemed to be met if the sum of the aid for the initial investment, expressed as a percentage of the investment, and of the job creation aid, expressed as a percentage of wage costs, does not exceed the most favourable amount resulting from application of either the ceiling set for the region in accordance with the criteria indicated at section 4.1 or the ceiling set for the region in accordance with the criteria indicated at section 4.3.

74. Where the Member State lays down that State aid under one scheme may be combined with aid under other schemes, it must specify, in each scheme, the method by which it will ensure compliance with the conditions listed above.
75. Regional investment aid shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in these guidelines.

5. Operating aid ⁽⁶⁸⁾

76. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate ⁽⁶⁹⁾. It is for the Member State to demonstrate the existence and importance of any handicaps ⁽⁷⁰⁾. In addition, certain specific forms of operating aid can be accepted in the low population density regions and the least populated areas.
77. Operating aid should in principle only be granted in respect of a predefined set of eligible expenditures or costs ⁽⁷¹⁾ and limited to a certain proportion of those costs.
78. Because of the specific nature of financial and intra-group activities, as defined in Section J (codes 65, 66 and 67) and intra-group activities falling within the scope of Section K (code 74) of the NACE code, operating aid granted for these activities has only a very limited likelihood of promoting regional development but a very high risk of distorting competition, as stated in the Commission notice on the application of the State aid rules to measures relating to direct business taxation ⁽⁷²⁾. The Commission will therefore not approve any operating aid to the financial services sector, or for intra-group activities under these guidelines unless such aid is granted under general schemes which are open to all sectors and which are designed to offset additional transport or employment costs. Operating aid intended to promote exports is likewise excluded.
79. Because it is intended to overcome delays and bottlenecks in regional development, except as provided for in paragraphs 80 and 81, operating aid should always be temporary and reduced over time, and should be phased out when the regions concerned achieve real convergence with the wealthier areas of the EU ⁽⁷³⁾.
80. In derogation from the previous paragraph, operating aid which is not both progressively reduced and limited in time may only be authorised:
- in the outermost regions, in so far as it is intended to offset the additional costs arising in the pursuit of economic activity from the factors identified in Article 299(2) of the Treaty, the permanence and combination of which severely restrain the development of such regions (remoteness, insularity, small size, difficult topography and climate, and economic dependence on a few products) ⁽⁷⁴⁾;

⁽⁶⁸⁾ Like other forms of regional aid, the granting of operating aid is always subject to the specific rules which may apply in particular sectors.

⁽⁶⁹⁾ Operating aid takes the form in particular of tax exemptions or reductions in social security contributions which are not linked to eligible investment costs.

⁽⁷⁰⁾ The Commission is currently studying the feasibility of establishing a methodology for evaluating the additional costs in the outermost regions.

⁽⁷¹⁾ For example, replacement investments, transport costs or labour costs.

⁽⁷²⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁷³⁾ This principle of degressivity must also be respected when new operating aid schemes are notified to replace existing ones. However, flexibility as regards the application of this principle may be permitted in the case of operating aid schemes designed to address the geographical handicaps of particular areas located within Article 87(3)(a) regions.

⁽⁷⁴⁾ In view of the constraints faced by the outermost regions, except in the cases referred to in paragraph 78, the Commission considers that operating aid of up to 10 % of the turnover of the beneficiary may be awarded without the need for specific justification. It is the task of the Member State to demonstrate that any proposed aid above this amount is justified in terms of its contribution to regional development, and that its level is proportional to the additional costs linked to the factors identified in Article 299(2) which it is intended to offset.

- in the least populated regions, in so far as it is intended to prevent or reduce the continuing depopulation of these regions ⁽⁷⁵⁾. The least populated regions represent or belong to regions at NUTS-II level with a population density of 8 inhabitants per km² or less and extend to adjacent and contiguous smaller areas meeting the same population density criterion.
81. In addition, in the outermost regions and low population density regions, aid which is not both progressively reduced and limited in time and which is intended partly to offset additional transport costs may be authorized under the following conditions:
- aid may serve only to compensate for the additional cost of transport, taking into account other schemes of assistance to transport. While the amount of aid may be calculated on a representative basis, systematic overcompensation must be avoided;
 - aid may be given only in respect of the extra cost of transport of goods produced in the outermost regions and low population density regions inside the national borders of the country concerned. It must not be allowed to become export aid. No aid may be given towards the transport or transmission of the products of businesses without an alternative location (products of the extractive industries, hydroelectric power stations, etc.);
 - for the outermost regions only, aid may also cover the cost of transporting primary commodities, raw materials or intermediate products from the place of their production to the place of final processing in the region concerned;
 - the aid must be objectively quantifiable in advance, on the basis of an aid-per-passenger or aid-per-ton/kilometer ratio, and there must be an annual report drawn up which, among other things, shows the operation of the ratio or ratios;
 - the estimate of additional cost must be based on the most economical form of transport and the shortest route between the place of production or processing and commercial outlets using that form of transport; external costs to the environment should also be taken into account.
82. In all cases, the need for and level of operating aid should be regularly re-examined to ensure its long-term relevance to the region concerned. The Commission will therefore only approve operating aid schemes for the duration of these guidelines.
83. In order to verify the effects on trade and competition of operating aid schemes, Member States will be required to provide each year a single report in respect of each NUTS-II region in which operating aid is granted which provides a breakdown of total expenditure, or estimated income forgone, for each operating aid scheme approved in the region concerned and identifies the ten largest beneficiaries of operating aid in the region concerned ⁽⁷⁶⁾, specifying the sector(s) of activity of the beneficiaries and the amount of aid received by each.

6. Aid for newly created small enterprises

84. While newly created small enterprises encounter difficulties throughout the EU, it appears that 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 therefore appears necessary to introduce a new form 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.

⁽⁷⁵⁾ It is the task of the Member State to demonstrate that the aid proposed is necessary and appropriate to prevent or reduce continuing depopulation.

⁽⁷⁶⁾ In terms of the amount of aid received.

85. In order to ensure that it is effectively targeted, it appears that this type of aid should be graduated according to 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, for an initial period at least, be strictly limited to small enterprises, limited in amount and degressive.
86. The Commission will accordingly approve aid schemes which provide aid of up to a total of EUR 2 million per enterprise ⁽⁷⁷⁾ for small enterprises with their economic activity in regions eligible for the derogation in Article 87(3)(a), and up to EUR 1 million per enterprise for small enterprises with their economic activity in regions eligible for the derogation in Article 87(3)(c). Annual amounts of aid awarded for newly created small enterprises must not exceed 33 % of the abovementioned total amounts of aid per enterprise.
87. The eligible expenses are legal, advisory, consultancy and administrative costs directly related to the creation of the enterprise, as well as the following costs, insofar as they are actually incurred within the first five years of the creation of the enterprise thereafter: ⁽⁷⁸⁾
- interests on external finance and a dividend on own capital employed not exceeding the reference rate;
 - fees for renting production facilities/equipment;
 - energy, water, heating, taxes (other than VAT and corporate taxes on business income) and administrative charges;
 - depreciation, fees for leasing production facilities/equipment as well as wage costs including compulsory social charges may also be included provided that the underlying investments or job creation and recruitment measures have not benefited from other forms of aid.
88. The aid intensity may not exceed
- in Article 87(3)(a) regions, 35 % of eligible expenses incurred in the first three years after the creation of the enterprise, and 25 % in the two years thereafter;
 - in Article 87(3)(c) regions, 25 % of eligible expenses incurred in the first three years after the creation of the enterprise, and 15 % in the two years thereafter.
89. These intensities are increased by 5 % in Article 87(3)(a) regions with a GDP per capita of less than 60 % of the EU-25 average, in regions with a population density of less than 12.5 inhabitants/km² and in small islands with a population of less than 5 000, and other communities of the same size suffering from similar isolation.
90. The Member State shall put in place the necessary system to ensure that the upper limits for the amount of aid and the relevant aid intensity in relation to the eligible costs concerned are not exceeded. In particular, the aid provided for in this chapter shall not be cumulated with other public support (including *de minimis* support) in order to circumvent the maximum aid intensities or amounts laid down.
91. Granting aid designed exclusively for newly created small enterprises may produce perverse incentives for existing small enterprises to close down and re-open in order to receive this type 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.

⁽⁷⁷⁾ Eligible enterprises are small enterprises within the meaning of Article 2 of Annex I to Commission Regulation (EC) No 364/2004 or any successor regulation, which are autonomous within the meaning of Article 3 of the Annex to Commission Regulation (EC) No 364/2004 and which have been created less than five years ago.

⁽⁷⁸⁾ VAT and direct business profit/income taxes are not included in the eligible expenses.

7. Transitional arrangements

7.1. Reductions of aid intensities for regions remaining within Article 87(3)(a) on 1 January 2007

92. Where the implementation of these guidelines will result in a reduction in maximum aid intensities of more than 15 percentage points, net to gross ⁽⁷⁹⁾, the reduction may be implemented in two stages with the initial reduction of a minimum of 10 percentage points being applied on 1 January 2007, and the balance on 1 January 2011.

7.2. Reductions of aid intensities in the economic development regions

93. Provided the areas concerned are proposed by the Member State as eligible for regional aid under Article 87(3)(c) for the whole period 2007-2013, the reduction of aid intensities for the economic development regions may take place in two stages. A reduction of at least 10 percentage points net to gross shall be applied on 1 January 2007. As necessary to meet the new aid intensities allowed under these guidelines, a final reduction shall be applied at the latest on 1 January 2011 ⁽⁸⁰⁾.

7.3. Phasing-out of operating aid

94. For regions which lose their capacity to grant operating aid as a result of the loss of eligibility under Article 87(3)(a), the Commission can accept a linear phasing out of operating aid schemes over a two-year period from the date of the loss of eligibility to grant such aid.

7.4. Phasing out of Article 87(3)(c) regions

95. Following the entry into force of these guidelines, a number of regions will lose their eligibility for regional investment aid. In order to facilitate the smooth transition of these regions to the reformed horizontal State aid regime which is progressively being put in place through the implementation of the State aid action plan, Member States may exceptionally designate additional regions to be eligible for regional aid under Article 87(3)(c) until 1 January 2009, provided that the following conditions are met:

- the regions concerned were eligible for regional aid under Article 87(3)(c) on 31 December 2006;
- the combined total population of the regions eligible for regional investment aid under Article 87(3)(c) pursuant to the allocation of population coverages referred to in paragraphs 27 and 28 and those designated in accordance with this provision shall not exceed 66 % of the national population eligible for regional aid under Article 87(3)(c) on 31 December 2006 ⁽⁸¹⁾;
- the maximum aid intensity permitted in the additional regions designated in accordance with this provision shall not exceed 10 %.

⁽⁷⁹⁾ I.e. from 50 % net grant equivalent to 30 % gross grant equivalent.

⁽⁸⁰⁾ Since Northern Ireland benefited from a specific provision in the regional aid guidelines for the period 2000-2006, the application of the same transitional arrangement is also justified.

⁽⁸¹⁾ After exclusion of those regions which were eligible for regional aid under Article 87(3)(c) on 31 December 2006 and which qualify for aid under the present guidelines by virtue of other provisions (statistical effect regions, economic development regions, low population density regions). The resulting allocations are set out in Annex V.

8. Regional aid maps and declaration of compatibility

96. The regions of a Member State eligible for regional investment aid under the derogations and the ceilings on the intensity of aid for initial investment⁽⁸²⁾ approved for each region together form a Member State's regional aid map. The regional aid map also defines the regions eligible to grant enterprise aid. Operating aid schemes are not covered by the regional aid maps, and are assessed on a case by case basis on the basis of a notification by the Member State concerned pursuant to Article 88(3) of the Treaty.
97. The Court of Justice has ruled that the 'decisions' by which the Commission adopts the regional aid maps for each Member State should be construed as forming an integral part of the guidelines on regional aid and as having binding force only on condition that they have been accepted by Member States.⁽⁸³⁾
98. Furthermore, it should be recalled that the regional aid maps also define the scope of any group exemption exempting regional aid from the notification obligation under Article 88(3) of the Treaty, whether such aid is granted on the basis of Regulation (EC) No 70/2001⁽⁸⁴⁾, or on the basis of a possible future exemption regulation for other forms of regional aid. Article 1(1)(b) of Regulation (EC) No 994/98⁽⁸⁵⁾ provides only for the exemption of 'aid that complies with the map approved by the Commission for each Member State for the grant of regional aid'.
99. Under these guidelines, depending on the socio-economic situation of the Member States, the regional aid map will include:
- (1) regions which can be identified on the basis of the criteria set out in these guidelines and in respect of which maximum aid intensities are defined by these guidelines. These are the regions eligible for the derogation under Article 87(3)(a) and the statistical effect regions.
 - (2) regions which are to be designated by Member States for eligibility for regional aid in accordance with Article 87(3)(c) up to the limit for population coverage determined in accordance with section 3.4.1.
100. Of course, provided they respect the conditions set out in these guidelines, it is the responsibility of the Member States themselves to decide whether they wish to grant regional investment aid and up to what level. As soon as possible after the publication of these guidelines, each Member State should accordingly notify to the Commission, in accordance with Article 88(3) of the Treaty, a single regional aid map covering its entire national territory.
101. The Commission will examine the notifications in accordance with the procedure set out in Article 88(3) of the Treaty. At the conclusion of its examination, it will publish the approved regional aid maps in the *Official Journal of the European Union*. These maps will take effect on 1 January 2007, or their date of publication if later, and will be considered an integral part of the present guidelines.
102. The notification should clearly identify the regions proposed for eligibility under Article 87(3)(a) or (c), and the aid intensities envisaged for large companies, taking account of adjustments in the regional aid ceiling for large investment projects. Where for certain regions, transitional rules will apply, or where a change of aid intensity is anticipated, the relevant periods and aid intensities should be detailed.

⁽⁸²⁾ As adjusted in accordance with paragraph 67 in the case of individually notifiable aid for large investment projects.

⁽⁸³⁾ Judgment of 18 June 2002 in Case C-242/00 Germany v. Commission.

⁽⁸⁴⁾ 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), as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22).

⁽⁸⁵⁾ 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 OJ L 142, 14.5.1998, p. 1.

103. Given that the regions eligible for support under Article 87(3)(a) and the statistical effect regions are determined exogenously at the NUTS-II level, it will not normally be necessary to provide detailed supporting socio-economic data. On the other hand detailed supporting information should be given to explain the designation of the Article 87(3)(c) regions, other than the economic development, the low population density and the border regions, including the detailed identification of the regions concerned, population data, information on GDP and unemployment levels in the regions concerned, and any other relevant information.
104. In order to ensure continuity, which is essential for long-term regional development, the list of regions notified by Member States should in principle apply throughout the period 2007-2013. It may, however, be subject to a mid-term review in 2010. Any Member State wishing to amend the list of regions eligible for aid under Article 87(3)(c) or the applicable aid intensities must submit a notification to the Commission before 1 April 2010 at the latest. Any changes of region in this context may not exceed 50 % of the total coverage allowed for the Member State under Article 87(3)(c). With the exception of the statistical effect regions, regions which lose their eligibility for regional aid coverage as a result of this mid-term review will not be eligible for any transitional support. Moreover, Member States may at any time notify to the Commission a request to add further regions to the list until such time as the relevant population coverage is reached.

9. Entry into force, implementation, transparency and review

105. The Commission intends to apply these guidelines to all regional aid to be granted after 31 December 2006. Regional aid awarded or to be granted before 2007 will be assessed in accordance with the 1998 guidelines on national regional aid.
106. Since they must be coherent with the regional aid map, notifications of regional aid schemes, or ad hoc aid to be granted after 31 December 2006, cannot normally be considered complete until the regional aid map has been adopted for the Member State concerned in accordance with the arrangements described in section 8. Accordingly, the Commission will not normally examine notifications of regional aid schemes which are to apply after 31 December 2006, or ad hoc aid to be granted after that date, until the adoption of the regional aid map for the Member State concerned⁽⁸⁶⁾. The same applies to aid schemes for newly created small enterprises covered by section 6 of these guidelines.
107. The Commission considers that the implementation of these guidelines will lead to substantial changes in the rules applicable to regional aid throughout the Community. Furthermore, in the light of the changed economic and social conditions prevailing in the EU, it appears necessary to review the continuing justification for and effectiveness of all regional aid schemes, including both investment aid and operating aid schemes. For these reasons, the Commission will propose the following appropriate measures to Member States pursuant to Article 88(1) of the Treaty:
- without prejudice to Article 10(2) of Regulation (EC) No 70/2001⁽⁸⁷⁾ on the application of Articles 87 and 88 of the Treaty to State aid for small and medium-sized enterprises, as amended by Regulation (EC) No 364/2004⁽⁸⁸⁾ and to Article 11(2) of Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment⁽⁸⁹⁾, Member States shall limit the application in time of all existing regional aid schemes to aid to be granted on or before 31 December 2006;

⁽⁸⁶⁾ The Commission informs the Member States that in order to reduce that burden of the obligation of notification to the maximum extent possible, it intends to make use of the powers conferred on it by Regulation (EC) No 994/98 to exempt from notification under Article 88(3) of the Treaty all transparent regional investment aid schemes which comply with the national regional aid map approved for the Member State concerned. Ad hoc individual aid and operating aid schemes will not be exempt from notification. Moreover, the information and individual notification requirements for large individual aid projects set out in section 4.3 of these guidelines will continue to apply, including in the case of aid which is granted under exempted schemes.

⁽⁸⁷⁾ OJ L 10, 13.1.2001, p. 33.

⁽⁸⁸⁾ OJ L 63, 28.2.2004, p. 22.

⁽⁸⁹⁾ OJ L 337, 13.12.2002, p. 3.

- where environment aid schemes allow regional investment aid to be granted for environmental investments pursuant to footnote 29 of the Community guidelines on State aid for environmental protection ⁽⁹⁰⁾, Member States shall amend the relevant schemes in order to ensure that aid may only be granted after 31 December 2006 if it complies with the regional aid map in force on the date the aid is granted;
- Member States shall as necessary amend other existing aid schemes in order to ensure that any regional bonuses such as those allowed for training aid, aid for research and development or environment aid may only be granted after 31 December 2006 in areas which are eligible for support under Article 87(3)(a) or (c) in accordance with the regional aid map adopted by the Commission in force on the date the aid is granted.

The Commission will invite Member States to confirm their acceptance of these proposals within one month.

108. In addition, the Commission considers that further measures are necessary to improve the transparency of regional aid in an enlarged union. In particular, it appears necessary to ensure that the Member States, economic operators, interested parties and indeed the Commission itself should have easy access to the full text of all applicable regional aid schemes in the EU. The Commission considers that this can easily be achieved through the establishment of linked internet sites. For this reason, when examining regional aid schemes, the Commission will systematically seek an undertaking from the Member State that the full text of the final aid scheme will be published on the internet and that the internet address of the publication will be communicated to the Commission. Projects for which expenses were incurred before the date of publication of the scheme will not be eligible for regional aid.
109. The Commission may decide to review or amend these guidelines at any time if this should be necessary for reasons associated with competition policy or in order to take account of other Community policies and international commitments.

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⁽⁹⁰⁾ OJ C 37, 3.2.2001, p. 3.

ANNEX I

Definition of the steel industry

The steel industry, for the purposes of these guidelines consists of the undertakings engaged in the production of the steel products listed below:

Product	Combined Nomenclature Code (1)
Pig iron	7201
Ferro-alloys	7202 11 20, 7202 11 80, 7202 99 11
Ferrous products obtained by direct reduction of iron ore and other spongy ferrous products	7203
Iron and non-alloy steel	7206
Semi-finished products of iron or non-alloy steel	7207 11 11, 7207 11 14, 7207 11 16, 7207 12 10, 7207 19 11, 7207 19 14, 7207 19 16, 7207 19 31, 7207 20 11, 7207 20 15, 7207 20 17, 7207 20 32, 7207 20 51, 7207 20 55, 7207 20 57, 7207 20 71
Flat rolled products of iron and non-alloy steel	7208 10 00, 7208 25 00, 7208 26 00, 7208 27 00, 7208 36 00, 7208 37, 7208 38, 7208 39, 7208 40, 7208 51, 7208 52, 7208 53, 7208 54, 7208 90 10, 7209 15 00, 7209 16, 7209 17, 7209 18, 7209 25 00, 7209 26, 7209 27, 7209 28, 7209 90 10, 7210 11 10, 7210 12 11, 7210 12 19, 7210 20 10, 7210 30 10, 7210 41 10, 7210 49 10, 7210 50 10, 7210 61 10, 7210 69 10, 7210 70 31, 7210 70 39, 7210 90 31, 7210 90 33, 7210 90 38, 7211 13 00, 7211 14, 7211 19, 7211 23 10, 7211 23 51, 7211 29 20, 7211 90 11, 7212 10 10, 7212 10 91, 7212 20 11, 7212 30 11, 7212 40 10, 7212 40 91, 7212 50 31, 7212 50 51, 7212 60 11, 7212 60 91
Bars and rods, hot rolled, in irregularly wound coils, of iron or non alloy steel	7213 10 00, 7213 20 00, 7213 91, 7213 99
Other bars and rods of iron and non-alloy steel	7214 20 00, 7214 30 00, 7214 91, 7214 99, 7215 90 10
Angles, shapes and sections of iron or non-alloy steel	7216 10 00, 7216 21 00, 7216 22 00, 7216 31, 7216 32, 7216 33, 7216 40, 7216 50, 7216 99 10
Stainless steel	7218 10 00, 7218 91 11, 7218 91 19, 7218 99 11, 7218 99 20
Flat-rolled products of stainless steel	7219 11 00, 7219 12, 7219 13, 7219 14, 7219 21, 7219 22, 7219 23 00, 7219 24 00, 7219 31 00, 7219 32, 7219 33, 7219 34, 7219 35, 7219 90 10, 7220 11 00, 7220 12 00, 7220 20 10, 7220 90 11, 7220 90 31
Bars and rods of stainless steel	7221 00, 7222 11, 7222 19, 7222 30 10, 7222 40 10, 7222 40 30
Flat rolled products of other alloy steel	7225 11 00, 7225 19, 7225 20 20, 7225 30 00, 7225 40, 7225 50 00, 7225 91 10, 7225 92 10, 7225 99 10, 7226 11 10, 7226 19 10, 7226 19 30, 7226 20 20, 7226 91, 7226 92 10, 7226 93 20, 7226 94 20, 7226 99 20

Product	Combined Nomenclature Code ⁽¹⁾
<i>Bars and rods of other alloys steels</i>	7224 10 00, 7224 90 01, 7224 90 05, 7224 90 08, 7224 90 15, 7224 90 31, 7224 90 39, 7227 10 00, 7227 20 00, 7227 90, 7228 10 10, 7228 10 30, 7228 20 11, 7228 20 19, 7228 20 30, 7228 30 20, 7228 30 41, 7228 30 49, 7228 30 61, 7228 30 69, 7228 30 70, 7228 30 89, 7228 60 10, 7228 70 10, 7228 70 31, 7228 80
<i>Sheet piling</i>	7301 10 00
<i>Rails and cross ties</i>	7302 10 31, 7302 10 39, 7302 10 90, 7302 20 00, 7302 40 10, 7302 10 20
<i>Seamless tubes, pipes and hollow profiles</i>	7303, 7304
<i>Welded iron or steel tubes and pipes, the external diameter of which exceeds 406,4 mm</i>	7305

⁽¹⁾ OJ L 279, 23.10.2001, p. 1.

ANNEX II

Definition of the synthetic fibres industry

The synthetic fibres industry is defined, for the purposes of these guidelines, as:

- extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses, or
- polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used, or
- 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.

ANNEX III

Form for the provision of summary information for aid for large investment projects requested in paragraph 65

- (1) Aid in favour of (name of the company/companies 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-III level) where the investment takes place:
- (6) Municipality (previously NUTS-V 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 output of existing establishment into new, additional products, 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 IV

Method for allocation of population shares in assisted Article 87(3)(c) areas across Member States

The guiding principle behind the allocation of eligible population figures is to attribute them according to the observed **degree of regional disparities** within and between different Member States.

These disparities are captured through two indicators the Gross Domestic Product per capita in Purchasing Power Standard (**GDP per capita in PPS**) and the **unemployment** level. The method calculates the disparities leaving aside all assisted Article 87(3)(a) regions and the 'statistical effect' as well as the economic development regions and the low population density regions. The data employed in the calculation is the average for the last three years for which data is available, 2000-2002 for GDP per capita and 2001-2003 for unemployment at national and EU-25 level.

The methodology is applied in three sequential steps:

Step I

In order to verify the referred disparity two **thresholds are used**. Regions at the NUTS-III level definition must have a GDP per capita below 85 % or an unemployment level of more than 115 % of the national average (MS = 100). As far as the unemployment level is concerned, it is considered that sufficient disparity is attained if the region in question has an unemployment figure that is 50 % higher than the national average.

Step II

To take into account the relative position of the Member State with respect to the EU-25 average the thresholds of 85 for GDP per capita and 115 for unemployment are modified according to the following formulas:

$$\text{Adjusted GDP threshold } GDP = 85 \times \left(\frac{1 + \frac{100}{RMS}}{2} \right)$$

$$\text{Adjusted unemployment threshold } Unemployment = \text{MIN} \left[150; 115 \times \left(\frac{1 + \frac{100}{RMS}}{2} \right) \right]$$

where RMS is the relative position of the MS to the EU 25 average in %.

The introduction of these corrections implies that regions in richer Member States should show a lower GDP per capita in comparison with the national average in order to qualify for the criteria of sufficient disparity. Regions in Member States with a low unemployment should have to show a higher level of unemployment although capped at the 150 % unemployment level. On the contrary, regions in poorer Member States can have a higher GDP per capita than 85 and regions in Member States with a high unemployment can prove sufficient disparity with an unemployment level below 115.

Examples of application of correction formulas

Relative position of the Netherlands (EU-25 =100): GDP per capita 122,5, Unemployment 32,9.

After application of the mentioned correction formulas the thresholds for the Netherlands shift from 85 to 77,2 for GDP per capita and from 115 to 150 for unemployment.

Relative position of Greece (EU-25 =100): GDP per capita 74,5, Unemployment 111,7

After application of the mentioned correction formulas the thresholds employed for Greece shift from 85 to 99,5 for GDP per capita and from 115 to 109,0 for unemployment.

Step III

The next step is to verify which areas not eligible for regional aid pursuant to Article 87(3)(a) or not specifically allocated as areas eligible for Article 87(3)(c) qualify for the sufficient disparity criteria. The population for all the NUTS-III areas that verify these criteria are added together for each Member State. Then the total population figure of all areas fulfilling these criteria for the EU-25 is calculated as well as the percentage that each Member State represents in this total. These respective percentages are then considered to be the **Repartition Key** for shares of population coverage allowed.

If the decision of the Commission is to allow coverage of 42 % of the EU-25 population to live in assisted areas, the population of all assisted Article 87(3)(a) and earmarked Article 87(3)(c) areas are deducted from this figure. The remaining quantity is distributed among the Member States according to the **Repartition Key**.

In addition and also since it is not feasible to prove any internal disparity for Member States with no NUTS-III regional breakdown (Luxemburg and Cyprus) a safety net is applied to guarantee that no Member State can have its assisted areas coverage reduced by more than 50 % Article (87(3)(a) and (c) areas taken together) than that under the 1998 Regional Aid Guidelines. The aim is to ensure that all Member States are allocated a margin providing sufficient flexibility for an effective regional development policy.

ANNEX V

Regional aid coverage, 2007-2013

Belgium	Regions	GDP/CAP ⁽¹⁾	Population covered
Article 87(3)(a)	...		
Statistical effect	Hainaut	75,45	
			12,4 %
Article 87(3)(c)			13,5 %
Total population coverage 2007-2013			25,9 %
⁽¹⁾ GDP per capita 2000-2002, PPS, EU-25 100 (Eurostat news release 47/2005 of 7.4.2005).			
Czech Republic	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Střední Morava	52,03	
	Severozápad	53,29	
	Střední Čechy	54,35	
	Moravskoslezsko	55,29	
	Severovýchod	55,59	
	Jihovýchod	58,17	
	Jihozápad	60,41	
			88,6 %
Statistical effect			
Article 87(3)(c)			
Total population coverage 2007-2013			88,6 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			7,7 %
Denmark			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			8,6 %
Total population coverage 2007-2013			8,6 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			2,7 %

Germany	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Dessau	65,99	
	Chemnitz	69,63	
	Brandenburg-Nordost	70,64	
	Magdeburg	72,27	
	Mecklenburg-Vorpommern	72,56	
	Thüringen	73,10	
	Dresden	74,95	
			12,5 %
Statistical effect	Halle	75,07	
	Leipzig	77,12	
	Brandenburg-Südwest	77,45	
	Lüneburg	81,80	
			6,1 %
Article 87(3)(c)			11,0 %
Total population coverage 2007-2013			29,6 %
Estonia	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Estonia	44,94	100 %
Greece	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Dytiki Ellada	56,30	
	Anatoliki Makedonia, Thraki	57,40	
	Ipeiros	59,30	
	Thessalia	62,90	
	Ionia Nisia	65,53	
	Kriti	72,27	
	Peloponnisos	73,71	
	Voreio Aigaio	74,29	
Statistical effect	Kentriki Makedonia	75,89	
	Dytiki Makedonia	76,77	
	Attiki	78,98	
			55,5 %
Article 87(3)(c)			7,9 %
Total population coverage 2007-2013			100,0 %

Spain	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Extremadura	59,89	
	Andalucia	69,29	
	Galicia	73,36	
	Castilla-La Mancha	74,75	
	Canarias	87,79	
			36,2 %
Statistical effect	Asturias	79,33	
	Murcia	79,37	
	Ceuta	79,64	
	Melilla	79,72	
			5,8 %
Article 87(3)(c)			17,7 %
Total population coverage 2007-2013			59,6 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			12,4 %
France	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Guyane	56,76	
	Réunion	60,63	
	Guadeloupe	67,32	
	Martinique	74,88	
			2,9 %
Statistical effect ...			
Article 87(3)(c)			15,5 %
Total population coverage 2007-2013			18,4 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			6,9 %
Ireland			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			50,0 %
Total population coverage 2007-2013			50,0 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			25,0 %

Italy	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Calabria	67,93	
	Campania	71,78	
	Sicilia	71,98	
	Puglia	72,49	
			29,2 %
Statistical effect	Basilicata	77,54	
			1,0 %
Article 87(3)(c)			3,9 %
Total population coverage 2007-2013			34,1 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			5,6 %
Cyprus			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			50,0 %
Total population coverage 2007-2013			50,0 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			16,0 %
Latvia	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Latvia	37,28	100 %
Lithuania	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Lithuania	40,57	100 %
Luxembourg			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			16,0 %
Total population coverage 2007-2013			16,0 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			5,1 %

Hungary			
	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Észak Magyarország	36,10	
	Észak Alföld	36,31	
	Dél Alföld	39,44	
	Dél Dunántúl	41,36	
	Közép Dunántúl	52,28	
	Nyugat Dunántúl	60,37	
			72,2 %
Statistical effect ...			
Article 87(3)(c) ...			27,8 %
Total population coverage 2007-2013			100,0 %
Malta			
	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Malta	74,75	100 %
Netherlands			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			7,5 %
Total population coverage 2007-2013			7,5 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			2,4 %
Austria			Population covered
Article 87(3)(a) ...			
Statistical effect	Burgenland	81,50	3,4 %
Article 87(3)(c)			19,1 %
Total population coverage 2007-2013			22,5 %

Poland	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Lubelskie	32,23	
	Podkarpackie	32,80	
	Warminsko-Mazurskie	34,70	
	Podlaskie	35,05	
	Swietokrzyskie	35,82	
	Opolskie	38,28	
	Malopolskie	39,81	
	Lubuskie	41,09	
	Lódzkie	41,45	
	Kujawsko-Pomorskie	41,80	
	Pomorskie	45,75	
	Zachodniopomorskie	46,29	
	Dolnoslaskie	47,52	
	Wielkopolskie	48,18	
	Slaskie	50,62	
Mazowieckie	68,77		
			100 %
Portugal			
	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Norte	61,94	
	Centro (PT)	63,08	
	Alentejo	65,72	
	Açores	61,61	
	Madeira	87,84	
			70,1
Statistical effect	Algarve	80,05	3,8 %
Article 87(3)(c) ...			2,8 %
Total population coverage 2007-2013			76,7 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			19,2 %
Slovenia			
	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Slovenia	74,40	100 %

Slovakia	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Východné Slovensko	37,21	
	Stredné Slovensko	40,72	
	Západné Slovensko	45,42	
			88,9 %
Statistical effect ...			
Article 87(3)(c) ...			
Total population coverage 2007-2013			88,9 %
Transitional additional coverage 2007-2008 under Article 87(3)(c)			7,5 %
Finland			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			33,0 %
Total population coverage 2007-2013			33,0 %
Sweden			Population covered
Article 87(3)(a) ...			
Statistical effect ...			
Article 87(3)(c)			15,3 %
Total population coverage 2007-2013			15,3 %
United Kingdom	Regions	GDP/CAP	Population covered
Article 87(3)(a)	Cornwall & Isles of Scilly	70,16	
	West Wales and the Valleys	73,98	
			4,0 %
Statistical effect	Highlands and Islands	77,71	0,6 %
Article 87(3)(c)			19,3 %
Total population coverage 2007-2013			23,9 %

Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects

(2009/C 223/02)

1. INTRODUCTION

1.1. General rules for regional aid measures

1. The Commission Guidelines on national regional aid for 2007-2013 ⁽¹⁾ ('RAG') clarify the general approach of the Commission regarding regional State aid. In accordance with the conditions laid down in the RAG, and notwithstanding the negative effects that regional State aid may have on trade and competition, the Commission may consider State aid compatible with the common market if it is granted to promote the economic development of certain disadvantaged regions within the European Union.

2. In general, the RAG take account of the relative seriousness of the problems affecting the development of the regions concerned by introducing specific regional aid ceilings. These maximum aid intensities are graduated between 10 % and 50 % of eligible costs, based primarily on the GDP per capita of the regions concerned, but also allowing Member States some flexibility to take account of local conditions. The regional aid maps for each Member State are published on the Europa site ⁽²⁾. These graduated aid intensities reflect, in essence, the balancing exercise which the Commission must perform between, on the one hand, the positive effects that regional investment aid can have, in particular in terms of promoting cohesion through attracting investment to disadvantaged areas, and, on the other hand, limiting the potential negative effects that can occur when granting such aid to individual undertakings, for example the negative impact for other economic operators and for regions whose relative competitive advantage is correspondingly diminished.

3. A large investment project is an initial investment with an eligible expenditure above EUR 50 million ⁽³⁾. Large investment projects are less affected by the handicaps that characterise disadvantaged areas than investment projects of a lesser scale. There is an increased risk that trade will be affected by large investment projects and thus a risk of a stronger distortion effect vis-à-vis competitors in other regions. Large investments also run the risk of the amount of aid exceeding the minimum necessary to compensate for the regional disadvantages, and there is the risk that State aid for these projects would lead to perverse effects such as inefficient location choices, higher distortion of competition and, since aid is a costly transfer

from taxpayers in favour of aid recipients, net welfare losses, i.e. the cost of the aid exceeds the benefits to consumers and producers.

4. The RAG foresee specific rules for regional aid to large investment projects ⁽⁴⁾. The RAG provide for the automatic, progressive scaling-down of regional aid ceilings for these large investment projects to limit distortions of competition to a level which can generally be assumed to be compensated by their benefits in terms of development of the regions concerned ⁽⁵⁾.

5. Moreover, Member States have to notify individually any aid for investment projects if the aid proposed is more than the maximum allowable amount of aid that an investment with eligible expenditure of EUR 100 million can receive under the applicable rules (notification threshold) ⁽⁶⁾. For these notified cases, the Commission verifies in particular the aid intensities, the compatibility with the general criteria of the RAG and whether the notified investment represents a major increase of production capacities, while at the same time addressing an underperforming or even declining market, or benefits firms with high market shares.

1.2. Regional aid measures subject to an in-depth assessment

6. Despite the automatic scaling-down, certain large amounts of regional aid for large investment projects could still have significant effects on trade, and may lead to substantive distortions of competition. For this reason, it was formerly Commission policy not to authorise aid for large investment projects above the following thresholds ⁽⁷⁾:

— the aid beneficiary accounts for more than 25 % of the sales of the product(s) concerned on the market(s) concerned, or

— the production capacity created by the project exceeds 5 % of the market, while the growth rate of the market concerned is below the EEA GDP growth rate.

⁽¹⁾ OJ C 54, 4.3.2006, p. 13.

⁽²⁾ http://ec.europa.eu/comm/competition/state_aid/regional_aid/regional_aid.html

⁽³⁾ As defined in paragraph 60 and footnotes 54 and 55 of the RAG.

⁽⁴⁾ Cf. section 4.3 of the RAG.

⁽⁵⁾ Cf. paragraph 67 of the RAG.

⁽⁶⁾ Cf. paragraph 64 of the RAG.

⁽⁷⁾ Cf. paragraph 24 of the 2002 Multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8, as amended in OJ C 263, 1.11.2003, p. 3).

7. However, under the current RAG, the Commission has opted for a more individualised approach, which allows the cohesion and other benefits that can be derived from such projects to be taken into consideration, in as concrete a fashion as possible. Any such benefits must, however, be weighed against the likely negative effects on trade and competition, which should also be identified in as concrete a manner as possible. Therefore, paragraph 68 of the RAG foresees that the Commission will conduct a formal investigation procedure pursuant to Article 88(2) of the Treaty establishing the European Community for cases above the notification threshold and meeting one or both of the conditions set out in points (a) and (b) of paragraph 68 of the RAG (the in-depth assessment thresholds which are the same as the thresholds described in paragraph 6 of this communication). In these cases, the objective of the formal investigation is to carry out a detailed verification 'that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States' ⁽¹⁾.
8. In footnote 63 of the RAG, the Commission announced its intention to 'draw up further guidance on the criteria it will take into account during this assessment'. Below, the Commission presents guidance as to the kind of information it may require and the methodology it will follow for measures subject to a detailed assessment. In line with the State Aid Action Plan ⁽²⁾, the Commission will carry out an overall evaluation of the aid based on a balance of its positive and negative effects in order to determine whether, as a whole, the aid measure can be approved.
9. The detailed assessment should be proportionate to the potential distortions which may be created by the aid. This means that the scope of the analysis will depend on the nature of the case. Therefore, the nature and the level of the evidence required will also depend on the features of each individual case. Also, while respecting the provisions governing the conduct of the formal investigation as set out in Articles 6 and 7 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 ⁽³⁾, the Commission may, inter alia, ask the Member State to provide independent studies to confirm the information contained in the notification, or seek input from other economic operators active in the relevant markets or from experts in regional development. Moreover, comments by interested parties are welcomed during formal investigations. The Commission will identify the key issues on which it is seeking input in the opening of the procedure.
10. The present communication is intended to ensure the transparency and predictability of the Commission decision-making process and equal treatment of Member States. The Commission reserves the possibility to amend and review this guidance in the light of case experience.

2. POSITIVE EFFECTS OF THE AID

2.1. Objective of the aid

11. Regional aid has an objective of common interest which reflects equity considerations, namely furthering economic cohesion by helping to reduce the gap between the development levels of the various regions of the Community. Paragraph 2 of the RAG sets out that: 'By addressing the handicaps of the disadvantaged regions, national regional aid promotes the economic, social and territorial cohesion of Member States and the European Union as a whole'. Paragraph 3 of the RAG adds that: 'Regional investment aid is designed to assist the development of the most disadvantaged regions by supporting investment and job creation. It promotes the expansion and diversification of the economic activities of enterprises located in the less-favoured regions, in particular by encouraging firms to set up new establishments there'.
12. For those large investment projects that meet the in-depth assessment thresholds, the Member State will be requested to demonstrate that the aid will address the equity objective in question. The Member State will therefore need to substantiate the contribution of the investment project to the development of the region concerned.
13. While the primary objective of regional aid is to foster equity concerns as economic cohesion, regional aid may also address issues of market failure. Regional handicaps may be linked to market failures such as imperfect information, co-ordination problems, difficulties for the beneficiary to appropriate investments in public goods or externalities from investments. Where, apart from equity objectives, regional aid also addresses efficiency concerns, the overall positive effect of the aid will be considered greater.
14. The following non-exhaustive list of indicative criteria can be used to demonstrate the regional contribution of the aid, in so far as it leads to attracting additional investment and activity in the region. These positive effects of the aid can be both direct (e.g. direct jobs created) and indirect (e.g. local innovation).

— The number of direct jobs created by the investment is an important indicator of the contribution to regional development. The quality of the jobs created and the required skill level should also be considered.

⁽¹⁾ Cf. paragraph 68 of the RAG.

⁽²⁾ Cf. paragraphs 11 and 20 of the SAAP (COM(2005) 107 final).

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

- An even higher number of new jobs might be created in the local (sub-)supplier network, helping to better integrate the investment in the region concerned and ensuring more widespread spillover effects. The number of *indirect jobs* created will therefore also be taken into account.
- A commitment by the beneficiary to enter into wide-spread *training* activities to improve the skills (general and specific) of its workforce will be considered as a factor that contributes to regional development. Emphasis will also be put on training that improves the knowledge and employability of workers outside the firm. General or specific training for which training aid is approved will not be counted as a positive effect of the regional aid to avoid double counting.
- External economies of scale or other benefits from a regional development viewpoint may arise as a result of proximity (*clustering effect*). Clustering of firms in the same industry allows individual plants to specialise more which leads to increased efficiency. Physical proximity facilitates the exchange of information, ideas and knowledge between firms. A concentration of economic activities attracts many job seekers, which assures a large pool of workers with different skills available to firms. Access to legal and commercial services is ensured which enhances productivity. In general, a concentration of economic activities may again attract other investments which in turn increase the positive spillover effects (virtuous circle).
- Investments embody technical knowledge and can be the source of a significant *transfer of technology* (*knowledge spillovers*). Investments taking place in technology intensive industries are more likely to involve technology transfer to the recipient region. The level and the specificity of the knowledge dissemination are also important in this regard.
- The projects' contribution to the region's ability to create new technology through local innovation can also be considered. Co-operation of the new production facility with *local higher education institutions* can be considered positively in this respect.
- The *duration* of the investment and possible future follow-on investments are an indication of a durable engagement of a company in the region.

15. The Member States are, in particular, invited to rely on evaluations of past State aid schemes or measures, impact assessments made by the granting authorities, expert

opinions and other possible studies related to the investment project under assessment. The business plan of the aid beneficiary could provide information on the number of jobs created, salaries paid (increase in household wealth as spill-over effect), volume of sales from local producers, turnover generated by the investment and benefiting the region possibly through additional tax revenues.

16. If relevant, the relationship between the planned investment project and the national strategic reference framework, as well as the relationship between the project and the operational programmes co-financed by the structural funds, also have to be considered. In this regard, the Commission might specifically take account of any Commission Decision relating to the measure in the context of the analysis of major projects under the structural funds or the Cohesion Fund⁽¹⁾. Such a decision is, among other elements, based on 'a cost-benefit analysis, including a risk assessment and the foreseeable impact on the sector concerned and on the social-economic situation of the Member State and/or the region and, when possible and where appropriate, of other regions of the Community'.

2.2. Appropriateness of the aid instrument

17. State aid in the form of investment subsidies is not the only policy instrument available to Member States to support investment and job creation in disadvantaged regions. Member States can use general measures such as infrastructure development, enhancing the quality of education and training, or improvements in the general business environment.
18. Measures for which the Member State considered other policy options, and for which the advantages of using a selective instrument such as State aid for a specific company are established, are considered to constitute an appropriate instrument. The Commission will in particular take account of any impact assessment of the proposed measure the Member State may have made.

2.3. Incentive effect

19. Analysing the incentive effect of the aid measure is one of the most important elements in the in-depth assessment of regional aid to large investment projects. The Commission will assess whether the proposed aid is necessary to produce 'a real incentive effect to undertake investments which would not otherwise be made in the assisted areas'⁽²⁾. This assessment will take place at two levels: first, at a general, procedural level, and, second, at a more detailed, economic level.

⁽¹⁾ Cf. section 2 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the ERDF, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25).

⁽²⁾ Cf. paragraph 38 of the RAG.

20. In paragraph 38, the RAG contain general criteria to provide a formal assessment of the incentive effect of regional aid. These criteria apply to all regional aid, not only regional aid for large investment projects.
21. In the case of regional aid to large investment projects covered by this communication, the Commission will verify in detail 'that the aid is necessary to provide an incentive effect for the investment' ⁽¹⁾. The objective of this detailed assessment is to determine whether the aid actually contributes to changing the behaviour of the beneficiary, so that it undertakes (additional) investment in the assisted region concerned. There are many valid reasons for a company to locate in a certain region, even without any aid being granted.
22. Having regard to the equity objective deriving from cohesion policy and as far as the aid contributes to achieving this objective, an incentive effect can be proven in two possible scenarios:
1. The aid gives an incentive to adopt a positive investment decision because an investment that would otherwise not be profitable for the company at any location can take place in the assisted region ⁽²⁾.
 2. The aid gives an incentive to opt to locate a planned investment in the relevant region rather than elsewhere because it compensates for the net handicaps and costs linked to a location in the assisted region.
23. The Member State should demonstrate to the Commission the existence of an incentive effect of the aid. It will need to provide clear evidence that the aid effectively has an impact on the investment choice or the location choice. It will have to specify which scenario applies. In order to permit a comprehensive assessment, the Member State will have to provide not only information concerning the aided project but also a comprehensive description of the counterfactual scenario, in which no aid would be granted by the Member State to the beneficiary.
24. In scenario 1, the Member State could provide proof of the incentive effect of the aid by providing company documents that show that the investment would not be profitable without the aid and that no other location than the assisted region concerned could be envisaged.
25. In scenario 2, the Member State could provide proof of the incentive effect of the aid by providing company documents that show a comparison has been made between the costs and benefits of locating in the assisted region concerned with an alternative region. Such comparative scenarios will have to be considered to be realistic by the Commission.
26. The Member States are, in particular, invited to rely on risk assessments (including the assessment of location-specific risks), financial reports, internal business plans, expert opinions and other studies related to the investment project under assessment. Documents containing information on demand forecasts, cost forecasts, financial forecasts, documents that are submitted to an investment committee and that elaborate on various investment scenarios, or documents provided to the financial markets could help to verify the incentive effect.
27. In this context, and in particular in scenario 1, the level of profitability can be evaluated by reference to methodologies which are standard practice in the particular industry concerned, and which may include: methods to evaluate the net present value of the project (NPV), the internal rate of return (IRR) or the return on capital employed (ROCE).
28. If the aid does not change the behaviour of the beneficiary by stimulating (additional) investment in the assisted region concerned, there is a lack of incentive effect to achieve the regional objective. If the aid has no incentive effect to achieve the regional objective, such aid can be considered as free money for the company. Therefore, in an in-depth assessment of regional aid to large investment projects, aid will not be approved in cases where it appears that the same investment would take place in the region even without the aid.

2.4. Proportionality of the aid

29. For the regional aid to be proportional, the amount and intensity of the aid must be limited to the minimum needed for the investment to take place in the assisted region.
30. The RAG generally ensure that regional aid is proportional to the seriousness of the problems affecting the assisted regions by applying regional aid ceilings in general and an automatic, progressive scaling-down of these regional aid ceilings for large investment projects (see paragraphs 1 and 3).

⁽¹⁾ Cf. paragraph 68 of the RAG.

⁽²⁾ Such investments may create conditions allowing further investments that are able to survive without additional aid.

31. For regional aid cases that require an in-depth assessment, a more detailed verification of this general principle of proportionality contained in the RAG is necessary.
32. In scenario 1, for an investment incentive, the aid will generally be considered proportionate if, because of the aid, the return on investment is in line with the normal rate of return applied by the company in other investment projects, with the cost of capital of the company as a whole or with returns commonly observed in the industry concerned.
33. In scenario 2, for a location incentive, the aid will generally be considered proportionate if it equals the difference between the net costs for the beneficiary company to invest in the assisted region and the net costs to invest in the alternative region(s). All such costs and benefits need to be taken into account, including for example administrative costs, transport costs, training costs not covered by training aid and also wage differences.
34. Ultimately, these net costs which are considered to be related to the regional handicaps result in a lower profitability of the investment. For that reason, calculations used for the analysis of the incentive effect, can also be used to evaluate whether the aid is proportionate.
35. The Member State needs to demonstrate the proportionality on the basis of appropriate documentation such as that mentioned in paragraph 26.
36. In no case can the aid intensity be higher than the regional aid ceilings corrected by the scaling-down mechanism, as indicated in the RAG.

3. NEGATIVE EFFECTS OF THE AID

37. To assess market shares and potential overcapacity in a market in structural decline, the Commission needs to define the relevant product market and geographic market. Thus, usually⁽¹⁾, the relevant markets will already have been defined for regional aid measures subject to an in-depth assessment.
38. Two main indicators of potential negative effects arising from the aid are already identified in paragraph 68 of the RAG, namely high market shares and potential overcapacity in a market in structural decline. They are linked to two theories of harm in a competition context, respectively the creation of market power and the creation or maintenance of inefficient market structures. A *prima facie* measurement of these two indicators will already have taken place before the opening of the investigation procedure. In order to provide all the elements for the final balancing exercise, the assessment of the two indicators will be refined in the in-depth assessment. A third indicator of potential negative effects arising from the aid that will be assessed in depth is the influence of the aid on trade. Although these three indicators are considered as the main negative effects potentially arising from regional aid to a large investment project, the Commission does not exclude that other indicators might also be relevant in specific cases.
39. The Commission will place particular emphasis on the negative effects linked with the notion of market power and overcapacity in cases where the aid gives an incentive to change the investment decision, so that without the aid no investment would take place (scenario 1 of the incentive effect).
40. If, however, the counterfactual analysis suggests that without the aid the investment would have gone ahead in any case, albeit possibly in another location (scenario 2), and if the aid is proportional, possible indications of distortions such as a high market share and an increase in capacity in an underperforming market would in principle be the same regardless of the aid.
41. When establishing its optimum investment level, in markets with a limited number of market players (a situation typical for large investment projects) each firm takes into account the investment carried out by its competitors. If aid induces a particular company to invest more, competitors may react by reducing their own expenditure in that area. In that case aid leads to a crowding-out of private investment. If, as a result, such competitors are weakened or even have to exit, the aid distorts competition. In this regard, as discussed in paragraph 38, the RAG distinguishes between cases where the aid beneficiary has market power and cases where the aid leads to a significant capacity expansion in a declining market.
42. In general, any aid to one beneficiary in a concentrated market is more likely to distort competition, since the decision of each firm is likely to affect its competitors

⁽¹⁾ Where doubts remain as to the appropriate definition of the relevant markets, the Commission will identify these in the decision to initiate the formal investigation procedure pursuant to Article 88(2) Treaty.

more directly. This is especially the case if a dominant market player is subsidised. As a result, if, due to the aid, the beneficiary can maintain or increase its market power⁽¹⁾, regional aid for large investment projects may have a deterrent effect on competitors' investment decisions and thereby generate distortions of competition. This would be to the detriment of consumers. Therefore, the Commission wants to limit State aid to companies with market power.

43. For all regional aid cases that trigger the notification threshold (paragraph 64 of the RAG), the Commission needs to assess (paragraph 68(a) of the RAG) the share of the aid beneficiary (or the group to which it belongs) of the sales of the product or products concerned on the relevant product market(s) and geographic market(s). However, market shares can only give a preliminary indication of possible problems. Therefore, in an in-depth assessment, the Commission will also take account of other factors, where relevant, including for example the market structure by looking at the concentration in the market⁽²⁾, possible barriers to entry⁽³⁾, buyer power⁽⁴⁾ and barriers to exit.

44. The Commission will take account of the market shares and other related factors before and after the investment (normally the year before the investment starts and the year after full production is reached). When assessing negative effects in detail, the Commission will take into account that, while some investment projects are carried out over a relatively short time-scale of one or two years, most large investment projects have a much longer duration. Therefore, in most cases, long-term analyses of the evolution of markets are necessary. However, the Commission will acknowledge the fact that those long-term analyses are more speculative, particularly in the case of volatile markets or markets undergoing rapid technological change. Therefore, the more long-term and thus the more speculative the analysis is, the less weight will be attached to the possible negative effect of market power or the possibility of exclusionary behaviour.

⁽¹⁾ Market power is the power to influence market prices, output, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time.

⁽²⁾ For this purpose, the Commission may consider the Herfindahl-Hirschman index (HHI). This index provides a basic analysis of the market structure. In a market with few market players where several of them have a relatively high market share, a high market share of the beneficiary might be less of a concern for competition.

⁽³⁾ These entry barriers include legal barriers (in particular intellectual property rights), economies of scale and scope, access barriers to networks and infrastructure. Where the aid concerns a market where the aid beneficiary is an incumbent, possible barriers to entry may exacerbate the potential market power wielded by the aid beneficiary and thus the possible negative effects of that market power.

⁽⁴⁾ Where there are strong buyers in the market, it is less likely that an aid beneficiary can increase prices vis-à-vis these strong buyers.

3.1.2. *Creating or maintaining inefficient market structures*

45. It is a sign of effective competition if inefficient firms are forced to exit a market. In the long term, this process fosters technological progress and an efficient use of scarce resources in the economy. However, a substantial capacity expansion induced by State aid in an underperforming market might unduly distort competition as the overcapacity could lead to a squeeze on profit margins and a reduction of competitors' capacity or even their exit from the market. This might lead to a situation where competitors that would otherwise be able to stay on are forced out of the market as a consequence of State aid. It may also prevent low cost firms from entering and it may weaken incentives for competitors to innovate. This results in inefficient market structures which are also harmful to consumers in the long run.

46. In order to evaluate whether the aid may serve to create or maintain inefficient market structures, as pointed out above, the Commission will take into account the additional production capacity created by the project and whether the market is underperforming⁽⁵⁾. According to the RAG, additional capacity will only be considered problematic if it is created in an underperforming market and if the additional capacity is more than five per cent of the market concerned.

47. Since capacity created in a market in absolute decline will normally be more distortive than capacity created in a market in relative decline, the Commission will distinguish between cases for which, from a long-term perspective, the relevant market is structurally in decline (i.e. shows a negative growth rate), and cases for which the relevant market is in relative decline (i.e. shows a positive growth rate, but does not exceed a benchmark growth rate (see paragraph 48)). Where the capacity created by the project takes place in a market which is structurally in absolute decline, the Commission will consider it to be a negative element in the balancing test that is unlikely to be compensated by any positive elements. The long term benefit for the region concerned is also more doubtful in such a case.

48. Underperformance of the market will normally be measured compared to the EEA GDP over the last five years before the start of the project (benchmark rate). Data on past performance are more readily available and less speculative than future projections. Nevertheless, in the in-depth assessment, the Commission may also take into

⁽⁵⁾ In this context, a market is meant to be 'underperforming' if its average annual growth rate in the reference period does not exceed the growth rate of EEA's GDP.

account expected future trends since the increase in capacity will exert its effect in the years following the investment. Indicators could be the foreseeable future growth of the market concerned and the resulting expected capacity utilisation rates, as well as the likely impact of the capacity increase on competitors through its effects on prices and profit margins.

49. Experience also shows that, in some cases, considering the growth of the product concerned in the EEA may not be the appropriate benchmark to assess the effects of aid, in particular if the market is considered to be worldwide and there is only limited production or consumption of the products concerned within the EEA. In such cases, the Commission will take a broader view of the effect of the aid on market structures, having regard, in particular, to its potential to crowd out EEA producers.

3.2. Negative effects on trade

50. As explained in paragraph 2 of the RAG, the geographical specificity of regional aid distinguishes it from other forms of horizontal aid. It is a particular characteristic of regional aid that it is intended to influence the choice made by investors about where to locate investment projects. When regional aid is off-setting the additional costs stemming from the regional handicaps and supports additional investment in assisted areas, it is contributing not only to the development of the region, but also to cohesion and ultimately benefits the whole Community⁽¹⁾. With regard to the potential negative location effects of regional aid, these are already recognised and restricted to a degree by RAG and the regional aid maps, which define exhaustively the areas eligible to grant regional aid, taking account of the equity and cohesion policy objectives, and the eligible aid intensities. Aid may not be granted to attract investments outside of these areas. When appraising large investment projects subject to this guidance, the Commission should have all necessary information to consider whether State aid would result in a substantial loss of jobs in existing locations within the Community.

51. More concretely, when investments adding production capacity in a market are made possible because of State aid, there is a risk that production or investment in other regions of the Community may be negatively affected. This is particularly likely if the capacity increase exceeds market growth, which will generally be the case for large investment projects meeting the second criteria of paragraph 68 of the RAG. The negative effects on trade, corresponding to the lost economic activity in the regions affected by the aid, may be felt through lost jobs in the market concerned, at the level of subcontractors⁽²⁾ and as a

result of lost positive externalities (e.g. clustering effect, knowledge spill-overs, education and training, etc.).

4. BALANCING THE EFFECTS OF THE AID

52. Having established that the aid is necessary as an incentive to carry out the investment in the region concerned, the Commission will balance the positive effects of the regional investment aid to a large investment project with its negative effects. Careful consideration will be given to the overall effects of the aid on cohesion within the Community. The Commission will not use the criteria set out in this communication mechanically but will make an overall assessment of their relative importance. In this balancing exercise, no single element is determinant, nor can any set of elements be regarded as sufficient on its own to ensure compatibility.

53. In particular, the Commission considers that attracting an investment to a poorer region (as defined by the higher regional aid ceiling) is more beneficial for cohesion within the Community than if the same investment is located in a more advantaged region. Thus, under scenario 2, where evidence has to be given of an alternative location, an assessment that without aid the investment would have been located to a poorer region (more regional handicaps — higher maximum regional aid intensity) or to a region that is considered to have the same regional handicaps as the target region (same maximum regional aid intensity) will constitute a negative element in the overall balancing test that is unlikely to be compensated by any positive elements because it runs counter to the very rationale of regional aid. On the other hand, the positive effects of regional aid which merely compensate for the difference in net costs relative to a more developed alternative investment location (and thus fulfils the proportionality test above, in addition to the 'positive effect' requirements as to objective, appropriateness and incentive effect), will normally be considered, under the balancing test, to outweigh any negative effects in the alternative location for new investment.

54. However, where there is credible evidence that the State aid would result in a substantial loss of jobs in existing locations within the European Union, which would otherwise have been likely to be preserved in the medium term, the social and economic effects on that existing location will have to be taken into account in the balancing exercise.

55. The Commission may, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999, close the procedure with a decision pursuant to Article 7 of that Regulation.

⁽¹⁾ In particular, additional activity or increased standard of living in the assisted area may increase demand for products and services originating from other parts of the Community.

⁽²⁾ Especially if they operate in local markets in the region.

56. The Commission may decide either to approve, condition or prohibit the aid ⁽¹⁾. If it adopts a conditional decision pursuant to Article 7(4) of that Regulation, it may attach conditions to limit the potential distortion of competition and ensure proportionality. In particular, it may reduce the notified amount of aid or aid intensity to a level considered to be proportional and thus compatible with the common market.
-

⁽¹⁾ When the aid is granted on the basis of an existing regional aid scheme, it is however to be noted that the Member State retains the possibility to grant such aid up to the level which corresponds to the maximum allowable amount that an investment with eligible expenditure of EUR 100 million can receive under the applicable rules.

Guidelines on National Regional aid for 2007-2013

(OJ C 54, 4.3.2006, p. 13)

(Text with EEA relevance)

(2010/C 222/02)

Communication of the Commission on the review of the State aid status and the aid ceiling of the statistical effect regions in the following National regional State aid maps for the period 1.1.2011-31.12.2013

N 745/06 — Belgium — (Published in OJ C 73, 30.3.2007, p. 15)

N 408/06 — Greece — (Published in OJ C 286, 23.11.2006, p. 5)

N 459/06 — Germany — (Published in OJ C 295, 5.12.2006, p. 6)

N 324/07 — Italy — (Published in OJ C 90, 11.4.2008, p. 4)

N 626/06 — Spain — (Published in OJ C 35, 17.2.2007, p. 4)

N 492/06 — Austria — (Published in OJ C 34, 16.2.2007, p. 5)

N 727/06 — Portugal — (Published in OJ C 68, 24.3.2007, p. 26)

N 673/06 — United Kingdom — (Published in OJ C 55, 10.3.2007, p. 2)

1. According to point 20 of the Guidelines on national Regional Aid for 2007-2013 (RAG) Statistical Effect Regions will benefit from a status as an assisted area pursuant to Article 107(3)(a) TFEU until the end of 2010. These regions will lose their status as an Article 107(3)(a) TFEU assisted area as from 1st January 2011, if an ex officio review to be carried out by the Commission in 2010 shows that their GDP/inhabitant over the most recent three years exceeds 75 % of the EU25 average. As already stipulated in the decisions on the regional State aid maps for 2007-2013, these regions changing status will benefit for the period 1.1.2011-31.12.2013 from eligibility to regional aid on the basis of Article 107(3)(c) TFEU.

2. The most recent statistical data available from Eurostat (Eurostat's News release 25/2010 of 18.2.2010) on GDP in PPS per capita, calculated as a three year average (2005-2007) (EU25 = 100) for the individual statistical effect regions recognised by the RAG are the following: Hainaut (74,0); Brandenburg-Südwest (84,1); Lüneburg (80,6); Leipzig (84,9); Sachsen-Anhalt (Halle) (79,5); Kentriki Makedonia (71,0); Dytiki Makedonia (73,8); Attiki (121,3); Principados de Asturias (90,5); Región de Murcia (83,6); Ciudad Autónoma de Ceuta (91,4); Ciudad Autónoma de Melilla (89,8); Basilicata (64,9); Burgenland (79,4); Algarve (77,7); Highlands and Islands (85,0).

3. According to these data, Hainaut, Kentriki Makedonia, Dytiki Makedonia and Basilicata maintain their status as an Article 107(3)(a) TFEU assisted area with an aid intensity of 30 % as their GDP/inhabitant over the most recent three years (2005-2007) is below 75 % of the EU25 average. All the other Statistical Effect Regions benefit for the period 1.1.2011-31.12.2013 from eligibility to regional aid on the basis of Article 107(3)(c) TFEU, with an aid intensity as indicated in the table below as their GDP/inhabitant over the most recent three years (2005-2007) exceeds 75 % of the EU25 average.

NUTS II	Name	Ceiling for regional investment aid ⁽¹⁾ (applicable to large enterprises)	
Statistical Effect Regions			
1. Regions which remain eligible for aid under Article 107(3)(a) TFEU until 31.12.2013			
		1.1.2007-31.12.2010	1.1.2011-31.12.2013
BE32	Hainaut	30 %	30 %
GR12	Kentriki Makedonia	30 %	30 %

NUTS II	Name	Ceiling for regional investment aid ⁽¹⁾ (applicable to large enterprises)	
GR13	Dytiki Makedonia	30 %	30 %
ITF5	Basilicata	30 %	30 %
2. Regions which become eligible for aid under Article 107(3)(c) TFEU as from 1.1.2011 until 31.12.2013			
DE42	Brandenburg-Südwest	30 %	20 %
DED3	Leipzig	30 %	20 %
DEE2	Halle	30 %	20 %
DE93	Lüneburg		
DE934	LK Lüchow-Dannenberg	30 %	20 %
DE93A	LK Uelzen	30 %	20 %
DE931	LK Celle	15 %	15 %
DE932	LK Cuxhaven	15 %	15 %
DE935	LK Lüneburg	15 %	15 %
GR30	Attiki	30 %	20 %
ES12	Principado de Asturias	30 %	20 %
ES62	Región de Murcia	30 %	20 %
ES63	C. Autónoma de Ceuta	30 %	20 %
ES64	C. Autónoma de Melilla	30 %	20 %
AT11	Burgenland	30 %	20 %
PT15	Algarve	30 %	20 %
UKM4	Highlands and Islands	30 %	20 %

⁽¹⁾ For investment projects with eligible expenditure not exceeding EUR 50 million, this ceiling is increased by 10 percentage points for medium-sized companies and 20 percentage points for small companies as defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). For large investment projects with eligible expenditure exceeding EUR 50 million, this ceiling is subject to adjustment in accordance with paragraph 67 of the Guidelines on national regional aid for 2007-2013.

▼ M1

PART III.4

SUPPLEMENTARY INFORMATION SHEET ON REGIONAL AID

This supplementary information sheet must be used for the notification of any aid scheme or ad hoc aid covered by the guidelines on national regional aid for 2007-2013 (RAG)⁽¹⁾. The present annex cannot be used for the particular purpose of notification of new regional aid maps for the period 2007-2013. Transparent investment aid schemes falling under the scope of the exemption regulation on regional investment aid are exempted from the notification obligation. Therefore, Member States are invited to clarify the scope of their notification; in the particular case that a scheme covers both transparent and non-transparent forms of investment aid, they are invited to limit the scope of the notification only to the second category.

In the case of *ad hoc aid* (i.e. aid granted outside existing aid schemes), Member States will have to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition. Moreover, Member States will have to demonstrate that the aid will not be unduly concentrated on a particular sector of activity and that it creates no adverse sectoral effects.

Another supplementary information sheet (Part III.5) must be submitted in case of notification of regional investment aid to large investment projects in the accordance with section 4.3 of the RAG.

1. **Scheme or ad hoc aid**

The scheme or the ad hoc aid relates to

1.1. initial investment

The aid is calculated as a percentage of the investment's eligible material and immaterial costs

The aid is calculated as a percentage of the expected wage costs of the persons to be hired

operating aid

aid for newly-created small enterprises

combination of any above

1.2. The aid is granted:

automatically, should the conditions of the scheme be fulfilled

on a discretionary basis, following a decision of the authorities

Should the aid be granted on a discretionary basis, please provide a short description of the criteria followed and attach a copy of the administrative provisions applicable for the awarding of aid:

.....

1.3. Does the aid respect the regional aid ceilings determined in the regional aid map in force at the time of awarding the aid, including those resulting from the provisions applicable to aid for large investment projects (section 4.3 of RAG)?

yes no

Does the scheme include a reference to the regional aid map in force?

yes no

⁽¹⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

▼ **M1**

2. **Initial investment aid**

2.1. Does the scheme cover investment in fixed capital or job creation linked to initial investment 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?
- a fundamental change in the overall production process of an existing establishment?
- the acquisition by an independent investor of capital assets directly linked to an establishment which has closed or which would have closed had it not been purchased?

2.2. Where the aid is calculated on the basis of material or immaterial investment costs, or of acquisition costs in the case of a takeover, does the aid include a clause stipulating that the beneficiary makes a financial contribution of at least 25 % of the total eligible costs and that this contribution will be free of any public support, including *de minimis* aid?

- yes no

2.3. Where the aid is granted automatically on the basis of objective criteria under a legal basis giving rights to the beneficiaries to receive the aid, does the scheme exclude the award of aid to projects which have started before the entry into force of the legal basis?

- yes no

Where the aid is not granted automatically, does the scheme provide that the application for aid must be submitted before work is started on the project and the competent authorities must have confirmed in writing that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility laid down by the scheme (see p. 38 of the RAG)?

- yes no

In the case of ad hoc aid, did the competent authority issue a letter of intent to award aid before work started on the project, which was conditional on the Commission approval of the measure?

- yes no

If any of the previous points mentioned above under 2.3 are not fulfilled, please explain why and how the authorities intend to comply with these necessary conditions:

.....

2.4. What are the aid intensities under the scheme or ad hoc aid expressed in gross terms?

.....

What are the parameters enabling the calculation of aid intensities?

.....

2.4.1. Grants

in nominal amount

.....

in present (discounted) value

.....

▼ M12.4.2. *Tax measures*

How is the discounted value of the tax capped and to which aid intensity?

.....

2.4.3. *Public soft loans*

maximum period of the loan:

.....

maximum proportion (amount of the loan as a % of the eligible investment):

.....

maximum length of the grace period:

.....

minimum interest rate:

.....

— Is the loan covered by normal securities required by banks?

yes no

If yes, to what extent?

.....

— What is the expected default rate, by categories of beneficiaries?

.....

— Is the interest rate increased in situations involving a particular risk?

yes no

— Is the interest rate fixed, variable, dependent on profits, a combination of above?

.....

— Are the loans subordinated?

yes no

2.4.4. *Interest rate subsidy:*

maximum amount of the rebate:

.....

maximum proportion (amount of the loan as a % or proportion of the eligible investment):

.....

maximum length of the grace period:

.....

duration of the loan:

.....

▼ M12.4.5. *Guarantee schemes*

Please indicate the types of loans for which guarantees may be granted:

.....

Please indicate the method and the parameters used for the calculation of the grant equivalent of the guarantee, including duration, proportion and amount of the loan:

.....

Please specify the premiums paid by the State to the bank:

.....

What is the expected default rate, by categories of beneficiaries?

.....

What is the maximum coverage (percentage) of a loan by the guarantee?

.....

What are the conditions for the mobilisation of guarantees?

.....

2.4.6. *Public participations*

Please indicate if the scheme involves aid in form of public participations:

.....

To what extent does the public participation deviate from the Market Economy Investor principle?

.....

Please provide relevant information in order to calculate the aid element of the public participation:

.....

2.4.7. *Other:*

.....

2.5. Is replacement investment excluded from the scheme?

yes no

If not, the authorities are requested to fill in section 3 of this form on operating aid.

2.6. Is assistance for firms in difficulty ⁽¹⁾ and/or for the financial restructuring of firms in difficulty excluded from the scheme?

yes no

⁽¹⁾ As defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

▼ M1

2.7. Investment aid calculated as a percentage of the investment's eligible material and immaterial costs

Does the eligible expenditure under the scheme relate to:

2.7.1. *Material assets:*

The value of the investment is established on the basis of ⁽¹⁾:

land

buildings

plant/machinery (equipment)

in case of a takeover, capital assets

Please provide a short description:

.....

Are the assets acquired new, except in the case of SMEs and takeovers?

yes no

Please specify:

.....

Does the scheme ensure that any aid awarded in the past for the acquisition of assets in case of takeovers has been taken into account/deducted prior to the purchase (see p. 54 of the RAG)?

yes no

Please specify:

.....

How is it ensured that the transactions in case of takeovers will take place under market conditions?

.....

Are costs related to the acquisition of assets — other than land and buildings — under financial lease included in the eligible expenditure?

yes no

Does the lease contain an obligation to purchase the asset — other than land and buildings — at the expiry of the term of the lease?

yes no

⁽¹⁾ In the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for investment aid.

▼M1

For the financial lease of land and buildings, does the lease continue for at least five years after the anticipated date of the completion of the investment project, for large companies, and three years for SMEs?

yes no

Should one of the previous questions under 2.7 be answered in the negative, please explain how the authorities intend to comply with the necessary conditions:

.....

2.7.2. *Immaterial assets:*

The value of the investment is established on the basis of expenditure entailed by the transfer of technology through the acquisition of:

- patent rights
- licences
- know-how
- unpatented technical knowledge

Please provide a short description:

.....

Does the scheme include a clause stipulating that the expenditure on eligible intangible investment must not exceed 50 % of the total eligible investment expenditure for the project in the case of large firms?

yes no

Does the measure ensure that eligible immaterial assets:

- are used exclusively in the establishment receiving the regional aid?
- are regarded as amortisable assets?
- are purchased from third parties under market conditions?
- are included in the capital assets of the firm and remain in the establishment receiving the regional aid for at least five years for large companies and three years for SMEs?

Should one of these conditions not be explicitly reflected in the scheme, explain why and how the authorities intend to respect these requirements:

.....

▼ M1

Does the scheme include in the eligible expenditure for SMEs the costs of preparatory studies and consultancy costs linked to the investment?

yes no

Does the scheme provide that consultancy costs for SMEs are limited to an aid intensity of up to 50 % of the actual costs incurred?

yes no

2.7.3. How is it ensured that aid for initial investment (both material and immaterial assets) is made conditional on the maintenance of the investment for a minimum period of five years in case of large companies and three years in case of SMEs?

.....

2.8. Investment aid calculated on the basis of wage costs

2.8.1. Does the measure ensure that the aid calculated on the basis of wage costs is linked to an initial investment project?

yes no

2.8.2. Does the measure ensure that job creation means a net increase in the number of employees (ALU) directly employed in a particular establishment compared with the average over the previous 12 months, after deducting any jobs lost during that 12 month period in the same establishment?

yes no

2.8.3. How is it ensured that the eligible expenditure will not exceed the wage costs of a person hired, calculated over a period of two years?

.....

2.8.4. Does the measure ensure that the posts will be filled within three years of the completion of works?

yes no

2.8.5. Does the measure ensure that the jobs created will be maintained within the region concerned for a minimum period of five years (or three years in the case of SMEs) from the date the post was first filled?

yes no

Should one of the previous questions mentioned under 2.8 be answered in the negative, please explain how the authorities intend to comply with these necessary conditions:

.....

▼ M1**3. Operating aid**

3.1. What is the direct link between the awarding of operating aid and the contribution to regional development?

.....

3.2. What are the structural handicaps that the operating aid is seeking to redress?

.....

3.3. How is it ensured that the nature and the level of the operating aid are proportional to the handicaps it seeks to alleviate?

.....

3.4. What arrangements have been made to ensure that the operating aid is progressively reduced and limited in time?

.....

3.5. Is the operating aid scheme open to all sectors?

yes no

3.6. Is the scheme designed to offset additional transport or employment costs?

yes no

3.7. If one of the above questions (3.5—3.6) is answered negatively, how is it ensured that p. 78 of the RAG is respected?

.....

3.8. Is operating aid intended to promote exports excluded?

yes no

Specific questions relating to the outermost regions or to regions with low population density or regions with least population density

3.9. Should operating aid not be progressively reduced and not be limited in time, please specify whether the following conditions are met:

3.9.1. Does the aid benefit an outermost region or a region with low population density or with least population density?

yes no

3.9.2. Is this aid intended to offset in part additional transport costs?

yes no

Please provide proof of the existence of these additional costs and the method of calculation used to determine their amount⁽¹⁾. In particular, please provide proof that the conditions of point 81 of the RAG are respected:

.....

Indicate what will be the maximum amount of aid (on the basis of an aid-per-passenger/kilometre ratio or aid per tonne/kilometre) and the percentage of the additional costs covered by the aid:

.....

⁽¹⁾ The description should reflect how the authorities intend to ensure that the aid is given only in respect of the extra cost of transport of goods inside the national borders, it must not be allowed to become export aid, it is calculated on the basis of the most economical form of transport and the shortest route between the place of production or processing and commercial outlets, and cannot be given for the transport of the products of businesses without an alternative location.

▼M1

3.9.3. In the outermost regions, is the aid intended to offset the additional costs arising in the pursuit of economic activity from the factors identified in Article 299(2) of the EC Treaty?

yes no

Please determine the amount of the additional cost and the method of calculation:

.....

How can the authorities establish the link between the additional costs and the factors identified in Article 299(2) of the EC Treaty?

.....

3.9.4. Is the aid intended to prevent or reduce the continuing depopulation of the least populated regions?

yes no

How can the authorities demonstrate that the aid proposed is necessary and appropriate to prevent or reduce continuing depopulation and that it will not affect trading conditions to an extent contrary to the common interest?

.....

4. Aid for newly-created small enterprises

Information on the beneficiaries

4.1. Are the beneficiaries small enterprises on the date of granting the aid within the meaning of Article 2 of Annex I to Commission Recommendation 2003/361/EC ⁽¹⁾?

yes no

4.2. Is the aid awarding authority required to verify that all the beneficiaries are autonomous in the meaning of Article 3 of Annex I to Recommendation 2003/361/EC?

yes no

4.3. Does the scheme ensure that aid is only granted to small enterprises which have been created less than five years before the date of granting the aid?

yes no

4.4. Please describe the mechanisms put in place in order to ensure that no misuse of the aid measure takes place in the form of existing enterprises being artificially closed down and re-started in order to receive this type of aid:

.....

Geographical application of the scheme

4.5. Is the aid scheme limited to assisted areas only?

yes no

⁽¹⁾ OJ L 124, 20.5.2003, p. 36.

▼ M1

4.6. The beneficiaries conduct their economic activity in the following regions (please specify in conformity with the denomination of the regions as defined in the regional aid map):

— All assisted areas in the Member State concerned
 yes no

— Article 87(3)(a) region(s)
 yes no

Please specify the region(s) (NUTS):

— Article 87(3)(c) region(s)
 yes no

Please specify the region(s) (NUTS):

Eligible expenditure

4.7. Are legal, advisory, consultancy and administrative costs directly related to the creation of the enterprise included in the eligible expenditure?

yes no

If yes, please specify:

4.8. Are the eligible costs strictly limited to those that are incurred within the first five years after the creation of the enterprise and, within those five years, to the time when the company qualifies as a small enterprise according to Article 2 and 3 of Annex 1 to Recommendation 2003/361/EC?

yes no

4.9. Please indicate in the following list, which costs are included in the eligible expenditures:

— Interests on external finance

— Dividend on own capital employed, not exceeding the reference rate

— Fees for renting production facilities/equipment

— Energy, water, heating costs

— Taxes (other than VAT and corporate taxes on business income)

Please specify:

— Administrative charges

Please specify:

— Depreciation

— Fees for leasing production facilities/equipment

▼ M1

— Wage costs

Are compulsory social charges included in the wage costs?

yes no

As regards depreciation, fees for leasing production facilities/equipment or wage costs, can you confirm that the underlying investments or job creation and recruitment measures have not benefited or will not benefit from other forms of aid?

yes no

Aid intensities

4.10. What is the aid intensity foreseen by the measure for eligible expenses incurred within the first three years after the creation of the enterprises or for expenditures directly related to the creation of the enterprise?

... % for Article 87(3)(a) region(s)

... % for Article 87(3)(c) region(s)

4.11. What is the aid intensity foreseen by the measure for eligible expenses incurred in the fourth and fifth year after the creation of the enterprises?

... % for Article 87(3)(a) region(s)

... % for Article 87(3)(c) region(s)

4.12. Is the aid intensity increased by five percentage points as indicated under point 89 of the RAG?

yes no

If yes, please specify:

— For Article 87(3)(a) regions with a GDP ⁽¹⁾ of less than 60 % of Community average

yes no

— For low population density regions with less than 12,5 inhabitants/km²

yes no

— For small islands with a population of less than 5 000

yes no

— For other communities with a population of less than 5,000 suffering from similar isolation like islands

yes no

Please specify the region(s):

4.13. In case the beneficiaries have establishments located in more than one type of region (Article 87(3)(a) or (c), outside assisted areas or those indicated under 4.12.), please indicate how it will be ensured that intensities or a possible top-up are applied correctly:

.....

Aid amount

4.14. Is the maximum aid amount awarded to beneficiaries located in Article 87(3)(a) regions limited to EUR 2 million per enterprise and in Article 87(3)(c) regions to EUR1 million per enterprise?

yes no

4.15. Are the annual aid amounts awarded limited to 33 % of the abovementioned maximum amounts?

yes no

⁽¹⁾ GDP per capita in Purchasing Power Standard (PPS).

▼ **M1**

- 4.16. Please provide a description on the mechanisms used or the form in which the aid is awarded to the beneficiary enterprises (e.g. grant, loan, etc.) and explain in detail how aid intensities and maximum aid amounts are calculated, in particular, for non transparent forms of aid:

.....

Cumulation

- 4.17. Can any other form of public support be granted on the basis of the same eligible costs as regards interest on external finance, dividend on own capital employed, fees for renting production facilities/equipment, energy, water, heating costs, or taxes (other than VAT and corporate taxes)?

yes no

If yes, please describe the mechanism put in place in order to ensure that the upper limits for the aid amount per enterprise in total and per year as well as aid intensities are respected:

.....

5. Scope of the scheme or ad hoc aid

- 5.1. Does the aid scheme apply to all sectors?

yes no

Is the aid scheme targeted at a particular sector of activity?

yes no

If yes, please explain

.....

- 5.2. Does the scheme apply to the production of the agricultural products listed in Annex I to the Treaty?

yes no

Does the scheme apply to the processing and marketing of agricultural products, but only to the extent laid down in the Community guidelines for State aid in the agriculture sector⁽¹⁾, or any replacement Guidelines?

yes no

- 5.3. Does the scheme apply to the transport sector?

yes no

If yes,

— Transport Services

- Maritime Transport
 Air Transport
 Road Transport
 Rail Transport
 Urban Transport
 Inland waterway Transport
 Combined transport

⁽¹⁾ OJ C 28, 1.2.2000, p. 2. Corrected by OJ C 232, 12.8.2000, p. 17.

▼ **M1**

Management of transport infrastructure

- Port infrastructure
 Airport infrastructure
 Road infrastructure
 Rail infrastructure
 Urban Transport infrastructure
 Inland waterway infrastructure

— Monitoring

Will the annual report trace any individual aid falling under the abovementioned categories with its amount and its beneficiary?

- yes no

5.4. Does the scheme apply to the shipbuilding sector?

- yes no

5.5. Does the scheme respect the specific provisions, such as the prohibition to grant aid to the steel sector ⁽¹⁾ and/or synthetic fibres ⁽²⁾?

- yes no

5.6. Does the scheme provide for respect of individual notification obligation foreseen in section 4.3. of the RAG – Aid for large investment projects ⁽³⁾?

- yes no

6. Cumulation

6.1. Where regional aid under one scheme can be combined with aid under other scheme(s), please specify, in each scheme, the method by which compliance is ensured with the conditions on cumulation listed in section 4.4 of the RAG.

.....

6.2. Is it ensured that regional investment aid shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the approved regional aid map?

- yes no

6.3. Where aid calculated on the basis of (material or immaterial) investment costs is combined with aid calculated on the basis of wage costs, does the aid scheme respect the intensity ceiling laid down for the region concerned?

- yes no

7. Transparency

7.1. Does the scheme exclude projects for which eligible expenditure was incurred before the date of publication of the final scheme in the Internet (see p. 108 of the RAG)?

- yes no

8. Other information

Please indicate here any other information (e.g. environmental impacts or benefits) you consider relevant to the assessment of the measure(s) concerned under the guidelines on national regional aid.

.....

⁽¹⁾ In the sense of Annex I to the RAG.

⁽²⁾ In the sense of Annex II to the RAG.

⁽³⁾ Please note that you have to fill in a specific notification form (Part III.5) in case of aid to large investment projects.



PART III.5

SUPPLEMENTARY INFORMATION SHEET ON REGIONAL AID FOR LARGE INVESTMENT PROJECTS

This supplementary information sheet must be used for the notification of any regional investment aid exceeding the threshold for individual notification defined in point 64 of the Guidelines for national regional aid for 2007-2013.

For ad hoc aid (aid granted outside existing schemes) the Member State must also provide the Supplementary Information Sheet on regional aid (Part III.4). In addition, Member States will have to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition. Moreover, Member States will have to demonstrate that the aid will not be unduly concentrated on a particular sector of activity and that it creates no adverse sectoral effects.

The Commission reserves the right to ask for further information in order to carry out an in-depth assessment if the thresholds for such an assessment as defined in point 68 of the Regional Aid Guidelines are reached.

Additionally to this supplementary information sheet(s) the Member State must provide:

- Part I. General Information,
- Part II. Summary Information for publication in the Official Journal of the European Union.

The Member State must also provide the relevant investment agreement, the (draft) aid contract and any other relevant document (including, in the case of ad hoc aid, the letter of intent), in order to confirm that the granting of the aid is in conformity with the general rules under the Guidelines for national regional aid for 2007-2013 and with any underlying aid scheme.

If amounts are converted into the euro or other currencies, please provide the implicit exchange rate assumptions. Please always indicate if the amounts mentioned are in nominal amounts or discounted.

1. Additional information on beneficiaries**1.1. Structure of the company or companies investing in the project****1.1.1. Identity of aid recipient(s):**

.....

1.1.2. If the legal identity of the aid recipient is different from the undertaking(s) that finance(s) the project or from the actual beneficiary(ies) of the aid, describe also these differences.

.....

1.1.3. Please give a clear description of the relation between the beneficiary, the group of enterprises it belongs to and other associated enterprises, including joint ventures.

.....

1.2. For the company or companies investing in the project, provide the following data for the last three financial years (at group level).**1.2.1. Worldwide turnover, EEA turnover, turnover in the Member State concerned:**

.....

1.2.2. Net operating income, return on capital employed and free cash flow:

.....

1.2.3. Employment worldwide, at EEA level and in the Member State concerned:

.....

1.2.4. Audited financial statements and annual report(s) for the last three years:

.....

1.3. If the investment takes place in an existing establishment (plant), provide the following data for the last three financial years of that entity (data for the existing establishment/plant).**1.3.1. Worldwide turnover, EEA turnover, turnover in Member State concerned:**

.....

▼ **M1**

1.3.2. Net operating income, return on capital employed and free cash flow:

.....

1.3.3. Employment:

.....

1.3.4. Aid history — Did the beneficiary receive aid for any other investment in the same establishment (plant) in the last three years?

yes no

If yes, please give more details:

.....

1.4. *Firms in difficulty*

Does the aid benefit a firm in difficulty ⁽¹⁾ or will it be used for the financial restructuring of a firm in difficulty?

yes no

If yes, please note that the Community guidelines on State aid for rescuing and restructuring firms in difficulty are applicable.

2. **Aid**

2.1. *Form of aid*

Please give a detailed description of each form of aid:

.....

2.2. *Amount of aid*

For each form of aid, provide the following information:

2.2.1. Amount of support, both in nominal and discounted terms:

.....

2.2.2. A complete schedule of the payment of the proposed assistance:

.....

In case of aid awarded in the form of exemptions on future taxes, please indicate how the discounted aid amount will be capped:

.....

2.2.3. The applicable existing aid scheme(s), including title, State aid number and reference to Commission approval, submission under interim procedure, or supplementary information sheet pursuant to an exemption regulation:

.....

2.2.4. The application for aid was submitted before work was started on the project and the competent authorities have confirmed in writing that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility laid down by the scheme.

yes no

If no, please explain.

.....

2.3. *Characteristics*

2.3.1. Are any of the assistance measures of the overall package not yet defined?

yes no

If yes, please specify, and explain how the total discounted aid amount will be capped:

.....

⁽¹⁾ As defined in the Community guidelines on State aid for Rescuing and Restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

▼ M1

- 2.3.2. Indicate which of the abovementioned measures does not constitute State aid and for what reason(s):
.....
- 2.3.3. How is it ensured that the aid is made conditional on the maintenance of the investment or the jobs created for a minimum period of five years in case of large companies and three years in case of SMEs?
.....
- 2.4. *Financing from Community and other sources*
- 2.4.1. Are some of the abovementioned measures to be co-financed by Community funds (European Investment Bank, European Social Fund, European Regional Development Fund, other)? Please explain.
.....
- 2.4.2. Is some additional support for the same project to be requested from any other European or international financing institutions?
 yes no
- If so, for what amounts?
.....
- 2.5. *Reporting*
- Please confirm that the following documents will be provided to the Commission:
- within two months of granting the aid, a copy of the aid contract between the granting authority and the beneficiary;
- on a five-yearly basis, starting from the approval of the aid by the Commission, an intermediary report (including information on the aid amounts being paid, on the execution of the aid contract and on any other investment projects started at the same establishment/plant);
- within six months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.
3. **Assisted project**
- 3.1. *Timeline*
- Specify the planned start date of the investment, the planned date of completion of the investment and the planned year by which full production will be reached, if necessary for each product envisaged by the investment project.
.....
- 3.2. *Description of the project*
- 3.2.1. Specify the type of the project and whether it is a new establishment; the extension of an existing establishment; diversification of the output of an establishment into new, additional products; a fundamental change in the overall production process of an existing establishment; or the acquisition of capital assets directly linked to an establishment by an independent investor which has closed or which would have closed had it not been purchased:
.....
- 3.2.2. Provide a short description of the project:
.....
- 3.3. *Breakdown of the project costs*
- 3.3.1. Specify the total cost of the investment over the lifetime of the project:
.....
- 3.3.2. Provide a detailed breakdown per year and per category (land, buildings, plant/machinery, or other) of the eligible costs associated with the investment project, where relevant for each product envisaged by the investment project:
.....

▼ **M1**3.4. *Financing of total project costs*

Please provide a complete description of the financing of the project and how it ensures that at least 25 % of the eligible costs are financed in a way which is free of public support, including *de minimis* aid.

.....

4. **Product and market characteristics**

In this section, if applicable, please take account of any relevant marketing or similar arrangements with other companies for the calculation of the capacity and the market share (e.g. exclusive licenses for sales).

4.1. *Characterisation of product(s) envisaged by the project*

4.1.1. Specify all the product(s) that will be produced in the aided facility upon the completion of the investment and indicate, where appropriate, the Prodcom code or CPA nomenclature for projects in the service sectors.

.....

4.1.2. Will the products envisaged by the project replace any other products produced by the beneficiary (at group level)? What product(s) will it replace? If these replaced products are not produced at the location of the project, indicate where they are currently produced. Please provide a description of the link between the replaced production and the current investment and give a time schedule for the replacement.

.....

4.1.3. What other product(s) can be produced with the same new facilities (through flexibility of the production installations of the beneficiary) at little or no additional cost?

.....

4.2. *Product concerned and relevant product market*

4.2.1. Explain if the project concerns an intermediate product and if a significant part of the output is not sold on the market (under market conditions). Based on the above explanation, for the purpose of calculating the market share and capacity increase in the remainder of this section. Please indicate if the product concerned is the product envisaged by the project or if it is the downstream product.

.....

4.2.2. Please indicate the demand side substitutes and the supply side substitutes of the product concerned. The relevant product market includes the product concerned and its substitutes considered to be such either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations of the beneficiary and its competitors).

.....

4.3. *Market share data*

Please answer the following questions for all products concerned.

4.3.1. For the purpose of applying point 68(a) of the RAG, the Commission will normally assume that the relevant geographic market is the European Economic Area (EEA). Please provide arguments if another geographic market for the product(s) is considered relevant.

.....

4.3.2. Please provide an estimate of all sales of the aid recipient on the relevant market (at group level, in value and volume terms), from the year preceding the start year of the investment to the year following full production of the product envisaged by the project. If applicable, provide a breakdown of these sales into product concerned and other categories of products sold by the aid beneficiary on the relevant market.

.....

4.3.3. Please provide an estimate of the overall sales of all producers on the relevant market (in value and volume terms), from the year preceding the start year of the investment to the year following full production of the product envisaged by the project. If available, include statistics prepared by public and/or independent sources.

.....

▼ M1

4.3.4. Please explain the methodology underlying the estimates and the implicit price assumptions.

.....

4.4. *Market evolution*

Please answer the following questions for all products concerned.

4.4.1. Provide for each of the last six years data on apparent consumption ⁽¹⁾ (in value and volume terms) in the relevant product market in the EEA. Please also provide implicit price assumptions. If available, include statistics prepared by the public and/or independent sources.

.....

4.4.2. Please calculate from the above figures the Compound Annual Growth Rate (CAGR) ⁽²⁾ of apparent consumption in the relevant product market in the EEA.

.....

4.4.3. Please calculate the average annual growth rate of the EEA's GDP over the last five years as a Compound Annual Growth Rate (CAGR) using Eurostat figures ⁽³⁾ (www.eu.int/comm/eurostat/ — currently the figures can be found under "Themes/Economy and finance/National accounts/Annual national accounts/GDP and main aggregates").

.....

4.4.4. Is the average annual growth rate of the apparent consumption on the relevant product market in the EEA over the last five years below the average annual growth rate of the EEA GDP over the last five years?

yes no

4.5. *Capacity considerations*

Please answer the following questions for all products concerned.

If from point 4.4 on market evolution follows that the average annual growth rate of the apparent consumption on the relevant market is below the average annual growth rate of the EEA GDP, provide the following information:

4.5.1. Provide an estimate of the production capacity created by the investment (in volume and value terms).

.....

4.5.2. Provide an estimate of any changes in the total capacity of the beneficiary (at group level) in the EEA between the year preceding the start year of the project and the year following completion of the project (in volume and in value terms). Please also provide implicit price assumptions. If available, include statistics prepared by public and/or independent sources.

.....

4.5.3. Provide an estimate of the total apparent consumption on the relevant product market(s) in the EEA for the year preceding the start year and for the year following the completion of the project (in volume and in value terms). Please also provide implicit price assumptions. If available, include statistics prepared by public and/or independent sources.

.....

5. **Other information**

Please indicate here any other information (e.g. environmental impacts or benefits) you consider relevant to the assessment of the measure(s) concerned.

.....

⁽¹⁾ Apparent consumption is production plus imports minus exports. If no apparent consumption data are readily available, other relevant data can be used.

⁽²⁾ The CAGR is calculated as $[y(t) / y(t - 5)]^{1/5} - 1$.

⁽³⁾ EU25 can be used as a proxy for the EEA in this context.

I

(Information)

COMMISSION

COMMUNITY FRAMEWORK FOR STATE AID FOR RESEARCH AND DEVELOPMENT AND INNOVATION

(2006/C 323/01)

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1. INTRODUCTION

1.1. Objectives of State aid for Research and Development and Innovation

Promoting Research and Development and Innovation (herein after: R&D&I) is an important objective of common interest. Article 163 of the EC Treaty stipulates that 'The Community shall have the objective of strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level, while promoting all the research activities deemed necessary ...'. Articles 164 to 173 of the EC Treaty determine the activities to be carried out in this respect and the scope and implementation of the multi annual framework programme.

When meeting in Barcelona in March 2002, the European Council adopted a clear goal for the future development of research spending. It agreed that overall spending on Research and Development (hereinafter: R&D) and innovation in the Community should be increased with the aim of approaching 3 % of gross domestic product by 2010. It further clarified that two thirds of this new investment should come from the private sector. To reach this objective, research investment should grow at an average rate of 8 % every year, shared between a 6 % growth rate for public expenditure ⁽¹⁾ and a 9 % yearly growth rate for private investment ⁽²⁾.

The objective is through State aid to enhance economic efficiency ⁽³⁾ and thereby, contribute to sustainable growth and jobs. Therefore, State aid for R&D&I shall be compatible if the aid can be expected to lead to additional R&D&I and if the distortion of competition is not considered to be contrary to the common interest, which the Commission equates for the purposes of this framework with economic efficiency. The aim of this framework is to ensure this objective and in particular, to make it easier for Member States to better target the aid to the relevant market failures ⁽⁴⁾.

Article 87(1) of the EC Treaty lays down the principle that State aid is prohibited. In certain cases, however, such aid may be compatible with the common market on the basis of Article 87 (2) and (3). Aid for R&D&I will primarily be justified on the basis of Article 87(3)(b) and 87(3)(c). In this framework the

Commission lays down rules which it will apply in the assessment of aid notified to it, thereby exercising its discretion and increasing legal certainty and transparency of its decision making.

1.2. State aid policy and R&D&I

In the context of the Lisbon strategy the level of R&D&I is considered not to be optimal for the economy in the Community, implying that an increase in the level of R&D&I would lead to higher growth in the Community. The Commission considers that the existing rules for State aid to R&D have to be modernised and enhanced to meet this challenge.

First, the Commission, in this framework, expands the existing possibilities of aid to R&D to new activities supporting innovation. Innovation is related to a process connecting knowledge and technology with the exploitation of market opportunities for new or improved products, services and business processes compared to those already available on the common market, and encompassing a certain degree of risk. For the purpose of State aid rules, the Commission considers however that State aid for innovation should be authorised not on the basis of an abstract definition of innovation but only to the extent that it relates to precise activities, which clearly address the market failures that are hampering innovation and for which the benefits of State aid are likely to outweigh any possible harm to competition and trade

Second, the Commission aims at supporting a better administration of State aid to R&D&I. It intends to extend the scope of the block exemption for R&D, which is currently limited to aid to small and medium sized enterprises (hereafter: SMEs) ⁽⁵⁾. A future general block exemption regulation (hereafter: BER) will cover the less problematic aid measures in the area of R&D&I. This framework will continue to apply for all measures notified to the Commission whether because the measure is not covered by the BER, because of an obligation in the BER to notify aid individually, or because the Member State decides to notify a measure which could in principle have been exempted under the BER, as well as for the assessment of all non notified aid.

Third, in order to better focus the Commission's scrutiny, this framework provides, for the assessment of measures falling within its scope, not only rules on the compatibility of certain aid measure (Chapter 5 below) but also, due to the increased risk of certain aid measures distorting competition and trade, additional elements concerning the analysis of the incentive effect and necessity of aid (Chapter 6 below) and an additional methodology to be applied in case of detailed assessment (Chapter 7 below).

⁽⁵⁾ State Aid Action Plan. Less and better targeted State aid: a roadmap for State aid reform 2005 2009. COM(2005) 107 final — SEC (2005) 795; adopted on 7 June 2005.

⁽¹⁾ It must be kept in mind that only a part of the public expenditure on R&D will qualify as State aid.

⁽²⁾ Cf. 'Investing in research: an action plan for Europe'; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2003)226 final, p. 7.

⁽³⁾ In economics, the term 'efficiency' (or 'economic efficiency') refers to the extent to which total welfare is optimised in a particular market or in the economy at large. Additional R&D&I increases economic efficiency by shifting market demand towards new or improved products, processes or services, which is equivalent to a decrease in the quality adjusted price of these goods.

⁽⁴⁾ A 'market failure' is said to exist when the market, if left to its own devices, does not lead to an economically efficient outcome. It is in those circumstances that state intervention, including state aid, has the potential to improve the market outcome in terms of prices, output and use of resources.

In this context the Commission underlines that competitive markets should in principle, on their own, lead to the most efficient outcome in terms of R&D&I. However, this may not always be the case in the field of R&D&I and government intervention might then improve the outcome. Undertakings will invest more in research only to the extent that they can draw concrete commercial benefits from the results and are aware of the possibilities to do so. There are many reasons for low levels of R&D&I, which are partly due to structural barriers, and partly to the presence of market failures. Structural barriers should preferably be handled by structural measures⁽⁶⁾, whereas State aid may play a role in counter weighing inefficiencies due to market failures. Furthermore, empirical evidence indicates that for State aid to be efficient it must be accompanied by favourable framework conditions, such as adequate intellectual property right systems, a competitive environment with research and innovation friendly regulations and supportive financial markets.

However, State aid also distorts competition, and strong competition is at the same time a crucial factor for the market driven stimulation of investment in R&D&I. Therefore, State aid measures must be carefully designed in order to limit the distortions. Otherwise, State aid can become counter productive and reduce the overall level of R&D&I and economic growth.

The main concern related to R&D&I aid to undertakings is that rival undertakings' dynamic incentives to invest are distorted and possibly reduced. When an undertaking receives aid, this generally strengthens its position on the market and reduces the return on investment for other undertakings. When the reduction is significant enough, it is possible that rivals will cut back on their R&D&I activity. In addition, when the aid results in a soft budget constraint for the beneficiary, it may also reduce the incentive to innovate at the level of the beneficiary. Furthermore, the aid can support inefficient undertakings or enable the beneficiary to enhance exclusionary practices or market power.

1.3. The balancing test and its application to aid to Research and Development and Innovation

1.3.1. *The State Aid Action Plan: less and better targeted aid, balancing test for the assessment of aid*

In the State Aid Action Plan⁽⁷⁾, the Commission announced that 'to best contribute to the re launched Lisbon Strategy for growth and jobs, the Commission will, when relevant, strengthen its economic approach to State aid analysis. An economic approach is an instrument to better focus and target certain State aid towards the objectives of the re launched Lisbon Strategy'.

⁽⁶⁾ Including: university education, research programmes and public research facilities, IPR rules favouring innovation, attractive framework conditions for undertakings to do R&D&I

⁽⁷⁾ State aid Action Plan (footnote), paragraph 21.

In assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potentially negative side effects by distortion of trade and competition. The State Aid Action Plan, building on existing practice, has formalised this balancing exercise in what has been termed a 'balancing test'⁽⁸⁾. It operates in three steps to decide upon the approval of a State aid measure; the first two steps are addressing the positive effects of State aid and the third is addressing the negative effects and resulting balancing of the positive and negative effects:

- (1) Is the aid measure aimed at a well defined objective of common interest (eg growth, employment, cohesion, environment)?
- (2) Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address the market failure or other objective?
 - (i) Is State aid an appropriate policy instrument?
 - (ii) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (iii) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

This balancing test is applicable to the design of State aid rules as well as for the assessment of cases.

For a block exemption regulation, the State aid is compatible if the conditions laid down are fulfilled. The same applies in general to most cases addressed in this framework. However, for the individual aid measures which may have a high distortive potential due to high aid amounts, the Commission will make an overall assessment of the positive and negative effects of the aid based on the proportionality principle.

1.3.2. *The objective of common interest addressed by the framework*

This framework addresses the objective of common interest of promoting Research and Development and Innovation. It aims at enhancing economic efficiency by tackling well defined market failures, which prevent the economy in the Community from reaching the optimal level of R&D&I.

⁽⁸⁾ Cf. State Aid Action Plan (footnote 5), paragraph 11 and 20, as elaborated in more detail already in the Communication on Innovation, COM(2005) 436 final of 21 September 2005.

To establish rules ensuring that aid measures achieve this objective, it is, first of all, necessary to identify the market failures hampering R&D&I. R&D&I takes place through a series of activities, which are upstream to a number of product markets, and which exploit available R&D&I capabilities to develop new or improved products⁽⁹⁾ and processes in these product markets, thus fostering growth in the economy. However, given the available R&D&I capabilities, market failures may prevent the market from reaching the optimal output and lead to an inefficient outcome for the following reasons:

- **Positive externalities/knowledge spill-overs:** R&D&I often generate benefits for society in the form of knowledge spill overs. However, left to the market, a number of projects may have an unattractive rate of return from a private perspective, even though the projects would be beneficial for society because profit seeking undertakings neglect the external effects of their actions when deciding how much R&D&I they should undertake. Consequently, projects in the common interest may not be pursued unless the government intervenes.
- **Public good/knowledge spill-overs:** For the creation of general knowledge, like fundamental research, it is impossible to prevent others from using the knowledge (public good), whereas more specific knowledge related to production can be protected, for example through patents allowing the inventor a higher return on their invention. To find the appropriate policy to support R&D&I, it is important to distinguish between creation of general knowledge and knowledge that can be protected. Undertakings tend to free ride on the general knowledge created by others, which makes undertakings unwilling to create the knowledge themselves. In fact, the market may not only be inefficient but completely absent. If more general knowledge was produced, the whole society could benefit from the knowledge spill overs throughout the economy. For this purpose, governments may have to support the creation of knowledge by undertakings. In the case of fundamental research, they may have to pay fully for companies' efforts to conduct fundamental research.
- **Imperfect and asymmetric information:** R&D&I are characterised by a high degree of risk and uncertainty. Due to imperfect and/or asymmetric information, private investors may be reluctant to finance valuable projects; highly qualified personnel may be unaware of recruitment possibilities in innovative undertakings. As a result, the allocation of human resources and financial resources may not be adequate in these markets and valuable projects for the economy may not be carried out.
- **Coordination and network failures.** The ability of undertakings to coordinate with each other or at least

interact, and thus deliver R&D&I may be impaired. Problems may arise for various reasons, including difficulties in coordinating R&D and finding adequate partners.

1.3.3. *Appropriate instrument*

It is important to keep in mind that there may be other, better placed instruments to increase the level of R&D&I in the economy, for example regulation, increase in funding of universities, general tax measures in favour of R&D&I⁽¹⁰⁾. The appropriateness of a policy instrument in a given situation is normally linked to the main reasons behind the problem. Reducing market barriers may be more appropriate than State aid to deal with the difficulty of a new entrant to appropriate R&D&I results. Increased investment in universities may be more appropriate to deal with a lack of qualified R&D&I personnel than granting State aid to R&D&I projects. Member States should therefore choose State aid when it is an appropriate instrument on the basis of the problem they are trying to address. This means it is necessary to clearly identify the market failure they intend to target with the aid measure.

1.3.4. *Incentive effect and necessity of aid*

State aid for R&D&I must lead to the recipient of aid changing its behaviour so that it increases its level of R&D&I activity and R&D&I projects or activities take place which would not otherwise be carried out, or which would be carried out in a more restricted manner. The Commission considers that as a result of aid, R&D&I activity should be increased in size, scope, amount spent or speed. Incentive effect is identified by counterfactual analysis, comparing the levels of intended activity with aid and without aid. Member States must clearly demonstrate how they intend to ensure that the incentive effect is present.

1.3.5. *Proportionality of the aid*

Aid is considered to be proportional only if the same result could not be reached with a less distortive aid measure. In particular, the amount and intensity of the aid must be limited to the minimum needed for the aided R&D&I activity to take place.

1.3.6. *Negative effects of the aid to R&D&I must be limited so that the overall balance is positive*

The possible distortions of competition resulting from State aid for R&D&I can be categorised as:

- disrupting the dynamic incentives of undertakings and crowding out;
- supporting inefficient production;

⁽¹⁰⁾ See the Notice on the application of the State aid rules to measures relating to direct business taxation; OJ C 384, 10.12.1998, p. 3.

⁽⁹⁾ This includes services.

- exclusionary practices and enhancing market power;
- effects on the localisation of economic activities across Member States;
- effects on trade flows within the internal market.

The negative effects are normally higher for higher aid amounts and for aid granted to activities which are close to commercialisation of the product or the service. Therefore aid intensities should generally be lower for activities linked to development and innovation than for research related activities. Furthermore, in the definition of eligible costs it is important to ensure that costs that can be considered to cover routine company activities are not eligible for aid. Also, characteristics of the beneficiary and the relevant markets have an influence on the level of distortion. Such aspects will be taken into account in more detail for the cases which will undergo a detailed assessment.

1.4. Implementing the balancing test: legal presumptions and need for more specific assessment

This framework will be used for the assessment of aid for research and development and innovation which is notified to the Commission. The Commission's compatibility assessment will be conducted on the basis of the balancing test presented in Chapter 1. Accordingly, a measure will only be approved if, considering each of the elements in the balancing test, this leads to an overall positive evaluation. However, the Commission's assessment may differ in the way this evaluation is conducted, as in each case the risks for competition and trade associated with certain types of measures may differ. Without prejudice to Articles 4 to 7 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 ⁽¹¹⁾, the Commission applies different legal presumptions according to the type of State aid measure notified.

All notified aid will be assessed first under the provisions in Chapter 5. In that chapter, the Commission has identified a series of measures for which it considers *a priori* that State aid targeting these measures will address a specific market failure hampering R&D&I. The Commission has furthermore elaborated a series of conditions and parameters, which aim at ensuring that State aid targeting these measures actually presents an incentive effect, is proportionate and has a limited negative impact on competition and trade. Chapter 5 thus contains parameters in respect of the aided activity, aid intensities and conditions attached to compatibility. In principle, only measures which fulfil the criteria specified in Chapter 5 are eligible for compatibility under Article 87(3)(c) of the EC Treaty on the basis of this framework.

In Chapter 6, the Commission presents more specifically how it will assess the necessity and incentive effect of the aid.

In Chapter 7, the Commission presents more specifically in which cases and how it will conduct a detailed assessment.

This translates into different levels of assessment described in more detail below. For the first level, the Commission considers that it is in principle sufficient that the measures concerned are in line with the conditions described in Chapter 5, provided that the conditions in Chapter 6 to presume the incentive effect are fulfilled. For all other measures, the Commission considers that additional scrutiny is necessary, because of higher risks for competition and trade, due to the activity, aid amount, or type of beneficiary. The additional scrutiny will generally consist in further and more detailed factual analysis of the case in line with the provisions set out in Chapter 6 in respect of necessity and incentive effect or in Chapter 7, in respect of the assessment for aid exceeding the threshold set in section 7.1. of this framework. As a result of this additional scrutiny, the Commission may approve the aid, declare it incompatible with the common market or declare that it is compatible with the common market subject to conditions.

Firstly, the Commission considers that for certain aid measures, fulfilling the provisions set out in Chapters 5 and 6 will generally be sufficient for securing compatibility, as it is presumed that for such a measure the result of the application of the balancing test would be positive. Whether a measure falls into this category depends upon the type of beneficiary, the activity aided and the amount of aid granted. The Commission considers that the following measures will be declared compatible on the basis of Chapters 5 and 6 if (i) they fulfil all the conditions and parameters mentioned in Chapter 5 and (ii) the aid is only granted after the aid application has been made to the national authorities:

- project aid and feasibility studies where the aid beneficiary is an SME and where the aid amount is below EUR 7,5 million per SME for a project (project aid plus aid for feasibility study);
- aid for industrial property rights costs for SMEs;
- aid for young innovative enterprises;
- aid for innovation advisory services; aid for innovation support services;
- aid for the loan of highly qualified personnel.

For the measures listed above, Chapter 6 clarifies that the incentive effect is presumed to be present if the condition mentioned above in (ii) is fulfilled.

Second, for notified aid **below** the thresholds set in section 7.1. of this framework, the additional scrutiny consists in a demonstration of the incentive effect and necessity as set out in Chapter 6. Such measures will therefore be declared compatible on the basis of Chapter 5 and Chapter 6 only if (i) they fulfil all the conditions and parameters mentioned in

⁽¹¹⁾ OJ L 83, 27.3.1999, p. 1.

Chapter 5 and (ii) the incentive effect and necessity have been demonstrated in accordance with Chapter 6.

Third, for notified aid **above** the thresholds set in section 7.1. of this framework, the additional scrutiny consists in a detailed assessment according to Chapter 7. These measures will therefore be declared compatible on the basis of Chapters 5, 6 and 7 only if (i) they fulfil all the conditions and parameters mentioned in Chapter 5 and (ii) the balancing test pursuant to Chapter 7 results in an overall positive evaluation.

1.5. Motivation for specific measures covered by this framework

Applying these criteria to R&D&I, the Commission has identified a series of measures for which State aid may, under specific conditions, be compatible with Article 87(3) (c) of the EC Treaty.

Aid for projects covering fundamental and industrial research and experimental development is mainly targeted at the market failure related to positive externalities (knowledge spillovers), including public goods. The Commission considers it useful to maintain different categories of R&D&I activities regardless of the fact that the activities may follow an interactive model of innovation rather than a linear model. Different aid intensities reflect different sizes of market failures and how close the activity is to commercialisation. Furthermore, compared to the previous State aid rules in this field, certain innovation activities have been included in experimental development. In addition, the bonus system has been simplified. Due to expected larger implications of market failures and expected higher positive externalities, bonuses appear justified for SMEs, collaboration by and collaboration with SMEs, cross border collaboration as well as public private partnerships (collaborations of undertakings with public research organisations).

Aid for technical feasibility studies related to R&D&I projects aims at overcoming the market failure related to imperfect and asymmetric information. These studies are considered to be further away from the market than the project itself, and therefore relatively high aid intensities can be accepted.

Aid for industrial property rights costs for SMEs is targeted at the market failure related to positive externalities (knowledge spillovers). The aim is to increase the possibilities for SMEs to sufficiently appropriate returns, thereby giving them greater incentive to undertake R&D&I.

Aid for young innovative enterprises has been introduced to deal with the market failures linked with imperfect and asymmetric information, which harm these undertakings in a particularly acute way, damaging their ability to receive appropriate funding for innovative ventures.

Aid for process and organisational innovation in services targets the market failures linked to imperfect information and positive externalities. It is meant to tackle the problem that innovation in services activities may not fit in the R&D categories. Innovation in service activities often results from interactions with customers and confrontation with the market, rather than from

the exploitation and use of existing scientific, technological or business knowledge. Furthermore, innovation in service activities tends to be based on new processes and organisation rather than technological development. To that extent, process and organisational innovation in services is not properly covered by R&D project aid and requires an additional and specific aid measure to address the market failures that hamper it.

Aid for advisory services and innovation support services, provided by innovation intermediaries, targets market failures linked with insufficient information dissemination, externalities and lack of coordination. State aid is an appropriate solution to change the incentives for SMEs to buy such services and to increase the supply and demand of the services provided by innovation intermediaries.

Aid for the loan of highly qualified personnel addresses the market failure linked with imperfect information in the labour market in the Community. Highly qualified personnel in the Community are more likely to be hired by large undertakings, because they tend to perceive large undertakings as offering better working conditions, and more secure and more attractive careers. By contrast, SMEs could benefit from important knowledge transfer and from increased innovation capabilities, if they were able to recruit highly qualified personnel to conduct R&D&I activities. Creating bridges between large undertakings or universities and SMEs may also contribute to addressing coordination market failures, and supporting clustering.

Aid for innovation clusters aims at tackling market failures linked with coordination problems hampering the development of clusters, or limiting the interaction and knowledge flows within clusters. State aid could contribute in two ways to this problem: first by supporting the investment in open and shared infrastructures for innovation clusters, and secondly by supporting cluster animation, so that collaboration, networking and learning is enhanced.

2. SCOPE OF APPLICATION AND DEFINITIONS

2.1. Scope of application of the framework

This framework applies to State aid for research and development and innovation. It will be applied in accordance with other Community policies on State aid, other provisions of the Treaties founding the European Communities and legislation adopted pursuant to those Treaties.

According to general Treaty principles, State aid cannot be approved if the aid measure is discriminatory to an extent not justified by its State aid character. With regard to R&D&I, it should in particular be underlined that the Commission will not approve an aid measure which excludes the possibility of exploitation of R&D&I results in other Member States.

Public authorities may commission R&D from companies or buy the results of R&D from them. If such R&D is not procured at market price, this will normally involve State aid within the meaning of Article 87(1) of the EC Treaty. If, on the other hand,

these contracts are awarded according to market conditions, an indication for which may be that a tender procedure in accordance with the applicable directives on public procurement, in particular Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁽¹²⁾ and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽¹³⁾ has been carried out, the Commission will normally consider that no State aid within the meaning of Article 87(1) of the EC Treaty is involved.

This framework applies to aid to support research and development and innovation in all sectors governed by the EC Treaty. It also applies to those sectors which are subject to specific Community rules on State aid, unless such rules provide otherwise.⁽¹⁴⁾

This framework applies to State aid for R&D&I in the environmental field⁽¹⁵⁾, as there are many synergies to exploit between innovation for quality and performance and innovation to optimise energy use, waste and safety.

Following the entry into force of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development⁽¹⁶⁾, aid for research and development to SMEs is exempt from the notification requirement under the conditions stipulated in 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⁽¹⁷⁾. Member States, however, remain free to notify such aid. If they decide to do so, this framework will continue to be used for the assessment of such notified aid.

While personnel costs are eligible in several of the measures covered by this framework and a measure on aid for the loan of highly qualified personnel has been introduced, general employment and training aid for researchers continue to fall under the specific State aid instruments for employment and training aid, currently 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⁽¹⁸⁾ and 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⁽¹⁹⁾.

⁽¹²⁾ OJ L 134, 30.4.2004, p. 1.

⁽¹³⁾ OJ L 134, 30.4.2004, p. 114.

⁽¹⁴⁾ For example, Article 3 of Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway provides special rules for the compatibility of State aid to R&D in the sector of transport by rail, road and inland waterway.

⁽¹⁵⁾ See current Community guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3, point 7. In addition, in the context of the revision of the environmental guidelines, the Commission will consider the opportunity to integrate new measures that can also cover eco innovation.

⁽¹⁶⁾ OJ L 63, 28.2.2004, p. 22.

⁽¹⁷⁾ OJ L 10, 13.1.2001, p. 33. Regulation as amended by Regulation (EC) No 364/2004.

⁽¹⁸⁾ OJ L 10, 13.1.2001, p. 20. Regulation as amended by Regulation (EC) No 363/2004, (OJ L 63, 28.2.2004, p. 20).

⁽¹⁹⁾ OJ L 337, 13.12.2002, p. 3.

Aid for research and development and innovation for undertakings in difficulty within the meaning of the Community Guidelines on State aid for rescue and restructuring undertakings in difficulty⁽²⁰⁾ is excluded from the scope of this framework.

2.2. Definitions

For the purpose of this framework the following definitions apply:

- (a) **'small and medium-sized enterprises'**, or 'SMEs', **'small enterprises'** and **'medium-sized enterprises'** means such undertakings within the meaning of Regulation (EC) No 70/2001, or any regulation replacing that regulation;
- (b) **'large enterprises'** means undertakings not coming under the definition of small and medium sized enterprises;
- (c) **'aid intensity'** means the gross aid amount expressed as a percentage of the project's eligible costs. 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 and for calculating the aid amount in a soft loan shall be the reference rate applicable at the time of grant. The aid intensity is calculated per beneficiary;
- (d) **'research organisation'** means an entity, such as 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 are reinvested in these activities, the dissemination of their results or teaching; undertakings that can exert influence upon such an entity, in the quality of, for example, shareholders or members, shall enjoy no preferential access to the research capacities of such an entity or to the research results generated by it;
- (e) **'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;

⁽²⁰⁾ Currently OJ C 244, 1.10.2004, p. 2.

- (f) **'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 of complex systems, which is necessary for the industrial research, notably for generic technology validation, to the exclusion of prototypes as covered by point(g);
- (g) **'experimental development'** means the acquiring, combining, shaping and using of 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 example, other activities aiming at the conceptual definition, planning and documentation of new products, processes and services. The 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 are also eligible, provided that these cannot be used or transformed to be used in industrial applications or commercially.

Experimental development does not include the 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;

- (h) **'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 R&D&I project,
- (i) **'process innovation'** ⁽²¹⁾ means the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment and/or software). Minor changes or improvements, an increase in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, regular seasonal and other cyclical changes, trading of new or significantly improved products are not considered innovations;

- (j) **'organisational innovation'** ⁽²²⁾ means the implementation of a new organisational method in the undertaking's business practices, workplace organisation or external relations. Changes in business practices, workplace organisation or external relations that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, regular seasonal and other cyclical changes, trading of new or significantly improved products are not considered innovations;
- (k) **'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;
- (l) **'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;
- (m) **'innovation clusters'** means groupings of independent undertakings — innovative start ups, small, medium and large undertakings as well as research organisations — operating in a particular sector and region and designed to stimulate innovative activity by promoting intensive interactions, sharing of facilities and exchange of knowledge and expertise and by contributing effectively to technology transfer, networking and information dissemination among the undertakings in the cluster. Preferably, the Member State should intend to create a proper balance of SMEs and large undertakings in the cluster, to achieve a certain critical mass, notably through specialisation in a certain area of R&D&I and taking into account existing clusters in the Member State and at Community level.

3. STATE AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE EC TREATY

Generally, any funding meeting the criteria of 87(1) of the EC Treaty will be considered to be State aid. For the sake of providing further guidance, situations typically arising in the field of Research, Development and Innovation activities are considered below.

3.1. Research organisations and innovation intermediaries as recipients of State aid within the meaning of Article 87(1) of the EC Treaty

The question whether research organisations are recipients of State aid must be answered in accordance with general State aid principles.

⁽²¹⁾ Cf. definition in the OSLO manual, Guidelines for Collecting and Interpreting Innovation Data, 3rd Edition, Organisation for Economic Co operation and Development, 2005, page 49.

⁽²²⁾ Cf. definition in the OSLO manual, page 51.

In line with Article 87(1) of the EC Treaty and the case law of the Court, public financing of R&D&I activities by research organisations will qualify as State aid, if all conditions of Article 87(1) of the EC Treaty are fulfilled. In accordance with the case law, this requires inter alia that the research organisation qualifies as an undertaking within the meaning of Article 87(1) of the EC Treaty. This does not depend upon its legal status (organized under public or private law) or economic nature (i.e. profit making or not). What is decisive for its qualification as an undertaking is whether the research organisation carries out an economic activity, which is an activity consisting of offering goods and/or services on a given market⁽²³⁾. Accordingly, any public funding of economic activities falls under Article 87(1) of the EC Treaty, should all other conditions be fulfilled.

3.1.1. Public funding of non-economic activities

If the same entity carries out activities of both economic and non economic nature, in order to avoid cross subsidisation of the economic activity, the public funding of the non economic activities will not fall under Article 87(1) of the EC Treaty, if the two kinds of activities and their costs and funding can be clearly separated⁽²⁴⁾. Evidence that the costs have been allocated correctly can consist of annual financial statements of the universities and research organisations.

The Commission nevertheless considers that the primary activities of research organisations are normally of a non economic character, notably:

- education for more and better skilled human resources;
- the conduct of independent R&D for more knowledge and better understanding, including collaborative R&D;
- the dissemination of research results.

The Commission furthermore considers that technology transfer activities (licensing, spin off creation or other forms of management of knowledge created by the research organisation) are of

⁽²³⁾ Case 118/85 *Commission v. Italy* [1987] ECR 2599, paragraph 7, Case C 35/96 *Commission v. Italy* [1998] ECR I 3851, CNSD, paragraph 36; Case C 309/99 *Wouters* [2002] ECR I 1577 paragraph 46.

⁽²⁴⁾ Economic activities comprise in particular research carried out under contract with industry, the renting out of research infrastructure and consultancy work.

non economic character if these activities are of an internal nature⁽²⁵⁾ and all income from these activities is reinvested in the primary activities of the research organisations⁽²⁶⁾.

3.1.2. Public funding of economic activities

If research organisations or other not for profit innovation intermediaries (for example, technology centres, incubators, chambers of commerce) perform economic activities, such as renting out infrastructures, supplying services to business undertakings or performing contract research, this should be done on normal market conditions, and public funding of these economic activities will generally entail State aid.

However, if the research organisation or not for profit innovation intermediary can prove that the totality of the State funding that it received to provide certain services has been passed on to the final recipient, and that there is no advantage granted to the intermediary, the intermediary organisation may not be recipient of State aid.

For aid to the final recipients, normal State aid rules apply.

3.2. Indirect State aid within the meaning of Article 87(1) of the EC Treaty to undertakings through publicly funded research organisations

This section is intended to clarify under which conditions undertakings obtain an advantage within the meaning of Article 87(1) of the EC Treaty in cases of contract research by a research organisation or collaboration with a research organisation. As far as the other elements of Article 87(1) of the EC Treaty are concerned, the normal rules apply. In particular, it will have to be assessed in accordance with the relevant case law whether the behaviour of the research organisation can be attributed to the State⁽²⁷⁾.

⁽²⁵⁾ By internal nature, the Commission means a situation where the management of the knowledge of the research organisation(s) is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.

⁽²⁶⁾ For all remaining kinds of technology transfer receiving State funding, the Commission does not consider itself in a position, on the basis of its current knowledge, to decide in a general manner upon the State aid character of the funding of such activities. It underlines the obligation of the Member States under Article 88(3) of the EC Treaty to assess the character of such measures in each case and to notify them to the Commission, in case they consider them to represent State aid.

⁽²⁷⁾ Cf. Case C 482/99 *France v. Commission* [2002] ECR I 4397, on the issue of imputability to the State.

3.2.1. *Research on behalf of undertakings (Contract research or research services)*

This point concerns the situation in which a project is carried out by a research organisation on behalf of an undertaking. The research organisation, acting as an agent, renders a service to the undertaking acting as principal in situations where (i) the agent receives payment of an adequate remuneration for its service and (ii) the principal specifies the terms and conditions of this service. Typically, the principal will own the results of the project and carry the risk of failure. When a research organisation carries out such a contract, there will normally be no State aid passed to the undertaking through the research organisation, if one of the following conditions is fulfilled:

- (1) the research organisation provides its service at market price; or
- (2) if there is no market price, the research organisation provides its service at a price which reflects its full costs plus a reasonable margin.

3.2.2. *Collaboration of undertakings and research organisations*

In a collaboration project, at least two partners participate in the design of the project, contribute to its implementation and share the risk and the output of the project.

In the case of collaboration projects carried out jointly by undertakings and research organisations, the Commission considers that no indirect State aid is granted to the industrial partner through the research organisation due to the favourable conditions of the collaboration if one of the following conditions is fulfilled:

- (1) the participating undertakings bear the full cost of the project.
- (2) the results which do not give rise to intellectual property rights may be widely disseminated and any intellectual property rights to the R&D&I results which result from the activity of the research organisation are fully allocated⁽²⁸⁾ to the research organisation.
- (3) the research organisation receives from the participating undertakings compensation equivalent to the market price for the intellectual property rights⁽²⁹⁾ which result from the activity of the research organisation carried out in the project and which are transferred to the participating

⁽²⁸⁾ 'Full allocation' means that the research organization enjoys the full economic benefit of those rights by retaining full disposal of them, notably the right of ownership and the right to license. These conditions may also be fulfilled if the organisation decides to conclude further contracts concerning these rights including licensing them to the collaboration partner.

⁽²⁹⁾ 'Compensation equivalent to the market price for the intellectual property rights' refers to compensation for the full economic benefit of those rights. In line with general State aid principles and given the inherent difficulty to establish objectively the market price for intellectual property rights, the Commission will consider this condition fulfilled if the research organisation as seller negotiates in order to obtain the maximum benefit at the moment when the contract is concluded.

undertakings. Any contribution of the participating undertakings to the costs of the research organisation shall be deducted from such compensation.

If none of the previous conditions are fulfilled, the Member State may rely on an individual assessment of the collaboration project⁽³⁰⁾. There may also be no State aid where the assessment of the contractual agreement between the partners leads to the conclusion that any intellectual property rights to the R&D&I results as well as access rights to the results are allocated to the different partners of the collaboration and adequately reflect their respective interests, work packages, and financial and other contributions to the project. If conditions (1), (2) and (3) are not fulfilled and the individual assessment of the collaboration project does not lead to the conclusion that there is no State aid, the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings.

4. COMPATIBILITY OF AID UNDER ARTICLE 87(3)(B) OF THE EC TREATY

Aid for R&D&I to promote the execution of an important project of common European interest may be considered to be compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty.

The Commission will conclude that Article 87(3)(b) of the EC Treaty applies if the following cumulative conditions are fulfilled:

- (1) the aid proposal concerns a project which is clearly defined in respect of the terms of its implementation including its participants as well as its objectives. The Commission may also consider a group of projects as together constituting a project.
- (2) the project must be in the common European interest: the project must contribute in a concrete, clear and identifiable manner to the Community interest. The advantage achieved by the objective of the project must not be limited to one Member State or the Member States implementing it, but must extend to the Community as a whole. The project must present a substantive leap forward for the Community objectives, for instance by being of great importance for the European Research Area or being a lead project for European industry. The fact that the project is carried out by undertakings in different countries is not sufficient. The positive effects of the aid could be shown for example by important spill overs for society, through the contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context, through creation of new markets or the development of

⁽³⁰⁾ This provision does not intend to modify the obligation of the Member States to notify certain measures on the basis of Article 88(3) of the EC Treaty.

new technologies. The benefits of the project should not be confined to the industry directly concerned but its results should be of wider relevance and application to the economy within the Community (up or downstream markets, alternative uses in other sectors, etc.).

- (3) the aid is necessary to achieve the defined objective of common interest and presents an incentive for the execution of the project, which must also involve a high level of risk. This could be shown by looking at the level of profitability of the project, at the amount of investment and time path of cash flows and at feasibility studies, risk assessments and expert opinions.
- (4) the project is of great importance with respect to its character and its volume: it must be a meaningful project with regard to its objective and a project of substantial size.

The Commission will consider notified projects more favourably if they include a significant own contribution of the beneficiary to the project. It will equally consider more favourably notified projects involving undertakings or research entities from a significant number of Member States.

In order to allow for the Commission to properly assess the case, the common European interest must be demonstrated in practical terms: for example, it must be demonstrated that the project enables significant progress to be made towards achieving specific Community objectives.

5. COMPATIBILITY OF AID UNDER ARTICLE 87(3)(C) OF THE EC TREATY

State aid for research and development and innovation shall be compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, if, on the basis of the balancing test, it leads to increased R&D&I activities without adversely affecting trading conditions to an extent contrary to the common interest. The Commission will view favourably notifications of aid measures which are supported by rigorous evaluations of similar past aid measures demonstrating the incentive effect of the aid. The following measures are eligible for compatibility under Article 87(3)(c) of the EC Treaty.

5.1. Aid for R&D projects

Aid for R&D projects will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty provided that the conditions set out in this section are fulfilled.

5.1.1. *Research categories*

The aided part of the research project must completely fall within one or more of the following research categories: fundamental research, industrial research, experimental development.

When classifying different activities, the Commission will refer to its own practice as well as the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and Technological Activities, Proposed Standard Practice for Surveys on Research and Experimental Development ⁽³¹⁾.

When a project encompasses different tasks, each task must 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.

This qualification need not necessarily follow a chronological approach, moving sequentially over time from fundamental research to activities closer to the market. Accordingly, nothing will prevent the Commission from qualifying a task which is carried out at a late stage of a project as industrial research, while finding that an activity carried out at an earlier stage of the project constitutes experimental development or is not research at all.

5.1.2. *Basic aid intensities*

The aid intensity, as calculated on the basis of the eligible costs of the project, shall not exceed:

- (a) 100 % for fundamental research;
- (b) 50 % for industrial research;
- (c) 25 % for experimental development.

The aid intensity must be established for each beneficiary of aid, including in a collaboration project.

In the case of State aid for an R&D project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific research project and, where they constitute aid (see section), contributions from research organisations to that project may not exceed the applicable aid intensities for each benefiting undertaking.

5.1.3. *Bonuses*

The ceilings fixed for industrial research and experimental development may be increased as follows:

- (a) where the aid is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises;

⁽³¹⁾ Organisation for Economic Co operation and Development, 2002.

(b) up to a maximum aid intensity of 80 %, a bonus of 15 percentage points may be added if ⁽³²⁾:

(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 must bear more than 70 % of the eligible costs of the collaboration project;
- the project must involve collaboration with at least one SME or be cross border, that is to say, the research and development activities are carried out in at least two different Member States.

(ii) the project involves effective collaboration between an undertaking and a research organisation, particularly in the context of co ordination of national R&D policies, and the following conditions are fulfilled:

- the research organisation bears at least 10 % of the eligible project costs;
- the research organisation has the right to publish the results of the research projects insofar as they stem from research implemented by that organisation.

(iii) only in case of industrial research, if the results of the project are widely disseminated through technical and scientific conferences or published 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 points (i) and (ii) subcontracting is not considered to be effective collaboration. In case of collaboration between an undertaking and a research organisation, the maximum aid intensities and bonuses specified in this Framework do not apply to the research organisation.

Table illustrating the aid intensities:

	Small enterprise	Medium-sized enterprise	Large Enterprise
<i>Fundamental research</i>	100 %	100 %	100 %
<i>Industrial research</i>	70 %	60 %	50 %
<i>Industrial research</i> subject to:	80 %	75 %	65 %
— collaboration between undertakings;			

⁽³²⁾ Projects funded under the Framework programme of the European Community for research, technological development and demonstration activities will automatically qualify for a bonus for collaboration due to the minimum conditions for participation in such projects.

	Small enterprise	Medium-sized enterprise	Large Enterprise
for large undertakings: cross border or with at least one SME or — collaboration of an undertaking with a research organisation or — dissemination of results			
<i>Experimental development</i>	45 %	35 %	25 %
<i>Experimental development</i> subject to:	60 %	50 %	40 %
— collaboration between undertakings; for large undertakings, with cross border or at least one SME or — collaboration of an undertaking with a research organisation			

5.1.4. Eligible costs

The aid intensity will be calculated on the basis of the costs of the research project to the extent that they can be considered as eligible. All eligible costs must be allocated to a specific category of R&D.

The following costs shall be eligible:

- (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, are considered as eligible;
- (c) costs for building 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 are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are 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 expenses, including costs of materials, supplies and similar products incurred directly as a result of the research activity.

5.1.5. Repayable advance

If a Member State grants a repayable advance which qualifies as State aid within the meaning of Article 87(1) of the EC Treaty, the following rules shall apply.

Where a Member State can demonstrate, on the basis of a valid methodology based on sufficient verifiable data, that it is possible to calculate the gross grant equivalent of such aid granted in the form of a repayable advance and to accordingly design a scheme where this gross grant equivalent fulfils the conditions on maximum intensities in this section, it may notify this scheme and the associated methodology to the Commission. If the Commission accepts the methodology and deems the scheme compatible, the aid may be granted on the basis of the gross grant equivalent of the repayable advance, up to the aid intensities permissible under this section.

In all other cases, the repayable advance is expressed as a percentage of the eligible costs; it may then exceed the rates indicated in this section, provided that the following rules are fulfilled.

In order to allow the Commission to assess the measure, it must provide for detailed provisions on the repayment in case of success and clearly define what will be considered as a successful outcome of the research activities. All these elements must be notified to the Commission. The Commission will examine that the definition of a successful outcome has been established on the basis of a reasonable and prudent hypothesis.

In case of a successful outcome, the measure must provide that the advance is repaid with an interest rate at least equal to the applicable rate resulting from the application of the Commission notice on the method for setting the reference and discount rates⁽³³⁾.

⁽³³⁾ OJ C 273, 9.9.1997, p. 3. also published under: http://ec.europa.eu/comm/competition/state_aid/legislation/reference.html.

In case of a success exceeding the outcome defined as successful, the Member State concerned should be entitled to request payments beyond repayment of the advance amount including interest according to the reference rate foreseen by the Commission.

In case the project fails, the advance does not have to be fully repaid. In case of partial success, the Commission will normally require that the repayment secured is in proportion to the degree of success achieved.

The advance may cover up to a maximum of 40 % of the eligible costs for the experimental development phase of the project and up to 60 % for the industrial research phase, to which bonuses can be added.

5.1.6. Fiscal measures

On the basis of evaluation studies⁽³⁴⁾ provided by Member States in the notification, the Commission will consider that R&D&I fiscal aid schemes have an incentive effect by stimulating higher R&D&I spending by undertakings.

The aid intensity of an R&D&I fiscal State aid measure can be calculated either on the basis of individual R&D&I projects or, at the level of an undertaking, as the ratio between the overall tax relief and the sum of all eligible R&D&I costs incurred in a period not exceeding three consecutive fiscal years. In the latter case, the R&D&I fiscal State aid measure may apply without distinction to all eligible R&D&I activities; the applicable aid intensity for experimental development must then not be exceeded⁽³⁵⁾.

At the time of notification, the Member State must provide an estimate of the number of beneficiaries.

5.1.7. Matching clause

In order to address actual or potential direct or indirect distortions of international trade, higher intensities than generally permissible under this section may be authorized if — directly or indirectly — competitors located outside the Community have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects, programmes, research, development or technology. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly.

⁽³⁴⁾ Even though this may not be possible *ex ante* for a newly introduced fiscal State aid measure, Member States will be expected to provide evaluation studies on the incentive effects of their own fiscal measures.

⁽³⁵⁾ Conversely, where an R&D&I fiscal State aid measure distinguishes between different R&D&I categories, the relevant aid intensities must not be exceeded.

If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular regarding the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the granted or proposed aid, it may also base its decision on circumstantial evidence.

5.2. Aid for technical feasibility studies

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)(c) of the EC Treaty provided that the aid intensity, as calculated on the basis of the study costs, does not exceed the following aid intensities:

- (a) for SMEs, 75 % for studies preparatory to industrial research activities and 50 % for studies preparatory to experimental development activities,
- (b) for large undertakings, 65 % for studies preparatory to industrial research activities and 40 % for studies preparatory to experimental development activities.

5.3. Aid for industrial property rights costs for SMEs

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)(c) of the EC Treaty up to the same level of aid as would have qualified as R&D aid in respect of the research activities which first led to the industrial property rights concerned.

Eligible costs are:

- (a) all costs preceding the grant of the right in the first legal 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.

5.4. Aid for young innovative enterprises

Aid to young innovative enterprises shall be compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty if the following conditions are fulfilled ⁽³⁶⁾:

- (a) the beneficiary is a small enterprise that has been of existence for less than 6 years at the time when the aid is granted and
- (b) the beneficiary is an innovative enterprise, on the basis that:
 - (i) the Member State can demonstrate, by means of an evaluation carried out by an external expert, notably on the basis of a business plan, that the beneficiary will in the foreseeable future develop products, services or processes which are technologically new or substantially improved compared to the state of the art in its industry in the Community, and which carry a risk of technological or industrial failure, or
 - (ii) the R&D expenses of the beneficiary represent at least 15 % of its total operating expenses 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.
- (c) the aid is not higher than EUR 1 million. This aid may not exceed EUR 1,5 million in regions eligible for the derogation in Article 87(3)(a) of the EC Treaty, and EUR 1,25 million in regions eligible for the derogation in Article 87(3)(c) of the EC Treaty.

The beneficiary may receive the aid only once during the period in which it qualifies as a young innovative enterprise. This aid may be cumulated with other aid under this framework, with aid for research and development and innovation exempted by Regulation (EC) No 364/2004 or any successor regulation and with aid approved by the Commission under the risk capital guidelines.

The beneficiary may receive State aid other than R&D&I aid and risk capital aid only 3 years after the granting of the young innovative enterprise aid.

5.5. Aid for process and organisational innovation in services

Innovation in services may not always fall within the research categories defined in section 5.1 but is typically less systematic

⁽³⁶⁾ This is without prejudice to the application of the Guidelines on national regional aid for 2007 — 2013, OJ C 54, 4.3.2006, p. 13, and notably the granting of aid for newly created small enterprises up to a total of EUR 2 million per small enterprise located in regions eligible for the derogation in Article 87(3)(a) of the Treaty.

and stems frequently from customer interaction, market demand, adoption of business and organisational models and practices from more innovative sectors or from other similar sources.

Aid for process and organisational innovation in services shall be compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty with a maximum aid intensity of 15 % for large enterprises, 25 % for medium enterprises and 35 % for small enterprises. Large enterprises are only eligible for such aid if they collaborate with SMEs in the aided activity, whereby the collaborating SMEs must incur at least 30 % of the total eligible costs.

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, do not qualify for State aid.

The following conditions must be fulfilled:

- (a) organisational innovation must always be related to the use and exploitation of Information and Communication Technologies (ICT) to change the organisation;
- (b) the innovation must be formulated as a project with an identified and qualified project manager, as well as identified project costs;
- (c) the result of the aided project must be the development of a standard, of a business model, methodology or concept, which can be systematically reproduced, possibly certified, and possibly patented;
- (d) the process or organisational innovation must be new or substantially improved compared to the state of the art in its industry in the Community. The novelty could be demonstrated by the Member States for instance on the basis of a precise description of the innovation, comparing it with state of the art process or organisational techniques used by other undertakings in the same industry;
- (e) the process or organisational innovation project must entail a clear degree of risk. This risk could be demonstrated by the Member State for instance in terms of: project costs in relation to company turnover, time required to develop the new process, expected gains from the process innovation by comparison with the project costs, probability of failure.

Eligible costs are the same as for aid to R&D projects (cf. section). In case of organisational innovation, however, costs of instruments and equipment cover costs of ICT instruments and equipment only.

5.6. Aid for innovation advisory services and for innovation support services

Aid for innovation advisory services and for innovation support services shall be compatible with the common market within the meaning of Article 87 (3) (c) of the EC Treaty if each of the following conditions are fulfilled:

- (1) the beneficiary is an SME;
- (2) the aid does not exceed a maximum of EUR 200 000 per beneficiary within any three year period ⁽³⁷⁾;
- (3) the service provider benefits from a national or European certification. If the service provider does not benefit from a national or European certification, the aid may not cover more than 75 % of the eligible costs;
- (4) the beneficiary must use the State 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).

The following costs shall be eligible:

- as regards innovation advisory services the following costs: 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
- as regards innovation support services the following costs: office space; data banks; technical libraries; market research; use of laboratory; quality labelling, testing and certification;

If the service provider is a not for profit entity, the aid may be given in the form of a reduced price, as the difference between the price paid and the market price (or a price which reflects full costs plus a reasonable margin). In such a case, the Member States shall set up a system ensuring transparency about the full costs of the innovation advisory and innovation support services provided, as well as about the price paid by the beneficiary, so that the aid received can be measured and monitored.

5.7. Aid for the loan of highly qualified personnel

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)(c) of the EC Treaty, provided the following conditions are fulfilled:

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

⁽³⁷⁾ Without prejudice to the possibility of also receiving *de minimis* aid in respect of other eligible expenses.

enterprise, which is sending the personnel on secondment. The seconded personnel must work on R&D&I activities within the SME receiving the aid.

Eligible costs are all personnel costs for borrowing and employing highly qualified personnel, including the costs of using a recruitment agency, as well as a mobility allowance for the seconded personnel. The maximum aid intensity shall be 50 % of the eligible costs, for a maximum of 3 years per undertaking and per person borrowed.

This provision does not allow covering consultancy costs (payment of the service rendered by the expert, without employing the expert in the undertaking) as such, which are covered under the rules for SME aid ⁽³⁸⁾.

5.8. Aid for innovation clusters

Investment aid may be granted for the setting up, expansion and animation of innovation clusters exclusively to the legal entity operating the innovation cluster. This entity shall be in charge of managing the participation and access to the cluster's premises, facilities and activities. Access to the cluster's premises, facilities and activities must not be restricted and the fees charged for using the cluster's facilities and for participating in the cluster's activities should reflect their costs.

Such aid may be granted for the following facilities:

- facilities for training and research centre;
- open access research infrastructures: laboratory, testing facility;
- broadband network infrastructures.

The maximum aid intensity is 15 %.

In the case of regions falling under Article 87(3)(a) of the EC Treaty, the Commission considers that the intensity must not exceed:

- 30 % for regions with less than 75 % of average EU 25 GDP per capita, for outermost regions with higher GDP per capita and until 1 January 2011 statistical effect regions ⁽³⁹⁾,
- 40 % for regions with less than 60 % of average EU 25 GDP per capita,
- 50 % for regions with less than 45 % of average EU 25 GDP per capita.

In recognition of their specific handicaps, the outermost regions will be eligible for a further bonus of 20 % if their GDP per capita falls below 75 % of the EU 25 average and 10 % in other cases.

⁽³⁸⁾ Currently Regulation (EC) No 70/2001.

⁽³⁹⁾ Cf. Guidelines on national regional aid for 2007-2013, para. 18-20.

The statistical effect regions which fall under the derogation under Article 87(3)(c) of the EC Treaty from 1 January 2011 will be eligible for an aid intensity of 20 %.

In the case of aid being granted to an SME, the maximum intensities shall be increased by 20 percentage points for aid granted to a small enterprise and by 10 percentage points for aid granted to a medium sized enterprise.

The eligible costs shall be the costs relating to investment in land, buildings, machinery and equipment.

Operating aid for cluster animation may be granted to the legal entity operating the innovation cluster. Such aid must be temporary and, as a general rule, must be abolished over time, so as to provide an incentive for prices to reflect costs reasonably rapidly.

Such aid may be granted for a limited duration of five years where the aid is degressive. Its intensity may amount to 100 % the first year but must have fallen in a linear fashion to zero by the end of the fifth year. In the case of non degressive aid, its duration is limited to five years and its intensity must not exceed 50 % of the eligible costs. In duly justified cases, and on the basis of convincing evidence provided by the notifying Member State, aid for cluster animation may be granted for a longer period of time, not exceeding 10 years.

The eligible costs shall be the personnel and administrative costs relating to the following activities:

- marketing of the cluster to recruit new companies to take part in the cluster,
- management of the cluster's open access facilities,
- organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster.

When notifying investment aid or aid for cluster animation, the Member State must provide an analysis of the technological specialisation of the innovation cluster, existing regional potential, existing research capacity, presence of clusters in the Community with similar purposes and potential market volumes of the activities in the cluster.

Cases where Member States fund innovation infrastructure to be operated on an open access basis within not for profit research organisations should be assessed using the provisions set out in section 3.1.

6. INCENTIVE EFFECT AND NECESSITY OF AID

State aid must have an incentive effect, i.e. result in the recipient changing its behaviour so that it increases its level of R&D&I activity. As a result of the aid, the R&D&I activity should be increased in size, scope, amount spent or speed.

The Commission considers that the aid does not present an incentive for the beneficiary in all cases in which the R&D&I activity⁽⁴⁰⁾ has already commenced prior to the aid application by the beneficiary to the national authorities.

If the aided R&D&I project has not started before the application, the Commission considers that the incentive effect is **automatically met** for the following aid measures:

- project aid and feasibility studies where the aid beneficiary is an SME and where the aid amount is below EUR 7,5 million for a project per SME,
- aid for industrial property rights costs for SMEs,
- aid for young innovative enterprises,
- aid for innovation advisory services and innovation support services,
- aid for the loan of highly qualified personnel.

For all other measures⁽⁴¹⁾, the Commission will require that an incentive effect is demonstrated by the notifying Member States.

In order to verify that the planned aid will induce the aid recipient to change its behaviour so that it increases its level of R&D&I activity, the Member States shall provide an *ex ante* evaluation of the increased R&D&I activity **for all individual measures assessed by the Commission**, on the basis of an analysis comparing a situation without aid and a situation with aid being granted. The following criteria may be used, together with other relevant quantitative and/or qualitative factors submitted by the Member State that made the notification:

increase in project size: increase in the total project costs (without decreased spending by the aid beneficiary by comparison with a situation without aid); increase in the number of people assigned to R&D&I activities;

increase in scope: increase in the number of the expected deliverables from the project; more ambitious project illustrated by a higher probability of a scientific or technological breakthrough or a higher risk of failure (notably linked to the higher risk involved in the research project, to the long term nature of the project and uncertainty about its results);

⁽⁴⁰⁾ If the aid proposal is to grant aid for an R&D&I project, this does not exclude that the potential beneficiary has already carried out feasibility studies which are not covered by the request for State aid.

⁽⁴¹⁾ I.e. project aid for large undertakings and for SMEs for aid exceeding EUR 7,5 million; aid for process and organisational innovation in services and aid for innovation clusters.

increase in speed: shorter time before completion of the project as compared to the same project being carried out without aid;

increase in total amount spent on R&D&I: increase in total R&D&I spending by the aid beneficiary; changes in the committed budget for the project (without corresponding decrease in the budget of other projects); increase in R&D&I spending by the aid beneficiary as a proportion of total turnover.

If a significant effect on *at least one* of these elements can be demonstrated, taking account of the normal behaviour of an undertaking in the respective sector, the Commission will normally conclude that the aid proposal has an incentive effect.

If the Commission undertakes a **detailed assessment** of an individual measure, these indicators may not be considered sufficient demonstration of an incentive effect, and the Commission may need to be provided with complementary evidence.

When **assessing an aid scheme**, the conditions relating to the incentive effect shall be deemed to be satisfied if the Member State has committed itself to grant individual aid under the approved aid scheme only after it has verified that an incentive effect is present and to submit annual reports on the implementation of the approved aid scheme. In the annual reports, the Member State must demonstrate how it has assessed the incentive effect of the aid before granting the aid through the use of the quantitative and qualitative indicators given above.

7. COMPATIBILITY OF AID SUBJECT TO A DETAILED ASSESSMENT

The Commission considers that an increase in the level of R&D&I activity in the Community is in the common interest of the Community as it can be expected to significantly contribute to growth, prosperity and sustainable development. In this context, the Commission recognises that State aid has a positive role to play when it is well targeted and creates the right incentive for undertakings to increase R&D&I. Nevertheless, State aid may also lead to significant distortions of competition which must be taken into consideration.

7.1. Measures subject to a detailed assessment

For the following measures, due to the higher risk of distortion of competition, the Commission will carry out a more detailed assessment.

For measures covered by a BER

- for all cases notified to the Commission following a **duty to notify aid individually** as prescribed in the BER.

For measures covered by this framework:

Where the aid amount exceeds :

- for **project aid** ⁽⁴²⁾ and **feasibility studies**:
 - if the project is predominantly fundamental research ⁽⁴³⁾, EUR 20 million per undertaking, per project/feasibility study;
 - if the project is predominantly industrial research ⁽⁴⁴⁾, EUR 10 million per undertaking, per project/feasibility study;
 - for all other projects, EUR 7,5 million per undertaking, per project/feasibility study.
- for **process or organisational innovation** in services activities, EUR 5 million per project per undertaking;
- for **innovation clusters** (per cluster), EUR 5 million.

The purpose of this detailed assessment is to ensure that high amounts of aid for R&D&I do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of additional R&D&I outweigh the harm for competition and trade.

The detailed assessment is a proportionate assessment, depending on the distortion potential of the case. Accordingly, the fact that a detailed assessment will be carried out does not necessarily imply the need to open a formal investigation procedure, although this may be the case for certain measures.

Provided Member States ensure full co operation and provide adequate information in a timely manner, the Commission will use its best endeavours to conduct the investigation in a timely manner.

7.2. Methodology of the detailed assessment: R&D&I criteria for economic assessment of certain individual cases

Below, the Commission presents guidance as to the kind of information it may require and the methodology it would follow

⁽⁴²⁾ For EUREKA projects, this ceiling is set at twice the amount.

⁽⁴³⁾ A project is considered to consist 'predominantly' of fundamental research, if more than half of the eligible project costs is incurred through activities which fall within the category of fundamental research.

⁽⁴⁴⁾ A project is considered to consist 'predominantly' of industrial research, if more than half of the eligible project costs is incurred through activities which fall within the categories of industrial research or fundamental research.

for measures subject to a detailed assessment. This guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty.

Detailed assessment will be conducted on the basis of the following positive and negative elements which will apply in addition to the criteria set out in Chapter 5. In some cases, the applicability and the weight attached to these elements may depend on the form or objective of the aid. The level of the Commission's assessment will be proportional to the risk of distortion of competition. This means that the scope of the analysis will depend on the nature of the case. State aid for activities that are far away from the market is therefore less likely to give rise to very extensive scrutiny.

Member States are invited to provide all the elements that they consider useful for the assessment of the case. The Member States are, in particular, invited to rely on evaluations of past State aid schemes or measures, impact assessments made by the granting authority, risk assessments, financial reports, internal business plans that any company should realise for important projects, expert opinions and other studies related to R&D&I.

7.3. Positive effects of the aid

The fact that the aid induces undertakings to pursue R&D&I in the Community which they would not otherwise have pursued constitutes the main positive element to take into consideration when assessing the compatibility of the aid.

In this context, the Commission will notably pay attention to the following elements:

- the net increase of R&D&I conducted by the undertaking,
- the contribution of the measure to the global improvement of the sector concerned as regards the level of R&D&I,
- the contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context.

7.3.1. Existence of a market failure

As indicated in Chapter 1, State aid may be necessary to increase R&D&I in the economy only to the extent that the market, on its own, fails to deliver an optimal outcome. It is established that certain market failures hamper the overall level of R&D&I in the Community. However, not all undertakings and sectors in the economy are confronted to these market failures to the same extent. Consequently, as regards measures subject to a detailed

assessment, the Member State should provide adequate information whether the aid refers to a general market failure regarding R&D&I in the Community, or to a specific market failure.

Depending on the specific market failure addressed, the Commission will take into consideration the following elements:

- **Knowledge spillovers:** the level of information dissemination foreseen; the specificity of the knowledge created; the availability of IPR protection.
- **Imperfect and asymmetric information:** level of risk and complexity of research; need for external finance; characteristics of the aid beneficiary to receive external finance.
- **Coordination failures:** number of collaborating undertakings; intensity of collaboration; diverging interest between collaborating partners; problems in designing contracts; problems of third parties to coordinate collaboration.

For State aid targeting R&D&I projects or activities located in assisted areas, the Commission will take into account: (i) disadvantages caused by the peripherality and other regional specificities, (ii) specific local economic data, social and/or historic reasons for a low level of R&D&I activity in comparison with the relevant average data and/or situation at national and/or Community level as appropriate; and (iii) any other relevant indicator showing an increased degree of market failure.

7.3.2. *Appropriate Instrument*

State aid for R&D&I can be authorised under Article 87(3)(c) of the EC Treaty when it is necessary to achieve an objective of common interest, as an exception to the general prohibition of State aid. An important element in the balancing test is whether and to what extent State aid for R&D&I can be considered an appropriate instrument to increase R&D&I activities, given that other less distortive instruments may achieve the same results.

In its compatibility analysis, the Commission will take particular account of any impact assessment of the proposed measure which the Member State has made. Measures for which the Member State has considered other policy options and for which the advantages of using a selective instrument such as State aid are established and submitted to the Commission, are considered to constitute an appropriate instrument.

7.3.3. *Incentive effect and necessity of aid*

Analysing the incentive effect of the aid measure is the most important condition in analysing State aid for R&D&I. Identifying the incentive effect **translates** into assessing whether

the planned aid will induce undertakings to pursue R&D&I which they would not otherwise have pursued.

Chapter 6 provides a series of indicators that can be used by Member States to demonstrate an incentive effect. However, when a measure undergoes a detailed assessment, the Commission will require that the incentive effect of the aid is substantiated more precisely, to avoid undue distortions of competition.

In its analysis, the Commission will, in addition to the indicators mentioned in Chapter 6, take into consideration the following elements:

- **Specification of intended change:** the intended change in behaviour State aid aims at in the notified case has to be well specified (new project triggered, size, scope or speed of a project enhanced).
- **Counterfactual analysis:** the change of behaviour has to be identified by counterfactual analysis: what would be the level of intended activity with and without aid? The difference of the two scenarios is considered to be the impact of the aid measure and describes the incentive effect.
- **Level of profitability:** if a project would not, in itself, be profitable to undertake for a private undertaking, but would generate important benefits for society, it is more likely that the aid has an incentive effect. To evaluate the overall profitability (or lack thereof) of the project, evaluation methodologies can be used which are standard practice in the particular industry concerned ⁽⁴⁵⁾.
- **Amount of investment and time path of cash flows:** High start up investment, low level of appropriable cash flows and a significant fraction of cash flows arising in the very far future will be considered positive elements in assessing the incentive effect.
- **Level of risk involved in the research project:** On the basis of e.g. feasibility studies, risk assessments and expert opinions, the assessment of risk will in particular take into account the irreversibility of the investment, the probability of commercial failure, the risk that the project will be less productive than expected, the risk that conducting the project would undermine other activities and the risk that the project costs undermine the undertaking's financial viability. For State aid targeting R&D&I projects or activities located in assisted areas, the Commission will take into account disadvantages caused by the peripherality and other regional specificities, which negatively impact on the level of risk in the research project.

⁽⁴⁵⁾ These may include methods to evaluate the Net Present Value of the project (that is to say, the sum of the discounted expected cash flow resulting from the investment minus the investment cost), the internal rate of return (IRR) or the return of capital employed (ROCE). Financial reports and internal business plans containing information on demand forecasts; cost forecasts; financial forecasts (for example, NPV, IRR, ROCE), documents that are submitted to an investment committee and that elaborate on various investment scenarios or documents provided to the financial markets could serve as evidence.

- **Continuous evaluation:** measures for which (low scale) pilot projects are foreseen, or which define well specified milestones resulting in termination of the project in case of failure and where a publicly available *ex post* monitoring is foreseen will be considered more positively as regards the assessment of the incentive effect.

7.3.4. Proportionality of the aid

Independently of the criteria mentioned in Chapter 5, the Member State concerned should provide the additional following information:

- **Open selection process:** Where there are multiple (potential) candidates for undertaking the R&D&I project in a Member State, the proportionality requirement is more likely to be met if the project has been allocated on the basis of transparent, objective and non discriminatory criteria.
- **Aid to the minimum:** Member States have to explain how the amount given has been calculated to ensure that it is limited to the minimum necessary.

7.4. Analysis of the distortion of competition and trade

State aid for R&D&I may impact on competition at two levels: (i) competition in the innovation process, i.e. competition in terms of R&D&I which takes place upstream of product markets and (ii) competition in the product markets where the results of the R&D&I activities are exploited.

In assessing the negative effects of the aid measure, the Commission will focus its analysis of the distortions of competition on the foreseeable impact the R&D&I aid has on competition between undertakings in the product markets concerned. The Commission will give more weight to risks for competition and trade that arise in a predictable future and with particular likelihood.

The impact on competition in the innovation process will be relevant insofar as it has a foreseeable impact on the outcome of future product market competition. In certain cases the results of R&D&I, for example, in the form of intellectual property rights, are themselves traded in so called technology markets, for instance through patent licensing. In these cases, the Commission may also consider the effect of the aid on competition in the technology markets.

The impact of R&D&I on product markets is largely dynamic and the analysis will therefore be of a forward looking nature. Frequently, the same innovative activity will be associated with multiple future product markets. If so, the impact of State aid will be looked upon on the set of markets concerned.

There are three distinct ways in which R&D&I aid can distort competition in product markets:

- (1) R&D&I aid can distort the dynamic incentives of market players to invest (crowding out effect);
- (2) R&D&I aid can create or maintain positions of market power;
- (3) R&D&I aid can maintain an inefficient market structure.

State aid may also have a negative effect on trade in the common market. In particular where R&D&I aid leads to the crowding out of competitors, the aid measures may essentially result in a shift of trade flows and location of economic activity.

7.4.1. Distorting dynamic incentives

The main concern related to R&D&I aid to undertakings is that competitors' dynamic incentives to invest are distorted. When an undertaking receives aid, this generally increases the likelihood of successful R&D&I on the part of this undertaking leading to an increased presence on the product market(s) in the future. This increased presence may lead competitors to reduce the scope of their original investment plans (crowding out effect).

In its analysis, the Commission will consider the following elements:

- **Aid amount.** Aid measures which involve significant amounts of aid are more likely to lead to significant crowding out effects. The significance of the aid amount will be measured with reference to total private R&D expenditure in the sector, and the amount spent by the main players.
- **Closeness to the market/category of the aid.** The more the aid measure is aimed at R&D&I activity close to the market, the more it is liable to develop significant crowding out effects.
- **Open selection process:** Where the grant is given on the basis of objective and non discriminatory criteria, the Commission will take a more positive stance.
- **Exit barriers:** Competitors are more likely to maintain (or even to increase) their investment plans when exit barriers to the innovation process are high. This may be the case when many of the competitors' past investments are locked in to a particular R&D&I trajectory.
- **Incentives to compete for a future market:** R&D&I aid may lead to a situation where competitors to the aid beneficiary renounce competing for a future market, because the advantage provided by the aid (in terms of the degree of technological advance or in terms of timing) reduces the possibility for them to profitably enter this future market.

- **Product differentiation and intensity of competition:** Where product innovation is rather about developing differentiated products (related, for example, to distinct brands, standards, technologies, consumer groups) competitors are less likely to be affected. The same is true if there are many effective competitors in the market.

7.4.2. *Creating market power*

Aid in support of R&D&I may have distortive effects in terms of increasing or maintaining the degree of market power in product markets. Market power is the power to influence market prices, output, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time, to the detriment of consumers. The Commission will assess the market power before the aid is granted, and the change in market power, which can be expected as a result of the aid.

The Commission is concerned mainly about those R&D&I measures allowing the aid beneficiary to transfer or strengthen market power held on existing product markets to future product markets. The Commission is therefore unlikely to identify competition concerns related to market power in markets where each aid beneficiary has a market share below 25 % and in markets having a market concentration with Herfindahl Hirschman Index (HHI) below 2 000.

In its analysis, the Commission will consider the following elements:

- **Market power of aid beneficiary and market structure:** Where the recipient is already dominant on a product market, the aid measure may reinforce this dominance by further weakening the competitive constraint that competitors can exert on the recipient undertaking. Similarly, State aid measures may have significant impact in oligopolistic markets where only a few players are active.
- **Level of entry barriers:** In the field of R&D&I, significant entry barriers may exist for new entrants. These barriers include legal entry barriers (in particular intellectual property rights), economies of scale and scope, access barriers to networks and infrastructure, and other strategic barriers to entry or expansion.
- **Buyer power:** The market power of an undertaking may also be limited by the market position of the buyers. The presence of strong buyers can serve to counter a finding of a strong market position if it is likely that the buyers will seek to preserve sufficient competition in the market.
- **Selection process:** Aid measures which allow undertakings with a strong market position to influence the selection process, for example, by having the right to recommend undertakings in the selection process or influencing the research path in a way which disfavours alternatives path on unjustified grounds, is liable to raise concern by the Commission.

7.4.3. *Maintaining inefficient market structures*

R&D&I aid may, if not correctly targeted, support inefficient undertakings and hence lead to market structures where many market players operate significantly below efficient scale. In its analysis, the Commission will consider whether the aid is granted in markets featuring overcapacity, in declining industries or in sensitive sectors. Concerns are less likely in situations where State aid for R&D&I aims at changing the growth dynamics of the sector, notably by introducing new technologies.

7.5. **Balancing and decision**

In the light of these positive and negative elements, the Commission balances the effects of the measure and determines whether the resulting distortions adversely affect trading conditions to an extent contrary to the common interest. The analysis in each particular case will be based on an overall assessment of the foreseeable positive and negative impacts of the State aid. For that purpose the Commission will not use the criteria set out in sections 7.3 and 7.4 mechanically but will make an overall assessment based on the proportionality principle.

The Commission may raise no objections to the notified aid measure without entering into the formal investigation procedure or, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999, decide to close the procedure with a decision pursuant to Article 7 of that Regulation. If it takes a conditional decision within the meaning of Article 7(4) of Regulation (EC) No 659/1999, it may in particular consider attaching the following conditions, which must reduce the resulting distortions or effect on trade and be proportionate:

- lower aid intensities than the maximum intensities allowed in Chapter 5, including claw back mechanisms and different conditions for repaying reimbursable advances,
- diffusion of results, collaboration and other behavioural commitments,
- separation of accounts in order to avoid cross subsidization from one market to another market, when the beneficiary is active in multiple markets,
- no discrimination against other potential beneficiaries (reduce selectivity).

8. **CUMULATION**

As regards cumulation, the aid ceilings fixed under this framework shall apply regardless of whether the support for the aided project is financed entirely from State resources or is partly financed by the Community, except in the specific and limited context of the conditions established for Community funding under the RTD Framework Programmes, adopted

respectively in accordance with Title XVIII of the EC Treaty or Title II of the Euratom Treaty.

Where the expenditure eligible for aid for R&D&I is eligible in whole or in part for aid for other purposes, the common portion will be subject to the most favourable ceiling under the applicable rules. This limitation does not apply to aid granted in accordance with the Community guidelines on State aid to promote risk capital investments in SME ⁽⁴⁶⁾.

Aid for R&D&I shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in this framework.

9. SPECIAL RULES FOR AGRICULTURE AND FISHERIES

As regards R&D aid concerning products listed in Annex I to the EC Treaty, and by way of derogation from aid intensity limitations or supplements specified elsewhere in this framework, the Commission will continue to allow an aid intensity of up to 100 %, subject to fulfilment in each case of the four following conditions:

- it is of general interest to the particular sector or sub sector concerned;
- information that research will be carried out, and with which goal, is 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 are made available on internet, for a period of at least 5 years. This information on the internet shall be published no later than any which may be given to members of any particular organisation;
- aid shall be granted directly to the researching institution or body 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.

The Commission will allow State aid for cooperation pursuant to Article 29 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) ⁽⁴⁷⁾ if such cooperation has been approved for Community co financing under that Article and/or the State aid is granted as additional financing pursuant to Article 89 of Regulation (EC)

No 1698/2005 under the same conditions and at the same intensity as the co financing.

Cases of R&D aid for products listed in Annex I to the EC Treaty not fulfilling the conditions in this chapter are to be examined under the normal rules of this framework.

10. FINAL PROVISIONS

10.1. Reporting and monitoring

10.1.1. Annual reports

In line with the requirements of Regulation (EC) No 659/1999 and 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 ⁽⁴⁸⁾, Member States must submit annual reports to the Commission.

Beyond the requirements stipulated in those provisions, annual reports for R&D&I aid measures shall contain for each measure, including the granting of aid under an approved scheme, the following information:

- the name of the beneficiary,
- the aid amount per beneficiary,
- the aid intensity,
- the sectors of activity where the aided projects are undertaken.

In case of fiscal aid, the Member State must only provide a list of those beneficiaries who have received an annual tax relief in excess of 200 000 EUR.

In case of clusters, the report must also give a brief description of the activity of the cluster and its effectiveness in attracting R&D&I activity. The Commission may request additional information regarding the aid granted, to check whether the conditions of the Commission's decision approving the aid measure have been respected.

The annual reports will be published on the internet site of the Commission.

For all aid granted under an approved scheme to large undertakings, Member States must also explain in the annual report how the incentive effect has been respected for aid given to such undertakings, notably using the indicators and criteria mentioned in Chapter 6 above.

⁽⁴⁶⁾ OJ C 194, 18.8.2006, p. 2.

⁽⁴⁷⁾ OJ L 277, 21.10.2005, p. 1. Regulation as amended by Regulation (EC) No 1463/2006 (OJ L 277, 9.10.2006, p. 1).

⁽⁴⁸⁾ OJ L 140, 30.4.2004, p. 1. Regulation as amended by Regulation (EC) No 1627/2006 (OJ L 302, 1.11.2006, p. 10).

10.1.2. Access to full text of schemes

The Commission considers that further measures are necessary to improve the transparency of State aid in the Community. In particular, it appears necessary to ensure that the Member States, economic operators, interested parties and the Commission itself have easy access to the full text of all applicable R&D&I aid schemes.

This can easily be achieved through the establishment of linked internet sites. For this reason, when examining R&D&I aid schemes, the Commission will systematically require the Member State concerned to publish the full text of all final aid schemes on the internet and to communicate the internet address of the publication to the Commission. The scheme must not be applied before the information is published on the internet.

10.1.3. Information sheets

Besides, whenever aid for R&D&I is granted on the basis of aid schemes without falling under the duty for individual notification, and exceeds EUR 3 million, Member States must, within 20 working days starting from the granting of the aid by the competent authority, provide the Commission with the information requested in the standard form laid down in the Annex to this framework. The Commission will make summary information available to the public through its website (http://ec.europa.eu/comm/competition/index_en.html).

Member States must ensure that detailed records regarding the granting of aid for all R&D&I measures are maintained. Such records, which must contain all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed, must be maintained for 10 years from the date on which the aid was granted.

The Commission will ask Member States to provide this information in order to carry out an impact assessment of this framework three years after its entry into force ⁽⁴⁹⁾.

10.2. Appropriate Measures

The Commission herewith proposes to Member States, on the basis of Article 88(1) of the EC Treaty, the following appropriate measures concerning their respective existing research and development aid schemes:

In order to comply with the provisions of this framework, Member States should amend, where necessary, such schemes in order to bring them into line with this framework within twelve months after its entry into force, with the following exceptions:

- Member States have twenty four months to introduce amendments regarding the provisions covered in point 3.1.1 of this framework;

- the new threshold for large individual projects will apply as from the entry into force of this framework;
- the duty to provide more detailed annual reports pursuant to point 10.1.1. and the duty to submit information sheets pursuant to point 10.1.3. will apply to existing aid schemes six months after the entry into force of this framework.

The Member States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of publication of this framework. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

10.3. Entry into force, validity and revision

This framework will enter into force on 1 January 2007 or, if it has not been published in the *Official Journal of the European Union* before that date, on the first day following its publication therein and will replace the Community Framework for State aid for Research and Development.

This framework will be applicable until 31 December 2013. After consulting the Member States, the Commission may amend it before that date on the basis of important competition policy or research policy considerations or in order to take account of other Community policies or international commitments. The Commission intends to carry out a review of the framework 3 years after its entry into force.

The Commission will apply this framework to all aid projects notified in respect of which it is called upon to take a decision after the framework is published in the *Official Journal*, even where the projects were notified prior to its publication. This includes individual aid granted under approved aid schemes and notified to the Commission following an obligation to notify such aid individually.

In line with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁵⁰⁾, the Commission will apply in the case of non notified aid,

- this framework if the aid was granted after its entry into force,
- the framework in force when the aid was granted in all other cases.

⁽⁴⁹⁾ In that process, Member States may want to support the Commission by providing their own *ex post* assessment of schemes and individual measures.

⁽⁵⁰⁾ OJ C 119, 22.5.2002, p. 22.

ANNEX

Form for the provision of summary information for aid under the extended reporting obligation (section 10.1)

- (1) Aid in favour of (name of the undertaking/undertakings 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:

▼ M3

PART III.6.a

**SUPPLEMENTARY INFORMATION SHEET FOR RESEARCH AND DEVELOPMENT
AND INNOVATION AID: AID SCHEMES**

This supplementary information sheet must be used for the notification of any aid scheme ⁽¹⁶⁾ covered by the Community framework for State aid for research and development and innovation (thereinafter the R&D&I Framework) ⁽¹⁷⁾. It must also be used for aid schemes for Research and Development to SMEs, which do not fall under a Block Exemption Regulation ⁽¹⁸⁾ as well as for aid intended for the production, processing and marketing of agricultural products.

1. Basic characteristics of the notified measure

Please fill in the relevant parts of the notification form corresponding to the character of the notified scheme. Please find below a basic guidance.

(A) Please specify the type of aid and fill in the appropriate subsections of **Section 4** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- Aid for R&D projects, *fill in Section 4.1;*
- Aid for technical feasibility studies, *fill in Section 4.2;*
- Aid for industrial property right costs for SMEs, *fill in Section 4.3;*
- Aid for young innovative enterprises, *fill in Section 4.4;*
- Aid for process and organisational innovation in services, *fill in Section 4.5;*
- Aid for innovations advisory services and for innovation support services, *fill in Section 4.6;*
- Aid for the loan of highly qualified personnel, *fill in Section 4.7;*
- Aid for innovation clusters, *fill in Section 4.8.*

*Furthermore, please fill in also **Section 5** (Incentive effect and necessity of aid) and **Section 8** (Reporting and monitoring) in order to provide the requested confirmations.*

(B) Does the aid scheme involve research organisations ⁽¹⁹⁾/innovation intermediaries?

- yes no

*If yes, please fill in **Section 2 and/or 3** (Research organisations and innovation intermediaries and Indirect State aid to undertakings through publicly funded research organisations) of this supplementary information sheet.*

(C) Can the aid be combined with other aid?

- yes no

*If yes, fill in **Section 6** (Cumulation) of this supplementary information sheet.*

(D) Does the R&D aid concern products listed in Annex I to the EC Treaty?

- yes no

*If yes, fill in **Section 7** (Specific questions related to agriculture and fisheries) of this supplementary information sheet.*

⁽¹⁶⁾ As regards the aid for promotion of execution of important projects of common European interest, the Commission may also consider a group of projects as together constituting a project. For details see Section 4 of Supplementary Information Sheet for research and development and innovation aid: individual aid (part III.6.b of Annex I to Commission Regulation (EC) No 794/2004).

⁽¹⁷⁾ Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

⁽¹⁸⁾ Currently 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) as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004, amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent regulation replacing it.

⁽¹⁹⁾ For definition see Section 2.2(d) of the R&D&I Framework.

▼ **M3**

(E) Please confirm that if the SME specific aid ⁽²⁰⁾/bonus is granted, the beneficiaries comply with the SME definition as defined by the Community legislation ⁽²¹⁾:

yes

(F) If the scheme involves commissioning/purchasing of R&D activities/results from undertakings by the public authorities, are the providers selected in an open tender procedure ⁽²²⁾?

yes no

If no, please note that such payments from the public authorities to undertakings would normally involve State aid.

(G) If applicable, please provide an exchange rate which has been used for the purposes of the notification:

(H) Please confirm that any aid granted under the notified scheme will be notified individually to the Commission if it reaches the thresholds for a detailed assessment laid down in Section 7.1 of the R&D&I Framework.

yes

(I) All documents provided by the Member States as annexes to the notification form shall be numbered and document numbers shall be indicated in the relevant parts of this supplementary information sheet.

2. **Research organisations and innovation intermediaries as recipients of State aid ⁽²³⁾**

2.1. *Public funding of non-economic activities*

(A) Do the research organisations or non-for-profit innovation intermediaries carry out an economic activity ⁽²⁴⁾ (an activity consisting in offering goods and/or services on a given market)?

yes no

If yes, please provide description of these activities:

.....

(B) If the same entity carries out activities of both economic and non-economic ⁽²⁵⁾ nature, can the two kinds of activities and their costs and funding be clearly separated?

yes no

If yes, provide details:

.....

If yes, please note that public funding of non-economic activities does not fall under Article 87(1) of the EC Treaty. If not, public funding of economic activities generally entails State aid.

2.2. *Public funding of economic activities*

(C) Can the Member State prove that:

— the totality of the State funding is passed on from the research organisations or not-for-profit innovation intermediaries (carrying out economic activities) to the final recipients;

AND

— there is no advantage granted to the intermediaries?

yes no

Please provide details and evidence:

.....

.....

If yes, please note that the intermediary organisations may not be recipient of State aid. As regards the aid to final recipients, normal State aid rules apply.

⁽²⁰⁾ I.e. measures under Sections 4.3, 4.4, 4.6 and 4.7 of this supplementary information sheet. Please note that the measure under Section 4.4 is limited to small enterprises.

⁽²¹⁾ See footnote 20.

⁽²²⁾ Cf. R&D&I Framework, Section 2.1.

⁽²³⁾ Cf. R&D&I Framework, Section 3.1.

⁽²⁴⁾ For details see Section 3.1.1 of R&D&I Framework (footnote 24).

⁽²⁵⁾ For details see Section 3.1.1 (second and third paragraphs) of R&D&I Framework.

▼ **M3****3. Indirect State aid to undertakings through publicly funded research organisations** ⁽²⁶⁾3.1. *Research on behalf of undertakings*

(A) Are the projects supported under the notified scheme carried out by research organisations on behalf of undertakings?

yes no

(B) If yes, do the research organisations (acting as agent) render services to the undertakings (acting as principals) in situations, where:

— the agents receive payment of an adequate remuneration for their services,

yes no

AND

— do the principals specify the terms and conditions of these services?

yes no

Please provide details:

.....

(C) Do the research organisations provide their services at market price?

yes no

If there is no market price, do the research organisations provide their services at a price which reflects full costs plus a reasonable margin?

yes no

Please provide details:

.....

If a research organisation renders services and if the answer to one of the questions in Section C is yes, there will be normally no State aid passed to the undertakings through the research organisation.

3.2. *Collaboration of undertakings and research organisations*

(A) Is the collaboration project carried out jointly by undertakings and research organisations?

yes no

If yes, provide details on the partnerships.

.....

(B) If yes, do the participating undertakings bear the full cost of the projects supported under the notified scheme?

yes no

Are the results which do not give rise to intellectual property rights widely disseminated AND are any intellectual property rights which result from the activity of the research organisations fully allocated ⁽²⁷⁾ to the research organisations?

yes no

Do the research organisations receive from the participating undertakings compensation equivalent to the market price for the intellectual property rights ⁽²⁸⁾ which result from the activity of the research organisations carried out in the project and which are transferred to the participating undertakings?

yes no

Please provide details (please note that any contribution of the participating undertakings to the costs of the research organisations shall be deducted from the compensation):

.....

⁽²⁶⁾ Cf. R&D&I Framework, Section 3.2.

⁽²⁷⁾ For details see Section 3.2.2 (footnote 28) of the R&D&I Framework.

⁽²⁸⁾ For details see Section 3.2.2 (footnote 29) of the R&D&I Framework.

▼ **M3**

- (C) If none of the answers to questions of Section B is yes, the Member State may rely on individual assessment of the collaboration projects ⁽²⁹⁾.

Please provide an individual assessment of the collaboration projects, taking into account the above mentioned elements. Please attach also the contractual agreements to the notification.

If none of the answers to questions of Section B is yes and if the individual assessment of the collaboration projects does not lead to the conclusion that there is no State aid, the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings.

4. Compatibility of aid under Article 87(3)(c) of the EC Treaty

4.1. Aid for R&D projects ⁽³⁰⁾

4.1.1. Research category ⁽³¹⁾

- (A) Please indicate which R&D stages ⁽³²⁾ are supported under the notified scheme:

- fundamental research
- industrial research
- experimental development

Give examples of major projects to be covered by the notified scheme:

.....

.....

- (B) If individual R&D projects encompass different research categories, please explain how this will be taken into account in determining the maximum aid intensity of a given project (the maximum aid intensity applicable must reflect the stages of research involved).

.....

.....

4.1.2. Eligible costs

All eligible costs must be allocated to a specific category of R&D ⁽³³⁾. Please specify (or tick) below.

	Fundamental research	Industrial research	Experimental development
Personnel costs			
Costs of instruments and equipment			
Costs for building and land			
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices			
Additional overheads incurred directly as a result of the research project			
Other operating expenses			

⁽²⁹⁾ There also may be no State aid where the assessment of the contractual agreement between the partners leads to the conclusion that any intellectual property rights to the R&D&I results as well as access rights to the results are allocated to the different partners of the collaboration and adequately reflect their respective interests, work packages, and financial and other contributions to the project.

⁽³⁰⁾ Cf. R&D&I Framework, Section 5.1.

⁽³¹⁾ To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002).

⁽³²⁾ For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

⁽³³⁾ Cf. Section 5.1.4 of the R&D&I Framework.

▼ **M3**

4.1.3. Aid intensities and bonuses

The aid intensity is calculated on the basis of the eligible costs of the project. It must be established for each beneficiary of aid, including in a collaboration project ⁽³⁴⁾.

(A) Basic intensities (without bonuses) ⁽³⁵⁾:

	Fundamental research	Industrial research	Experimental development
Maximum aid intensity			

(B) Bonuses:

Do the supported projects benefit from a bonus?

yes no

If yes, please specify below.

— Is an SME bonus applied under the notified scheme?

yes no

Specify the level of bonus applicable ⁽³⁶⁾:

— Is a bonus for effective collaboration between undertakings (i) or collaboration of an undertaking with a research organisation (ii) or (only for projects of industrial research) dissemination of results (iii) applied under the notified scheme?

yes no

(i) If a bonus for an effective collaboration between at least two undertakings, which are independent of each other, is applied, please confirm that the following conditions are fulfilled:

no single undertaking bears more than 70% of the eligible costs of the collaboration project;

AND

the project involves collaboration with at least one SME or the collaboration has a cross-border character, i.e. research and development activities are carried out in at least two different Member States.

Specify the level of bonus applicable ⁽³⁷⁾:

(ii) If a bonus for an effective collaboration between an undertaking and a research organisation, particularly in the context of coordination of national R&D policies, is applied, please confirm that the following conditions are fulfilled:

the research organisation bears at least 10% of the eligible costs;

AND

the research organisation has the right to publish the result of the research projects insofar as they stem from research implemented by that organisation.

Specify the level of bonus applicable ⁽³⁸⁾:

⁽³⁴⁾ In the case of State aid for an R&D project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific research project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each benefiting undertaking.

⁽³⁵⁾ The aid intensity may not exceed 100% for fundamental research, 50% for industrial research and 25% for experimental development.

⁽³⁶⁾ The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

⁽³⁷⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80%.

⁽³⁸⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80%. This bonus does not apply to the research organisation.

▼ M3

(iii) If in the case of industrial research a bonus for wide dissemination of the results of the project is applied, please specify at least one of the following methods of wide dissemination:

- technical and scientific conferences;
- publication in scientific or technical journals;
- availability in open access repositories (databases where raw research data can be accessed by anyone);
- availability through free or open source software.

Specify the level of bonus applicable ⁽³⁹⁾:

(C) Specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

4.1.4. Special conditions for repayable advance ⁽⁴⁰⁾

(A) Is the aid to the R&D projects granted in the form of a repayable advance?

- yes no

(B) If yes, is the aid granted in the form of a repayable advance under the notified scheme expressed as gross grant equivalent ⁽⁴¹⁾?

- yes no

If yes, what is the aid intensity of repayable advance expressed as gross grant equivalent ⁽⁴²⁾ applicable under the notified scheme:

Furthermore, please provide the complete methodology applied AND the underlining verifiable data on which the above mentioned methodology has been based:

.....

(C) If the aid cannot be expressed in gross grant equivalent, what is the level of the repayable advance expressed as a percentage of the eligible costs:

In case the rates of repayable advance granted to the R&D project are higher than the rates indicated in Sections 5.1.2 and 5.1.3 (up to the maximum rates indicated in Section 5.1.5 of the R&D&I Framework, please):

— notify to the Commission the detailed information on the repayment in the case of success and define clearly what will be considered as a successful outcome of the research activities,

AND

— confirm the following:

- the measure provides that in case of successful outcome the advance is repaid with an interest rate at least equal to the applicable rate resulting from the application of the Commission notice on the method of setting the reference and discount rates ⁽⁴³⁾;
- in case of a success exceeding the outcome defined as successful, the Member State is entitled to request payments beyond payments of the advance amount including interest according to the reference rate foreseen by the Commission;
- in case of partial success, the Member State requires that the repayment secured is in proportion to the degree of success achieved.

⁽³⁹⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

⁽⁴⁰⁾ Cf. R&D&I Framework, Section 5.1.5.

⁽⁴¹⁾ Gross grant equivalent of a repayable advance reflects the probability that the advance will be repaid by the beneficiaries.

⁽⁴²⁾ The gross grant equivalent must fulfil the conditions on maximum aid intensities laid down in Sections 5.1.2 and 5.1.3 of the R&D&I Framework.

⁽⁴³⁾ OJ C 273, 9.9.1997, p. 3. Also published under: http://ec.europa.eu/comm/competition/state_aid/legislation/reference.html

▼ **M3**4.1.5. Special conditions for fiscal measures ⁽⁴⁴⁾

- (A) Is the aid to the R&D projects supported under the notified scheme granted in the form of a fiscal measure?

yes no

If the aid for the R&D project is granted in the form of a fiscal measure, please provide evaluation studies in order to enable the Commission to assess the incentive effect of the R&D fiscal aid.

- (B) If yes, please specify how the aid intensities are calculated:

- on the basis of individual R&D project;
- as the ratio between the overall tax relief and the sum of all eligible R&D costs incurred in a period not exceeding three consecutive fiscal years;
- other:

Please provide details on the calculation method applied:

.....

.....

4.2. Aid for technical feasibility studies ⁽⁴⁵⁾

4.2.1. General conditions

The studies are preparatory to ⁽⁴⁶⁾:

- industrial research;
- experimental development.

4.2.2. Aid intensities

Specify the maximum aid intensity ⁽⁴⁷⁾ (%) for SMEs:

Specify the maximum aid intensity ⁽⁴⁸⁾ (%) for large companies:

The aid intensity is calculated on the basis of cost of feasibility studies of the project.

4.3. Aid for industrial property right costs for SMEs ⁽⁴⁹⁾

4.3.1. Conditions

Which stage of research ⁽⁵⁰⁾ is concerned?

- fundamental research;
- industrial research;
- experimental development.

4.3.2. Eligible costs and aid intensities

- (A) Specify the eligible costs
- ⁽⁵¹⁾
- :

- costs preceding the grant of the right in the first legal jurisdiction:
- translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdiction:
- costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings:

⁽⁴⁴⁾ Cf. R&D&I Framework, Section 5.1.6.

⁽⁴⁵⁾ Cf. R&D&I Framework, Section 5.2.

⁽⁴⁶⁾ To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002); for definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

⁽⁴⁷⁾ For SMEs, the aid intensity may not exceed 75% for studies preparatory to industrial research activities and 50% for studies preparatory to experimental development activities.

⁽⁴⁸⁾ For large companies, the aid intensity may not exceed 65% for studies preparatory to industrial research activities and 40% for studies preparatory to experimental development activities.

⁽⁴⁹⁾ Cf. R&D&I Framework, Section 5.3.

⁽⁵⁰⁾ For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

⁽⁵¹⁾ For details see Section 5.3 (second paragraph) of the R&D&I Framework.

▼ **M3**

(B) Specify the maximum aid intensity (%) ⁽⁵²⁾:

4.4. *Aid for young innovative enterprises* ⁽⁵³⁾ (for small enterprises)

Please confirm that:

(A) the beneficiaries are exclusively small enterprises as defined by Community legislation ⁽⁵⁴⁾, in existence for less than six years at the time when the aid is granted;

(B) the beneficiaries are innovative enterprises.

Please confirm that the compliance with this condition is ensured through:

an evaluation carried out by an external expert demonstrating that the beneficiary will in the foreseeable future develop products, services or processes which are technologically new or substantially improved compared to the state of the art in its industry in the Community, and which carry a risk of technological or industrial failure;

OR

the evidence that the R&D expenses of the beneficiary represent at least 15 % of its total operating expenses 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.

Please provide details on how this is implemented:

.....

(C) Specify the maximum aid amount applicable under the notified scheme:

Please confirm that the aid for young innovative enterprises will not exceed:

EUR 1 million in non-assisted areas;

EUR 1,5 million in regions eligible for the derogation in Article 87(3)(a) of the EC Treaty;

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

(D) Please confirm that:

the beneficiaries didn't receive aid for young innovative enterprises before and will receive this type of aid only once during the period in which they qualify as a young innovative enterprise.

(E) Do the enterprises benefit from a cumulation of aid?

yes no

If yes, please indicate how the specific cumulation rules for young innovative enterprise aid (Section 5.4 of the R&D&I Framework) will be complied with.

.....

4.5. *Aid for process and organisational innovation in services* ⁽⁵⁵⁾

4.5.1. General conditions

(A) To which type of innovation in service activities ⁽⁵⁶⁾ does the notified scheme refer to?

process innovation in service activities;

organisational innovation in service activities.

⁽⁵²⁾ Maximum aid levels correspond to the same levels of aid as would have qualified as R&D aid in respect of the research activities which first led to the industrial property rights concerned.

⁽⁵³⁾ Cf. R&D&I Framework, Section 5.4.

⁽⁵⁴⁾ See footnote 20.

⁽⁵⁵⁾ Cf. R&D&I Framework, Section 5.5.

⁽⁵⁶⁾ For definitions see Section 2.2(i), (j) of the R&D&I Framework.

▼ **M3**

Please provide a detailed description of the innovation in service activities ⁽⁵⁷⁾ (process and/or organisational):

.....

.....

.....

.....

(B) Please confirm that:

- the organisational innovation is related to the use and exploitation of Information and Communication Technologies (ICT) to change the organisation;
- the innovation is formulated as a project with an identified and qualified project manager, as well as identified project costs;
- the result of the aided project is the development of a standard, of a business model, methodology of concept, which can be systematically reproduced, possibly certified, and possibly patented;
- the process or organisational innovation is new or substantially improved compared to the state of the art in its industry in the Community;
- the process or organisational innovation projects entail a clear degree of risk;
- the aid is granted to large enterprises only if they collaborate with SMEs in the aided activity and that the collaborating SMEs incur at least 30 % of the total eligible costs.

Please provide details/evidence concerning all these elements:

.....

.....

4.5.2. Eligible costs and aid intensities

(A) Please specify the eligible costs ⁽⁵⁸⁾:

	Eligible costs
Personnel costs	
Costs of instruments and equipment	
Costs for building and land	
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices	
Additional overheads incurred directly as a result of the research project	
Other operating expenses	

(B) Specify the maximum aid intensity ⁽⁵⁹⁾ for large enterprises (%):

Specify the maximum aid intensity ⁽⁶⁰⁾ for medium enterprises ⁽⁶¹⁾ (%):

Specify the maximum aid intensity ⁽⁶²⁾ for small enterprises ⁽⁶³⁾ (%):

The aid intensity is calculated on the basis of the eligible costs of the projects.

⁽⁵⁷⁾ In order to classify the activities, you may refer to the Commission practice or the specific definitions provided in the OSLO Manual, Guidelines for Collecting and Interpreting Innovation Data, 3rd Edition (Organisation For Economic Cooperation and Development, 2005).

⁽⁵⁸⁾ For details see Section 5.1.4. Please note that in the case of organisational innovation, the costs of instruments and equipment cover costs of ICT instruments and equipment only.

⁽⁵⁹⁾ The maximum aid intensity is 15 % of the eligible costs.

⁽⁶⁰⁾ The maximum aid intensity is 25 % of the eligible costs.

⁽⁶¹⁾ See footnote No 20.

⁽⁶²⁾ The maximum aid intensity is 35 % of the eligible costs.

⁽⁶³⁾ Idem footnote No 46.

▼ **M3**4.6. Aid for innovation advisory services and for innovation support services ⁽⁶⁴⁾ (for SMEs)

4.6.1. General conditions

(A) Specify the maximum aid amount (not exceeding EUR 200 000 per beneficiary within any three year period):

(B) Please confirm that:

- if the service provider does not benefit from a national or European certification the aid will not cover more than 75% of the eligible costs;
- the beneficiaries use the State 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).

Please provide details on how this will be ensured.

.....

4.6.2. Eligible costs

(A) What type of aid is granted?

- aid for innovation advisory services;
- aid for innovation support services.

(B) If it is an aid for innovation advisory services, specify the eligible costs:

- 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:

(C) If it is an aid for innovation support services, specify the eligible costs:

- office space:
- data banks:
- technical libraries services:
- market research:
- use of laboratory:
- quality labelling:
- testing and certification:

4.6.3. Special conditions for a non-for-profit entity

If the service providers are non-for-profit entities, the aid may be given in the form of a reduced price, as the difference between the price paid and the market price (or a price which reflects full costs plus a reasonable margin).

(A) Is the aid given in the form of a reduced price?

- yes no

⁽⁶⁴⁾ Cf. R&D&I Framework, Section 5.6.

▼ **M3**

If yes, provide evidence of the existence of a system ensuring transparency about the full costs of the innovation advisory and innovation support services provided, as well as about the price paid by the beneficiaries, so that the aid received can be measured and monitored.

.....

.....

4.7. *Aid for the loan of highly qualified personnel* ⁽⁶⁵⁾ (for SMEs)

4.7.1. General conditions

(A) Where do the highly qualified personnel ⁽⁶⁶⁾ come from?

- research organisations;
- large enterprises.

Provide details (if possible) on research organisations and on large enterprises.

.....

.....

(B) Please confirm that:

- the seconded personnel are not replacing other personnel;
- the seconded personnel are employed in a newly created function within the beneficiary undertaking.

Specify please this newly created function:

.....

.....

- the seconded personnel have been employed for at least two years in the research organisations or the large enterprises which are sending the personnel on secondment;
- the seconded personnel work on R&D&I activities within the SME receiving aid.

4.7.2. Eligible costs and aid intensities

(A) Specify the eligible costs:

- costs for borrowing and employing highly qualified personnel:
.....
- mobility allowance for the seconded personnel:

(B) Please confirm that consultancy costs (payment of the service rendered by the expert without employing the expert in the undertaking) are excluded from eligible costs of the aid for the loan of highly qualified personnel.

(C) Specify the maximum aid intensity ⁽⁶⁷⁾ (%):

4.8. *Aid for innovation clusters* ⁽⁶⁸⁾

4.8.1. General conditions

(A) What type of aid is granted to the beneficiaries?

- investment aid;
- operating aid for cluster animation.

⁽⁶⁵⁾ Cf. R&D&I Framework, Section 5.7.
⁽⁶⁶⁾ For definition see Section 2.2. (k) of the R&D&I Framework.
⁽⁶⁷⁾ The maximum aid intensity is 50 % of the eligible costs, for a maximum of three years per undertaking and per person borrowed.
⁽⁶⁸⁾ Cf. R&D&I Framework, Section 5.8.

▼ **M3**

- (B) Please confirm that:
- the aid is exclusively granted to the legal entities operating the innovation clusters;
 - the beneficiaries are in charge of managing the participation and access to the clusters' premises, facilities and activities.
- Please provide details:
-
-
- access to the clusters' premises, facilities and activities is not restricted.
- (C) Do the fees charged for using the cluster's facilities and for participating in the cluster's activities reflect their costs?
- yes no
- If yes, please demonstrate how this is ensured:
-
-
- If not, please provide details (especially with respect to the existence of aid within the meaning of Article 87(1) of the EC Treaty, see Section 3.1 of the R&D&I Framework):
-
-
- (D) Please attach an analysis of the technological specialisation of the innovation cluster, existing regional potential, existing research capacity, presence of clusters in the Community with similar purposes and potential market volumes of the activities in the cluster:
-
-

4.8.2. Specific conditions concerning investment aid for cluster animation

- (A) What type of investment is carried out?
- setting up of innovation clusters;
 - expansion of innovation clusters;
 - animation of innovation clusters.
- (B) For which facilities is the aid granted?
- facilities for training and research centre;
 - open-access research infrastructures, laboratory, testing facility;
 - broadband network infrastructures.
- (C) Specify the eligible costs:
- costs relating to investment in land:
 - buildings:
 - machinery:
 - equipment:
- (D) What is the basic aid intensity (%) ⁽⁶⁹⁾:
- If applicable, what is the basic aid intensity for regions falling under Article 87(3)(a) of the EC Treaty:
- with less than 75 % of average EU-25 GDP per capita, outermost regions with higher GDP per capita and statistical effect regions (until 1 January 2011)(%) ⁽⁷⁰⁾:

⁽⁶⁹⁾ The maximum aid intensity is 15 % of the eligible costs.
⁽⁷⁰⁾ The maximum aid intensity is 30 % of the eligible costs.

▼ **M3**

— with less than 60 % of average EU-25 GDP per capita (%) ⁽⁷¹⁾:

— with less than 45 % of average EU-25 GDP per capita (%) ⁽⁷²⁾:

If applicable, what is the basic aid intensity for statistical effect regions falling under Article 87(3)(c) of the EC Treaty from 1 January 2011 (%) ⁽⁷³⁾:

(E) Is any bonus granted to beneficiaries?

yes no

If yes, specify below:

— Do you apply an SME bonus?

yes no

Specify the level of bonus applicable to small enterprises ⁽⁷⁴⁾:

Specify the level of bonus applicable to medium-sized enterprises ⁽⁷⁵⁾:

— Do you apply a bonus for undertakings located in outermost regions?

yes no

If yes, specify the level of bonus applicable to undertakings located in outermost regions:

— where their GDP per capita falls below 75 % of EU-25 GDP average (%) ⁽⁷⁶⁾:

— other outermost regions (%) ⁽⁷⁷⁾:

4.8.3. Specific conditions concerning operating aid for cluster animation

(A) For how long is such aid granted: years

If the aid is granted for a longer period than five years, please provide convincing evidence in order to justify such longer period ⁽⁷⁸⁾.

.....

(B) Is the aid degressive?

yes no

(C) Specify the eligible costs:

marketing of the cluster to recruit new companies to take part in the cluster:

management of the cluster's open-access facilities:

organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster:

(D) Aid intensity:

— degressive aid (please specify degressive rates for each year) ⁽⁷⁹⁾:

— non-degressive aid (%) ⁽⁸⁰⁾:

⁽⁷¹⁾ The maximum aid intensity is 40 % of the eligible costs.

⁽⁷²⁾ The maximum aid intensity is 50 % of the eligible costs.

⁽⁷³⁾ The maximum aid intensity is 20 % of the eligible costs.

⁽⁷⁴⁾ The aid intensity may be increased by maximum 20 percentage points for small enterprises.

⁽⁷⁵⁾ The aid intensity may be increased by maximum 10 percentage points for medium-sized enterprises.

⁽⁷⁶⁾ The aid intensity may be increased by maximum 20 percentage points.

⁽⁷⁷⁾ The aid intensity may be increased by maximum 10 percentage points.

⁽⁷⁸⁾ In any case, the period may never exceed 10 years.

⁽⁷⁹⁾ The intensity may amount 100 % for the eligible costs the first year but must have fallen in a linear fashion to zero by the end of the fifth year.

⁽⁸⁰⁾ The maximum aid intensity is 50 % of the eligible costs.

▼ M3

5. Incentive effect and necessity of aid ⁽⁸¹⁾

5.1. General conditions

Please confirm that when granting the aid under the notified measure, it will be ensured that the R&D&I activities of individual beneficiaries will not commence prior to their aid application or granting decision in case of fiscal aid.

yes

Please provide details on how the compliance with this condition will be ensured:

.....

In case the aid is granted for projects of large enterprises, to SMEs if it exceeds EUR 7,5 million, for process and organisational innovation in services and for innovation clusters, please confirm that the incentive effect will be evaluated on the basis of at least one of the following indicators:

- increase in project size;
- increase in scope;
- increase in speed;
- increase in total amount spent on R&D&I;
- other:

Please provide details on how this evaluation will be carried out:

.....

6. Cumulation ⁽⁸²⁾

(A) Is the aid granted under the notified scheme combined with other aid ⁽⁸³⁾?

yes no

(B) If yes, please describe the cumulation rules applicable to the notified aid scheme:

.....

(C) Please specify how the respect of cumulation rules will be verified in the notified aid scheme:

.....

7. Specific questions relating to agriculture and fisheries ⁽⁸⁴⁾

(A) Does the R&D aid concern products listed in Annex I to the EC Treaty?

yes no

If yes, specify the type of products:

.....

⁽⁸¹⁾ Cf. R&D&I Framework, Chapter 6.

⁽⁸²⁾ Cf. R&D&I Framework, Chapter 8.

⁽⁸³⁾ Please note that the aid for R&D&I shall not be cumulated with de minimis support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the R&D&I Framework.

⁽⁸⁴⁾ Cf. R&D&I Framework, Chapter 9.

▼ M3

(B) If yes, please provide the answers to the following questions:

— is the aid of general interest to the particular sector or sub-sector concerned?

yes no

If yes, provide evidence:

.....

— is the information that research will be carried out, and with which goal published on Internet prior to the commencement of the research AND does the information published include an approximate date of the expected results and their place of publication on the Internet, as well as a mention that the result will be available at no cost?

yes no

If yes, provide evidence and specify the Internet address:

.....

— are the results of the research made available on Internet, for a period of at least five years AND can it be confirmed that the information on the Internet will be published no later than any which may be given to members of any particular organisation?

yes no

If yes, provide evidence:

.....

— is the aid granted directly to the researching institution or body AND does it exclude the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, as well as the provision of price support to producers of such products?

yes no

If yes, provide evidence:

.....

If the answers to all four conditions of Section B above are yes, the aid intensity up to 100% can be allowed. If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.

(C) Specify the total aid intensity (%):

(D) Cooperation pursuant to Council Regulation (EC) No 1698/2005 on support for rural development by the EAFRD ⁽⁸⁵⁾

Has the cooperation been approved for Community co-financing under Article 29 of Regulation (EC) No 1698/2005 AND/OR is the State aid granted as additional financing pursuant to Article 89 of this Regulation under the same conditions and at the same intensity as the co-financing ⁽⁸⁶⁾?

yes no

If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.

⁽⁸⁵⁾ Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1), as amended by Regulation (EC) No 1463/2006 (OJ L 277, 9.10.2006, p. 1).

⁽⁸⁶⁾ Commission will allow State aid for cooperation pursuant to Article 29 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) if such cooperation has been approved for Community co-financing under that Article and/or the State aid is granted as additional financing pursuant to Article 89 of Regulation (EC) No 1698/2005 under the same conditions and at the same intensity as the co-financing.

▼ **M3****8. Reporting and monitoring** ⁽⁸⁷⁾**8.1. Annual reports**

Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 ⁽⁸⁸⁾.

(A) Please undertake to submit annual reports on the implementation of the notified scheme to the Commission, containing all the elements listed below ⁽⁸⁹⁾:

- name of the beneficiary;
- aid amount per beneficiary;
- aid intensity;
- sectors of activity where the aided projects are undertaken.

yes

(B) Please undertake to explain in the annual report for all aid granted under an approved scheme to large undertakings how the incentive effect has been respected for aid given to such undertakings ⁽⁹⁰⁾.

yes

8.2. Access to full text of schemes

(A) Please undertake to publish the full text of the final aid schemes as approved by the Commission on the Internet.

yes

Please provide the Internet address:

(B) Please confirm that the scheme as approved by the Commission will not be applied before the information is published on the Internet (as required under Section A above).

yes

8.3. Information sheets, monitoring

(A) Please undertake, whenever aid for R&D&I is granted on the basis of aid schemes without falling under the duty for individual notification, and exceeds EUR 3 million ⁽⁹¹⁾, to provide the Commission within 20 working days starting from the granting of the aid by the competent authority with the information requested in the standard form laid down in the Annex to the R&D&I Framework.

yes

(B) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

yes

(C) Please undertake to ensure that detailed records referred to in Section B above are maintained for 10 years from the date on which the aid was granted.

yes

(D) Please undertake to submit the records referred to in Section B above on request of the Commission.

yes

9. Other information

Please give any other information you consider necessary to assess the measure(s) in question under the Community Framework for State aid for research, development and innovation.

⁽⁸⁷⁾ Cf. R&D&I Framework, Section 10.1.

⁽⁸⁸⁾ 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).

⁽⁸⁹⁾ As regards the specific reporting requirements for fiscal aid and clusters, please see Section 10.1.1 (third and fourth paragraphs) of the R&D&I Framework.

⁽⁹⁰⁾ Notably using the criteria specified in section 6 of the R&D&I Framework.

⁽⁹¹⁾ If applicable, please provide an exchange rate used when answering this question.

▼ M3

PART III.6.b

SUPPLEMENTARY INFORMATION SHEET FOR RESEARCH AND DEVELOPMENT AND INNOVATION AID: INDIVIDUAL AID

This supplementary information sheet must be used for the notification of any individual aid covered by the Community framework for State aid for research and development and innovation (hereinafter the R&D&I Framework) ⁽⁹²⁾. It must also be used for individual aid for Research and Development to SMEs, which does not fall under a Block Exemption Regulation ⁽⁹³⁾ or is subject to individual notification obligation as it exceeds the individual notification thresholds laid down in the block exemption. This notification sheet also covers the individual aid intended for the production, processing and marketing of agricultural products.

1. Basic characteristics of the notified measure

Please fill in the relevant parts of the notification form corresponding to the character of the notified measure. In particular, please note that **Section 8** is to be completed only if the notified measure is subject to a detailed assessment, i.e. only if condition(s) of **Section 7** are met. Please find below a basic guidance.

- (A) Is the aid granted in order to promote the execution of an important project of common European interest?

yes no

If yes, please fill in **Section 4** (Compatibility of aid under Article 87(3)(b) of the EC Treaty) of this supplementary information sheet. Furthermore please fill in **Section 11** (Reporting and monitoring).

- (B) If no, please specify the type of aid and fill in the appropriate subsections of **Section 5** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- Aid for R&D projects, fill in Section 5.1;
- Aid for technical feasibility studies, fill in Section 5.2;
- Aid for industrial property right costs for SMEs, fill in Section 5.3;
- Aid for young innovative enterprises, fill in Section 5.4;
- Aid for process and organisational innovation in services, fill in Section 5.5;
- Aid for innovations advisory services and for innovation support services, fill in Section 5.6;
- Aid for the loan of highly qualified personnel, fill in Section 5.7;
- Aid for innovation clusters, fill in Section 5.8.

Furthermore, please fill in: **Section 6** (Incentive effect and necessity of aid) in order to verify the incentive effect, **Section 7** (Criteria triggering a detailed assessment) in order to verify if the notified aid is subject to the detailed assessment of **Section 8** (Additional information for detailed assessment) and **Section 11** (Reporting and monitoring).

- (C) Does the aid involve research organisations ⁽⁹⁴⁾/innovation intermediaries?

yes no

If yes, fill in **Section 2 and/or 3** (Research organisations and innovation intermediaries and Indirect State aid to undertakings through publicly funded research organisations) of this supplementary information sheet.

- (D) Can the aid be combined with other aid?

yes no

If yes, fill in **Section 9** (Cumulation) of this supplementary information sheet.

⁽⁹²⁾ Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

⁽⁹³⁾ Currently 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) as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent regulation replacing it.

⁽⁹⁴⁾ For definition see Section 2.2.(d) of the R&D&I Framework.

▼ **M3**

- (E) Does the R&D aid concern products listed in Annex I to the EC Treaty?

 yes no

If yes, fill in **Section 10** (Specific questions related to agriculture and fisheries) of this supplementary information sheet.

- (F) In case the notified individual aid is based on an approved scheme, please provide details concerning that scheme, including its publication reference (Internet address) and State aid registration number:

.....
.....

- (G) Please confirm that if the SME specific aid
- ⁽⁹⁵⁾
- /bonus is granted, the beneficiary complies with the SME definition as defined by the Community legislation
- ⁽⁹⁶⁾
- :

 yes

Please provide relevant information and evidence:

.....
.....

- (H) If the aid involves commissioning/purchasing of R&D activities/results from undertakings by the public authorities, are the providers selected in an open tender procedure
- ⁽⁹⁷⁾
- ?

 yes no

If no, please note that such payments from the public authorities to undertakings would normally involve State aid.

- (I) If applicable, please provide an exchange rate which has been used for the purposes of the notification:

- (J) All documents provided by the Member States as annexes to the notification form shall be numbered and document numbers shall be indicated in the relevant parts of this supplementary information sheet.

2. Research organisations and innovation intermediaries as recipients of state aid ⁽⁹⁸⁾

If there are several research organisations or innovation intermediaries involved in the notified project, please provide the information below for each of them.

2.1. Public funding of non-economic activities

- (A) Does the research organisation or non-for-profit innovation intermediary carry out an economic activity
- ⁽⁹⁹⁾
- (an activity consisting in offering goods and/or services on a given market)?

 yes no

If yes, please provide description of these activities:

.....
.....

- (B) If the same entity carries out activities of both economic and non-economic
- ⁽¹⁰⁰⁾
- nature, can the two kinds of activities and their costs and funding be clearly separated?

 yes no

If yes, provide details:

.....
.....

If yes, please note that public funding of non-economic activities does not fall under Article 87(1) of the EC Treaty. If not, public funding of economic activities generally entails State aid.

⁽⁹⁵⁾ I.e. measures under Sections 5.3, 5.4, 5.6 and 5.7 of this supplementary information sheet. Please note that the measure under Section 5.4 is limited to small enterprises.

⁽⁹⁶⁾ See footnote 20.

⁽⁹⁷⁾ Cf. R&D&I Framework, Section 2.1.

⁽⁹⁸⁾ Cf. R&D&I Framework, Section 3.1.

⁽⁹⁹⁾ For details see Section 3.1.1 of R&D&I Framework (footnote 24).

⁽¹⁰⁰⁾ For details see Section 3.1.1 (2nd and 3rd paragraph) of R&D&I Framework.

▼ **M3**2.2. *Public funding of economic activities*

Can the Member State prove that:

- the totality of the State funding has been passed on from the research organisation or not-for-profit innovation intermediary (carrying out economic activities) to the final recipients;

AND

- there is no advantage granted to the intermediary?

yes no

Please provide details and evidence:

.....

If yes, please note that the intermediary organisations may not be recipient of State aid. As regards the aid to final recipients, normal State aid rules apply.

3. **Indirect State aid to undertakings through publicly funded research organisations** ⁽¹⁰¹⁾

If there are more research organisations or innovation intermediaries involved in the notified project, please provide the information below for each of them.

3.1. *Research on behalf of undertakings*

- (A) Is the supported project carried out by research organisations on behalf of undertakings?

yes no

- (B) If yes, do the research organisations (acting as agent) render services to the undertakings (acting as principals) in situations, where:

- the agents receive payment of an adequate remuneration for their services,

yes no

AND

- do the principals specify the terms and conditions of these services?

yes no

Please provide details:

.....

- (C) Do the research organisations provide their services at market price?

yes no

If there is no market price, do the research organisations provide their services at a price which reflects full costs plus a reasonable margin?

yes no

Please provide details:

.....

If a research organisation renders services and if the answer to one of the questions in Section C is yes, there will be normally no State aid passed to the undertakings through the research organisation.

3.2. *Collaboration of undertakings and research organisations*

- (A) Is the collaboration project carried out jointly by undertakings and research organisations?

yes no

If yes, provide details on the partnerships:

.....

⁽¹⁰¹⁾ Cf. R&D&I Framework, Section 3.2.

▼ **M3**

- (B) If yes, do the participating undertakings bear the full cost of the projects supported under the notified scheme?

yes no

Are the results which do not give rise to intellectual property rights widely disseminated AND are any intellectual property rights which result from the activity of the research organisations fully allocated ⁽¹⁰²⁾ to the research organisations?

yes no

Do the research organisations receive from the participating undertakings compensation equivalent to the market price for the intellectual property rights ⁽¹⁰³⁾ which result from the activity of the research organisations carried out in the project and which are transferred to the participating undertakings?

yes no

Please provide details (please note that any contribution of the participating undertakings to the costs of the research organisations shall be deducted from the compensation):

.....

- (C) If none of the answers to questions of Section B is yes, the Member State may rely on individual assessment of the collaboration projects ⁽¹⁰⁴⁾.

Please provide an individual assessment of the collaboration projects, taking into account the above mentioned elements. Please attach also the contractual agreements to the notification.

If none of the answers to questions of Section B is yes and if the individual assessment of the collaboration projects does not lead to the conclusion that there is no State aid, the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings.

4. **Compatibility of aid under article 87(3)(b) of the EC treaty**

Aid for R&D&I to promote the execution of an important project ⁽¹⁰⁵⁾ of common European interest may be considered to be compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty.

4.1. *General conditions (cumulative)*

- (A) Please confirm that:

the project contributes in a concrete, clear and identifiable manner to the Community interest ⁽¹⁰⁶⁾;

AND

the advantage achieved by the objective of the project is not limited to one Member State or to the Member States implementing it, but extends to the Community as a whole ⁽¹⁰⁷⁾;

AND

the project presents a substantive leap forward for the Community objectives.

Please provide details and evidence:

.....

⁽¹⁰²⁾ For details see Section 3.2.2 (footnote 28) of the R&D&I Framework.

⁽¹⁰³⁾ For details see Section 3.2.2 (footnote 29) of the R&D&I Framework.

⁽¹⁰⁴⁾ There also may be no State aid where the assessment of the contractual agreement between the partners leads to the conclusion that any intellectual property rights to the R&D&I results as well as access rights to the results are allocated to the different partners of the collaboration and adequately reflect their respective interests, work packages, and financial and other contributions to the project.

⁽¹⁰⁵⁾ The Commission may also consider a group of projects as together constituting a project.

⁽¹⁰⁶⁾ Please note that the common European interest must be demonstrated in practical terms, e.g. it must be demonstrated that the project enables significant progress to be made towards achieving specific Community objectives.

⁽¹⁰⁷⁾ The fact that the project is carried out by undertakings in different countries is not sufficient.

▼ **M3**

- (B) Specify the positive effects of the aid:
- important spill-overs for society;
 - contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context;
 - creation of new markets;
 - development of new technologies;
 - other positive effects.
-
-

- (C) Please provide the terms of implementation of the project (including participants, objectives) ⁽¹⁰⁸⁾:
-
-

- (D) Please provide details and evidence illustrating that the aid is necessary to achieve the defined objective of common interest AND presents an incentive for the execution of the project ⁽¹⁰⁹⁾:
-
-

- (E) Please provide details and evidence demonstrating that the project involves a high level of risk:
-
-

- (F) Please provide details and evidence illustrating that the project is of great importance with respect to its character and its volume ⁽¹¹⁰⁾:
-
-

4.2. Description of the project

Please provide a detailed description of the project. For orientation please see Section 5.1 of this supplementary information sheet.

.....

.....

5. **Compatibility of aid under article 87(3)(c) of the EC treaty**

If there are several beneficiaries involved in the notified project, please provide the information below for each of them.

5.1. *Aid for R&D projects* ⁽¹¹¹⁾5.1.1. *Research category* ⁽¹¹²⁾

- (A) Please indicate which R&D stages ⁽¹¹³⁾ are supported under the notified aid measure:

- fundamental research;
- industrial research;
- experimental development.

⁽¹⁰⁸⁾ Please note that the projects must be clearly defined as regards these aspects.

⁽¹⁰⁹⁾ For orientation please see the criteria included in Section 6 of this supplementary information sheet.

⁽¹¹⁰⁾ I.e. is meaningful with respect to its objective and is of substantial size.

⁽¹¹¹⁾ Cf. R&D&I Framework, Section 5.1.

⁽¹¹²⁾ To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002).

⁽¹¹³⁾ For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

▼ **M3**

- (B) If the R&D projects encompass different research categories, please list and qualify the different tasks as falling under the categories of fundamental research, industrial research or experimental development or as not falling under any of those categories at all.

.....

.....

5.1.2. Eligible costs

All eligible costs must be allocated to a specific category of R&D ⁽¹¹⁴⁾. Please specify the eligible costs and indicate their amount.

	Fundamental research	Industrial research	Experimental development
Personnel costs			
Costs of instruments and equipment			
Costs for building and land			
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices			
Additional overheads incurred directly as a result of the research project			
Other operating expenses			

5.1.3. Aid intensities and bonuses

The aid intensity is calculated on the basis of the eligible costs of the project. It must be established for each beneficiary of the aid, including in a collaboration project ⁽¹¹⁵⁾.

- (A) Basic intensities (without bonuses) ⁽¹¹⁶⁾:

	Fundamental research	Industrial research	Experimental development
Maximum aid intensity			

⁽¹¹⁴⁾ Cf. Section 5.1.4 of the R&D&I Framework. These eligible costs apply to aid for R&D projects (Section 5.1) research projects and to process and organisational innovation in services (Section 5.5).

⁽¹¹⁵⁾ In the case of State aid for an R&D project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific research project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each benefiting undertaking.

⁽¹¹⁶⁾ The aid intensity may not exceed 100 % for fundamental research, 50 % for industrial research and 25 % for experimental development.

▼ **M3**

(B) Bonuses:

Are bonuses applied under the notified measure?

- yes no

If yes, please specify below:

— Is an SME bonus applied?

- yes no

Specify the level of bonus applicable ⁽¹¹⁷⁾:

— Is a bonus for effective collaboration between undertakings (i) or collaboration of an undertaking with a research organisation (ii) or (only for projects of industrial research) dissemination of results (iii) applied under the notified aid measure?

- yes no

(i) If a bonus for an effective collaboration between at least two undertakings, which are independent of each other, is applied, please confirm that the following conditions are fulfilled:

- no single undertaking bears more than 70 % of the eligible costs of the collaboration project;

AND

- the project involves collaboration with at least one SME or the collaboration has a cross-border character, i.e. research and development activities are carried out in at least two different Member States.

Specify the level of bonus applicable ⁽¹¹⁸⁾:

(ii) If a bonus for an effective collaboration between an undertaking and a research organisation, particularly in the context of coordination of national R&D policies, is applied, please confirm that the following conditions are fulfilled:

- the research organisation bears at least 10 % of the eligible costs;

AND

- the research organisation has the right to publish the result of the research projects in so far as they stem from research implemented by that organisation.

Specify the level of bonus applicable ⁽¹¹⁹⁾:(iii) If in the case of industrial research a bonus for wide dissemination of the results of the project is applied, please specify at least one of the following methods of wide dissemination:

- technical and scientific conferences;
- publication in scientific or technical journals;
- availability in open access repositories (databases where raw research data can be accessed by anyone);
- availability through free or open source software.

Specify the level of bonus applicable ⁽¹²⁰⁾:

(C) Specify the total aid intensity of the projects supported under the notified aid measure (taking into account the bonuses) (%):

⁽¹¹⁷⁾ The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

⁽¹¹⁸⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

⁽¹¹⁹⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %. This bonus does not apply to the research organisation.

⁽¹²⁰⁾ The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

▼ **M3**5.1.4. Special conditions for repayable advance ⁽¹²¹⁾

(A) Is the aid to the R&D projects granted in the form of a repayable advance?

yes no

(B) Is the aid granted in the form of a repayable advance under the notified measure expressed as gross grant equivalent ⁽¹²²⁾?

yes no

If yes, what is the aid intensity of repayable advance expressed as gross grant equivalent ⁽¹²³⁾:

.....

Furthermore, please specify on the basis of which approved aid scheme ⁽¹²⁴⁾ is the aid granted and provide details on the complete methodology applied in order to determine the gross grant equivalent, underlying verifiable data.

.....

.....

(C) If the aid cannot be expressed in gross grant equivalent, what is the level of the repayable advance expressed as a percentage of the eligible costs:

.....

In case the rates of repayable advance granted to the R&D project are higher than the rates indicated in Sections 5.1.2 and 5.1.3 (up to the maximum rates indicated in Section 5.1.5) of the R&D&I Framework, please:

— notify to the Commission the detailed information on the repayment in the case of success and define clearly what will be considered as a successful outcome of the research activities;

AND

— confirm the following:

the measure provides that in case of successful outcome the advance is repaid with an interest rate at least equal to the applicable rate resulting from the application of the Commission notice on the method of setting the reference and discount rates ⁽¹²⁵⁾;

in case of a success exceeding the outcome defined as successful, the Member State is entitled to request payments beyond payments of the advance amount including interest according to the reference rate foreseen by the Commission;

in case of partial success, the Member State requires that the repayment secured is in proportion to the degree of success achieved.

5.1.5. Matching clause ⁽¹²⁶⁾

Is the matching clause used in this notified measure?

yes no

If yes, higher intensities than generally permissible may be authorised.

If yes, provide details and evidence that competitors located outside the Community have received in the last three years or are going to receive, aid of an equivalent intensity for similar projects, programmes, research, development or technology:

.....

.....

⁽¹²¹⁾ Cf. R&D&I Framework, Section 5.1.5.

⁽¹²²⁾ Gross grant equivalent of a repayable advance reflects the probability that the advance will be repaid by the beneficiaries.

⁽¹²³⁾ The gross grant equivalent must fulfil the conditions on maximum aid intensities laid down in Sections 5.1.2 and 5.1.3 of the R&D&I Framework.

⁽¹²⁴⁾ For details see Section 5.1.5 of the R&D&I Framework (2nd paragraph).

⁽¹²⁵⁾ OJ C 273, 9.9.1997, p. 3. Also published under: http://ec.europa.eu/comm/competition/state_aid/legislation/reference.html.

⁽¹²⁶⁾ Cf. R&D&I Framework, Section 5.1.7.

▼ **M3**

Do actual or potential direct or indirect distortions of international trade exist?

yes no

If yes, provide evidence:

.....

Provide also sufficient information to enable the Commission to assess the situation, in particular regarding the need to take account of the competitive advantage enjoyed by a third-country competitor:

.....

5.2. Aid for technical feasibility studies ⁽¹²⁷⁾

5.2.1. General conditions

The studies are preparatory to ⁽¹²⁸⁾:

- industrial research;
 experimental development.

5.2.2. Aid intensities

Specify the maximum aid intensity ⁽¹²⁹⁾ (%):

The aid intensity is calculated on the basis of cost of feasibility studies of the project.

5.3. Aid for industrial property right costs for SMEs ⁽¹³⁰⁾

5.3.1. Conditions

Which stage of research ⁽¹³¹⁾ is concerned?

- fundamental research;
 industrial research;
 experimental development.

5.3.2. Eligible costs and aid intensities

(A) Specify the eligible costs ⁽¹³²⁾ and indicate their amount:

- costs preceding the grant of the right in the first legal jurisdiction:
-
- translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdiction:
-
- costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings:
-

(B) Specify the maximum aid intensity (%) ⁽¹³³⁾:

⁽¹²⁷⁾ Cf. R&D&I Framework, Section 5.2.

⁽¹²⁸⁾ To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002); for definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

⁽¹²⁹⁾ For SMEs, the aid intensity may not exceed 75 % for studies preparatory to industrial research activities and 50 % for studies preparatory to experimental development activities; for large companies, the aid intensity may not exceed 65 % for studies preparatory to industrial research activities and 40 % for studies preparatory to experimental development activities.

⁽¹³⁰⁾ Cf. R&D&I Framework, Section 5.3.

⁽¹³¹⁾ For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

⁽¹³²⁾ For details see Section 5.3 (second paragraph) of the R&D&I Framework.

⁽¹³³⁾ Maximum aid levels correspond to the same levels of aid as would have qualified as R&D aid in respect of the research activities which first led to the industrial property rights concerned.

▼ **M3**5.4. *Aid for young innovative enterprises* ⁽¹³⁴⁾ (for small enterprises)

Please confirm that:

- (A)
-
- the beneficiary is a small enterprise as defined by Community legislation
- ⁽¹³⁵⁾
- , in existence for less than six years at the time when the aid is granted;

Please provide details and evidence:

.....
.....

- (B)
-
- the beneficiary is an innovative enterprise.

Please confirm that the compliance with this condition is ensured through:

-
- an evaluation carried out by an external expert demonstrating that the beneficiary will in the foreseeable future develop products, services or processes which are technologically new or substantially improved compared to the state of the art in its industry in the Community, and which carry a risk of technological or industrial failure;

OR

-
- the evidence that the R&D expenses of the beneficiary represent at least 15 % of its total operating expenses 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.

Please provide details on how this is implemented:

.....
.....

- (C) Specify the maximum aid amount applicable under the notified measure
- ⁽¹³⁶⁾
- :

- (D) Please confirm that:

-
- the beneficiary did not receive aid for young innovative enterprises before and will receive this type of aid only once during the period in which it qualifies as a young innovative enterprise.

- (E) Does the enterprise benefit from a cumulation of aid?

-
- yes
-
- no

If yes, please indicate how the specific cumulation rules for young innovative enterprise aid (Section 5.4 of the R&D&I Framework) will be complied with:

.....
.....5.5. *Aid for process and organisational innovation in services* ⁽¹³⁷⁾

5.5.1. General conditions

- (A) To which type of innovation in service activities
- ⁽¹³⁸⁾
- does the notified measure refer?

-
- process innovation in service activities;
-
-
- organisational innovation in service activities.

Please provide a detailed description of the innovation in service activities ⁽¹³⁹⁾ (process and/or organisational):.....
.....⁽¹³⁴⁾ Cf. R&D&I Framework, Section 5.4.⁽¹³⁵⁾ See footnote 20.⁽¹³⁶⁾ The aid may not exceed EUR 1 million in non-assisted areas; EUR 1,5 million in regions eligible for the derogation in Article 87(3)(a) of the EC Treaty; EUR 1,25 million in regions eligible for the derogation in Article 87(3)(c) of the EC Treaty.⁽¹³⁷⁾ Cf. R&D&I Framework, Section 5.5.⁽¹³⁸⁾ For definitions see Section 2.2(i), (j) of the R&D&I Framework.⁽¹³⁹⁾ In order to classify the activities, you may refer to the Commission practice or the specific definitions provided in the OSLO Manual, Guidelines for Collecting and Interpreting Innovation Data, 3rd Edition (Organisation For Economic Cooperation and Development, 2005).

▼ **M3**

(B) Please confirm that:

- the organisational innovation is related to the use and exploitation of Information and Communication Technologies (ICT) to change the organisation;
- the innovation is formulated as a project with an identified and qualified project manager, as well as identified project costs;
- the result of the aided project is the development of a standard, of a business model, methodology of concept, which can be systematically reproduced, possibly certified, and possibly patented;
- the process or organisational innovation is new or substantially improved compared to the state of the art in its industry in the Community;
- the process or organisational innovation project entails a clear degree of risk;
- the aid is granted to large enterprise only if collaborates with SMEs in the aided activity and that the collaborating SMEs incur at least 30 % of the total eligible costs.

Please provide details/evidence for all these elements:

.....

.....

5.5.2. Eligible costs and aid intensities

(A) Please specify the eligible costs ⁽¹⁴⁰⁾ and indicate their amount:

	Eligible costs
personnel costs	
costs of instruments and equipment	
costs for building and land	
cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices	
additional overheads incurred directly as a result of the research project	
other operating expenses	

(B) Specify the maximum aid intensity ⁽¹⁴¹⁾ (%):*The aid intensity is calculated on the basis of the eligible costs of the projects.*5.6. Aid for innovation advisory services and for innovation support services ⁽¹⁴²⁾ (for SMEs)

5.6.1. General conditions

(A) Specify the maximum aid amount (not exceeding EUR 200 000 per beneficiary within any three year period):

(B) Please confirm that:

- if the service provider does not benefit from a national or European certification, the aid will not cover more than 75 % of the eligible costs;
- the beneficiaries use the State 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).

Please provide details on how this will be ensured:

.....

.....

⁽¹⁴⁰⁾ For details see Section 5.1.4 R&D&I Framework. Please note that in the case of organisational innovation, the costs of instruments and equipment cover costs of ICT instruments and equipment only.

⁽¹⁴¹⁾ The maximum aid intensity is 15 % of the eligible costs for a large enterprise; 25 % of the eligible costs for a medium enterprise; 35 % of the eligible costs for a small enterprise.

⁽¹⁴²⁾ Cf. R&D&I Framework, Section 5.6.

▼ **M3**

5.6.2. Eligible costs

- (A) What type of aid is granted?
- aid for innovation advisory services;
- aid for innovation support services.
- (B) If it is an aid for innovation advisory services, specify the eligible costs and indicate their amount:
- 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:
- (C) If it is an aid for innovation support services, specify the eligible costs and indicate their amount:
- office space:
- data banks:
- technical libraries services:
- market research:
- use of laboratory:
- quality labelling:
- testing and certification:

5.6.3. Special conditions for a non-for-profit entity

If the service provider is a non-for-profit entity, the aid may be given in the form of a reduced price, as the difference between the price paid and the market price (or a price which reflects full costs plus a reasonable margin).

Is the aid given in the form of a reduced price?

- yes no

If yes, provide evidence of the existence of a system ensuring transparency about the full costs of the innovation advisory and innovation support services provided, as well as about the price paid by the beneficiaries, so that the aid received can be measured and monitored.

.....

.....

5.7. Aid for the loan of highly qualified personnel ⁽¹⁴³⁾ (for SMEs)

5.7.1. General conditions

(A) Where do the highly qualified personnel ⁽¹⁴⁴⁾ come from?

- research organisations;
- large enterprises.

Provide details (if possible) on research organisations and on large enterprises.

.....

.....

⁽¹⁴³⁾ Cf. R&D&I Framework, Section 5.7.

⁽¹⁴⁴⁾ For definition see Section 2.2(k) of the R&D&I Framework.

▼ **M3**

- (B) Please confirm that:
- the seconded personnel are not replacing other personnel;
 - the seconded personnel are employed in a newly created function within the beneficiary undertaking.
Specify please this newly created function:
.....
.....
 - the seconded personnel have been employed for at least two years in the research organisations or the large enterprises which are sending the personnel on secondment;
 - that the seconded personnel work on R&D&I activities within the SME receiving aid.

5.7.2. Eligible costs and aid intensities

- (A) Specify the eligible costs and indicate their levels:
- costs for borrowing and employing highly qualified personnel:
 - mobility allowance for the seconded personnel:
- (B) please confirm that consultancy costs (payment of the service rendered by the expert without employing the expert in the undertaking) are excluded from eligible costs of the aid for the loan of highly qualified personnel.
- (C) Specify the maximum aid intensity ⁽¹⁴⁵⁾ (%):

5.8. Aid for innovation clusters ⁽¹⁴⁶⁾

5.8.1. General conditions

- (A) What type of aid is granted to the beneficiary?
- investment aid;
 - operating aid for cluster animation.
- (B) Please confirm that:
- the aid is exclusively granted to the legal entity operating the innovation cluster;
 - the beneficiary is in charge of managing the participation and access to the cluster's premises, facilities and activities;
Please provide details:
.....
.....
 - access to the clusters' premises, facilities and activities is not restricted.
- (C) Do the fees charged for using the cluster's facilities and for participating in the cluster's activities reflect their costs?
- yes no
- If yes, please demonstrate how this is ensured:
.....
.....
- If not, please provide details (especially with respect to the existence of aid within the meaning of Article 87(1) of the EC Treaty, see Section 3.1 of the R&D&I Framework):
.....
.....
- (D) Please attach an analysis of the technological specialisation of the innovation cluster, existing regional potential, existing research capacity, presence of clusters in the Community with similar purposes and potential market volumes of the activities in the cluster:
.....
.....

⁽¹⁴⁵⁾ The maximum aid intensity is 50 % of the eligible costs, for a maximum of three years per undertaking and per person borrowed.
⁽¹⁴⁶⁾ Cf. R&D&I Framework, Section 5.8.

▼ **M3**

5.8.2. Specific conditions concerning investment aid for cluster animation

- (A) What type of investment is carried out?
- setting up of innovation clusters;
- expansion of innovation clusters;
- animation of innovation clusters.
- (B) For which facilities is the aid granted?
- facilities for training and research centre;
- open-access research infrastructures, laboratory, testing facility;
- broadband network infrastructures.
- (C) Specify the eligible costs and indicate their amount:
- costs relating to investment in land:
- buildings:
- machinery:
- equipment:
- (D) What is the basic aid intensity (%) ⁽¹⁴⁷⁾:
- (E) Is any bonus granted to the beneficiary?
- yes no
- If yes, specify below:*
- Do you apply an SME bonus?
- yes no
- Specify the level of the bonus ⁽¹⁴⁸⁾:
- Do you apply a bonus for undertakings located in outermost regions?
- yes no
- If yes, specify the level of bonus applicable to an undertaking located in outermost regions ⁽¹⁴⁹⁾:

5.8.3. Specific conditions concerning operating aid for cluster animation

- (A) For how long is such aid granted: years
- If the aid is granted for a longer period than 5 years, please provide convincing evidence in order to justify such longer period ⁽¹⁵⁰⁾.
-
-
- (B) Is the aid degressive?
- yes no
- (C) Specify the eligible costs and indicate their amount:
- marketing of the cluster to recruit new companies to take part in the cluster:
- management of the cluster's open-access facilities:
- organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster:

⁽¹⁴⁷⁾ The maximum aid intensity is 15% of the eligible costs; for regions falling under Article 87(3)(a) of the EC Treaty the maximum aid intensity is the following: 30% of the eligible costs for regions with less than 75% of average EU-25 GDP per capita, outermost regions with higher GDP per capita and statistical effect regions (until 1 January 2011); 40% for regions with less than 60% of average EU-25 GDP per capita (%); 50% for regions with less than 45% of average EU-25 per capita. For statistical effect regions falling under Article 87(3)(c) of the EC Treaty from 1 January 2011 the maximum aid intensity is 20% of the eligible costs.

⁽¹⁴⁸⁾ The aid intensity may be increased by maximum 20 percentage points for small enterprises and by maximum 10 percentage points for medium-sized enterprises.

⁽¹⁴⁹⁾ The aid intensity may be increased by maximum 20 percentage points for outermost regions where GDP per capita falls below 75% of EU-25 average and by maximum 10 percentage points for other outermost regions.

⁽¹⁵⁰⁾ In any case, the period may never exceed 10 years.

▼ **M3**

- (D) Aid intensity:
- degressive aid (please specify degressive rates for each year) ⁽¹⁵¹⁾:
 - non-degressive aid (%) ⁽¹⁵²⁾:

6. Incentive effect and necessity of aid ⁽¹⁵³⁾6.1. *General conditions*

- (A) Has the R&D&I activity already commenced prior to the aid application by the beneficiary to the national authorities ⁽¹⁵⁴⁾?

yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary.

- (B) If no, specify the relevant dates:

— the R&D&I activity commenced on:

— the aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

6.2. *Evaluation of the incentive effect*

If the aid is granted for:

- process and organisational innovation in services,
- innovation clusters,
- R&D project for large undertakings,
- feasibility studies for large undertakings,
- R&D project for SMEs for aid exceeding EUR 7,5million,
- feasibility studies for SMEs for aid exceeding EUR 7,5million,

the Commission will require that the incentive effect is demonstrated by means of an evaluation. Go to the next questions.

Otherwise, the Commission considers that the incentive effect is automatically met for the measure at hand.

6.2.1. *General conditions*

If it is necessary to demonstrate an incentive effect for several beneficiaries participating in the notified project, please provide the information below for each of them.

In order to verify that the planned aid will induce the aid recipient to change its behaviour so that it increases its level of R&D&I, the Commission requires an evaluation for the research categories in which it considers that the incentive effect is not automatically met (listed in Section 4.2 of this notification form).

Please fill in the evaluation of the increased R&D&I activity (below), on the basis of an analysis comparing a situation without aid and a situation with aid being granted.

6.2.2. *Criteria*

- (A) Will the project size be increased?

yes no

If yes, specify the type of increase:

increase in the total project costs (without decreased spending by the beneficiary by a comparison with a situation without aid);

increase in the number of people assigned to R&D&I activities;

other type of increase:

Provide evidence of the relevant increases:

.....

⁽¹⁵¹⁾ The intensity may amount 100 % for the eligible costs the first year but must have fallen in a linear fashion to zero by the end of the fifth year.

⁽¹⁵²⁾ The maximum aid intensity is 50 % of the eligible costs.

⁽¹⁵³⁾ Cf. R&D&I Framework, Chapter 6.

⁽¹⁵⁴⁾ If the aid proposal is to grant aid for an R&D&I-project, this does not exclude that the potential beneficiary has already carried out feasibility studies which are not covered by the request for State aid.

▼ **M3**

(B) Will the scope be increased?

- yes no

If yes, specify the type of increase:

- increase in the number of the expected deliverables from the project;
- more ambitious project illustrated by a higher possibility of a scientific or technological breakthrough or a higher risk of failure;
- other kind of increase:

Provide evidence of the relevant increases:

.....

(C) Will the project speed be increased?

- yes no

If yes, provide evidence that the project will be completed in a shorter time with the aid than without the aid:

.....

(D) Will the total amount spent on R&D&I be increased?

- yes no

If yes, specify the type of increase:

- increase in total R&D&I spending by the aid beneficiary;
- changes in the committed budget for the project (without corresponding decrease in the budget of other projects);
- increase in R&D&I spending by the aid beneficiary as a proportion of total turnover;
- other type of increase:

.....

Provide evidence for the relevant increases:

.....

(E) The Member State can also demonstrate the presence of incentive effect through other relevant quantitative and/or qualitative criteria. Please provide details and evidence:

.....

7. **Criteria triggering a detailed assessment** ⁽¹⁵⁵⁾

If the aid concerns an R&D&I project or a feasibility study, please fill in Section 7.1 below. If the aid is granted for process or organisational innovation in service activities or for innovation clusters, please go to Section 7.2 of this supplementary information sheet. Otherwise, no detailed assessment is required.

7.1. *Projects and feasibility studies*

(A) Eligible costs corresponding to fundamental research represent ... % of the total eligible costs (**ratio I**).

If **ratio I** is superior to 50%, does one undertaking receive an aid amount exceeding EUR 20 million ⁽¹⁵⁶⁾ per project/feasibility study?

- yes no

⁽¹⁵⁵⁾ Cf. R&D&I Framework, Section 7.1.

⁽¹⁵⁶⁾ If applicable, please provide an exchange rate used when answering this question.

▼ **M3**

- (B) Eligible costs corresponding to industrial research and feasibility studies preparatory to industrial research represent ... % of the total eligible costs (**ratio II**).

If **ratio I + II** is superior to 50 %, does one undertaking receive an aid amount exceeding EUR 10 million per project/feasibility study?

- yes no

- (C) If **ratio I + II** is inferior to 50 %, does one undertaking receive an aid amount exceeding EUR 7,5 million per project/feasibility study?

- yes no

If the answer to one of these three questions is yes, then the notified aid is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

7.2. *Process or organisational innovation in service activities and innovation clusters*

If the aid is granted for process or organisational innovation in service activities, does one undertaking receive an aid amount exceeding EUR 5 million per project?

- yes no

If the aid is granted for innovation clusters, does the cluster (legal entity operating the innovation cluster) receive an aid amount exceeding EUR 5 million?

- yes no

If yes, then the notified aid is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

Please note that the Commission will carry out a detailed assessment also in all cases notified to the Commission following an obligation to notify individually as prescribed in the block exemption regulation.

8. **Additional information for detailed assessment** ⁽¹⁵⁷⁾

If there are several beneficiaries participating in the notified project subject to a detailed assessment, please provide the information below for each of them. This is without prejudice to the full description of the notified project, including all participants, in the previous sections of this supplementary information sheet.

8.1. *General observations*

The purpose of this detailed assessment is to ensure that high amounts of aid for R&D&I do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of additional R&D&I outweigh the harm for competition and trade.

Provisions below represent a guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty.

- (A) The Member States are in particular invited to rely on the information sources listed below. Please indicate if these supporting documents are attached to the notification:

- evaluations of past State aid schemes or measures;
- impact assessments made by the granting authority;
- risk assessments;
- financial reports;
- internal business plans;
- expert opinions;
- other studies related to R&D&I.

⁽¹⁵⁷⁾ Cf. R&D&I Framework, Chapter 7.

▼ **M3**

(B) Similarly, please indicate the relevant positive effects of the notified measure and provide the supporting documents:

- net increase of R&D&I conducted by the undertaking;
- contribution of the measure to the global improvement of the sector concerned as regards the level of R&D&I;
- contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context;
- other:

For each of the sections below please provide the documents which are relevant for the notified measure. Member States are invited to provide any other elements that they consider useful for the assessment of the notified measure.

8.2. *Existence of a market failure* ⁽¹⁵⁸⁾

(A) Please identify the market failure(s) hampering R&D&I in the present case and justifying the need for State aid and provide the supporting documents:

- knowledge spillovers (positive externalities/public goods);
- imperfect and asymmetric information;
- coordination failures.

(B) If State aid targets R&D&I projects or activities located in assisted areas, please provide information on:

- disadvantages caused by the peripherality and other regional specificities;
- specific local economic data, social and/or historic reasons for a low level of R&D&I activity in comparison with the relevant average data and/or situation at national and/or Community level as appropriate,;
- other relevant indicator showing an increased degree of market failure.

8.3. *Appropriate instrument* ⁽¹⁵⁹⁾

Please indicate on what basis the Member State decided to use a selective instrument such as State aid in order to increase R&D&I activities and provide supporting documents:

- impact assessment of the proposed measure;
- comparison with other policy options considered by the Member State;
- other:

8.4. *Incentive effect and analysis of the aid* ⁽¹⁶⁰⁾

(A) Please specify the intended change in the behaviour of the beneficiary induced by the aid (e.g. new project triggered, size, scope or speed of a project enhanced) and provide supporting documents:

-
-
- furthermore, please provide a description by means of counterfactual analysis of the behaviour of the beneficiary with respect to the project if it had not received the aid:
.....
.....
- please describe why the aid is necessary in order to make the project under scrutiny more attractive than the project described by means of counterfactual analysis, i.e. the project to be carried out without the aid:
.....
.....

⁽¹⁵⁸⁾ Cf. R&D&I Framework, Section 7.3.1.
⁽¹⁵⁹⁾ Cf. R&D&I Framework, Section 7.3.2.
⁽¹⁶⁰⁾ Cf. R&D&I Framework, Section 7.3.3.

▼ **M3**

(B) The following elements may be used for the purposes of demonstration of an incentive effect. Please specify those relevant for the notified measure and provide supporting documents:

- level of profitability;
- amount of investment and the time path of cash flows;
- level of risk involved in the research project ⁽¹⁶¹⁾;
- continuous evaluation.

8.5. *Proportionality of the aid* ⁽¹⁶²⁾

(A) If there were multiple (potential) candidates for undertaking the R&D&I project in the Member State, was the beneficiary selected in an open selection process?

- yes no

Please provide details and supporting documents:

.....

(B) Please explain how it is ensured that the aid is limited to the minimum necessary and provide supporting documents:

.....

8.6. *Analysis of the distortion of competition and trade* ⁽¹⁶³⁾

8.6.1. *Relevant markets and effects on trade*

(A) When relevant, please describe the likely impact of the aid on competition in the innovation process ⁽¹⁶⁴⁾:

.....

(B) Please indicate whether the aid is likely to have impact on any product market.

- yes no

Please specify the product markets on which the aid is likely to have impact:

.....

(C) For each of these markets please provide some indicative market share of the beneficiary:

.....

For each of these markets please provide some indicative market shares of the other companies present in the market. If possible, please provide the associated Herfindahl-Hirschman Index (HHI):

.....

(D) Please describe the structure and dynamics of the relevant markets and provide supporting documents:

.....

⁽¹⁶¹⁾ Please note in this context that for State aid targeting R&D&I projects or activities located in assisted areas, the Commission will take into account disadvantages caused by the peripherality and other regional specificities, which negatively impact on the level of risk in the research project.

⁽¹⁶²⁾ Cf. R&D&I Framework, Section 7.3.4.

⁽¹⁶³⁾ Cf. R&D&I Framework, Section 7.4.

⁽¹⁶⁴⁾ The impact on competition in the innovation process will be relevant insofar as it has a foreseeable impact on the outcome of future product market competition. For details see Section 7.4 (third paragraph) of the R&D&I Framework.

▼ **M3**

(E) If relevant, please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....

8.6.2. Distorting dynamics incentives

The following elements will be considered by the Commission in its analysis of effects of the aid on competitors' dynamic incentives to invest. Please, indicate those in relation to which supporting documents are provided:

- aid amount;
- closeness to the market/category of aid;
- open selection process;
- exit barriers;
- incentives to compete for a future market;
- product differentiation and intensity of competition.

8.6.3. Creating market power

The following elements will be considered by the Commission in its analysis of effects of the aid on beneficiary's market power. Please, indicate those in relation to which details and supporting documents are provided:

- market power of aid beneficiary and market structure;
- level of entry barriers;
- buyer power;
- selection process.

8.6.4. Maintaining inefficient market structures

Please specify if the aid is granted:

- in markets featuring overcapacity;
- in declining industries;
- in sensitive sectors.

Please provide details and supporting documents:

.....

9. **Cumulation** ⁽¹⁶⁵⁾

(A) Is the aid granted under the notified measure combined with other aid ⁽¹⁶⁶⁾?

- yes no

(B) If yes, please describe the cumulation rules applicable to the notified aid measure:

.....

(C) Please specify how the respect of cumulation rules will be verified under the notified aid measure:

.....

⁽¹⁶⁵⁾ Cf. R&D&I Framework, Chapter 8.
⁽¹⁶⁶⁾ Please note that the aid for R&D&I shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the R&D&I Framework.

▼ **M3**10. **Specific questions relating to agriculture and fisheries** ⁽¹⁶⁷⁾

(A) Does the R&D aid concern products listed in Annex I to the EC Treaty?

 yes no

If yes, specify the type of products:

.....
.....

(B) If yes, please provide the answers to the following questions:

— is the aid of general interest to the particular sector or sub-sector concerned?

 yes no

If yes, provide evidence:

.....
.....

— is the information that research will be carried out, and with which goal published on Internet prior to the commencement of the research AND does the information published include an approximate date of the expected results and their place of publication on the Internet, as well as a mention that the result will be available at no cost?

 yes no

If yes, provide evidence and specify the Internet address:

.....
.....

— are the results of the research made available on Internet, for a period of at least five years AND can it be confirmed that the information on the Internet will be published no later than any which may be given to members of any particular organisation?

 yes no

If yes, provide evidence:

.....
.....

— is the aid granted directly to the researching institution or body AND does it exclude the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, as well as the provision of price support to producers of such products?

 yes no

If yes, provide evidence:

.....
.....*If the answers to all four conditions of Section B above are yes, the aid intensity up to 100% can be allowed. If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.*

(C) Specify the total aid intensity (%):

⁽¹⁶⁷⁾ Cf. R&D&I Framework, Chapter 9.

▼ **M3**

- (D) Cooperation pursuant to Regulation (EC) No 1698/2005 on support for rural development by the EAFRD ⁽¹⁶⁸⁾

Has the cooperation been approved for Community co-financing under Article 29 of Regulation (EC) No 1698/2005 AND/OR is the State aid granted as additional financing pursuant to Article 89 of this Regulation under the same conditions and at the same intensity as the co-financing ⁽¹⁶⁹⁾?

yes no

If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.

11. Reporting and monitoring ⁽¹⁷⁰⁾

11.1. Annual reports

Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 ⁽¹⁷¹⁾.

Please undertake to submit annual reports on the implementation of the notified aid measure to the Commission, containing all the elements listed below ⁽¹⁷²⁾.

- name of the beneficiary;
- aid amount per beneficiary;
- aid intensity;
- sectors of activity where the aided project is undertaken.

yes

11.2. Information sheets, monitoring

- (A) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

yes

- (B) Please undertake to ensure that detailed records referred to in Section A above are maintained for 10 years from the date on which the aid was granted.

yes

- (C) Please undertake to submit the records referred to in Section A above on request of the Commission.

yes

12. Other information

Please give any other information you consider necessary to assess the measure(s) in question under the Community Framework for State aid for research, development and innovation.

⁽¹⁶⁸⁾ Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1) as amended by Regulation (EC) no 1463/2006 (OJ L 277, 9.10.2006, p. 1).

⁽¹⁶⁹⁾ Commission will allow State aid for cooperation pursuant to Article 29 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) if such cooperation has been approved for Community co-financing under that Article and/or the State aid is granted as additional financing pursuant to Article 89 of Regulation (EC) No 1698/2005 under the same conditions and at the same intensity as the co-financing.

⁽¹⁷⁰⁾ Cf. R&D&I Framework, Section 10.1.

⁽¹⁷¹⁾ 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).

⁽¹⁷²⁾ As regards the specific reporting requirements for clusters, please see Section 10.1.1 (fourth paragraph) of the R&D&I Framework.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

COMMUNITY GUIDELINES ON STATE AID FOR ENVIRONMENTAL PROTECTION

(Text with EEA relevance)

(2008/C 82/01)

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1. INTRODUCTION

1.1. State aid policy and Energy Policy for Europe

(1) The spring 2007 European Council called on Member States and EU institutions to pursue actions to develop a sustainable integrated European climate and energy policy. The Council stated among other things: 'Given that energy production and use are the main sources for greenhouse gas emissions, an integrated approach to climate and energy policy is needed to realise this objective. Integration should be achieved in a mutually supportive way. With this in mind, the Energy Policy for Europe (EPE) will pursue the following three objectives, fully respecting Member States' choice of energy mix and sovereignty over primary energy sources and underpinned by a spirit of solidarity amongst Member States:

- increasing security of supply,
- ensuring the competitiveness of European economies and the availability of affordable energy,
- promoting environmental sustainability and combating climate change.'

(2) As a milestone in the creation of this Energy Policy for Europe, the European Council supported a comprehensive Energy Action Plan for the period 2007-2009 and invited in particular the Commission to submit the proposals requested in the Action Plan as speedily as possible. One of these proposals relates to the review of the Community guidelines on State aid for environmental protection.

(3) The European Council made a firm independent commitment for the EU to achieve at least a 20 % reduction in greenhouse gas emissions by 2020 compared to 1990. It also stressed the need to increase energy efficiency in the EU so as to achieve the objective of saving 20 % of the EU's energy consumption compared to projections for 2020, and endorsed a binding target of a 20 % share of renewable energies in overall EU energy consumption by 2020 as well as a 10 % binding minimum target to be achieved by all Member States for the share of biofuels in overall EU transport petrol and diesel consumption by 2020.

(4) These new guidelines constitute one of the instruments to implement the Action Plan and the environmental aspects of the energy- and climate change-related targets decided by the European Council.

1.2. State aid policy and environmental protection

(5) In the 'State Aid Action Plan — Less and better targeted State aid: A roadmap for State aid reform 2005-2009' (1) (hereafter referred to as the 'State Aid Action Plan') the

Commission noted that State aid measures can sometimes be effective tools for achieving objectives of common interest. Under some conditions, State aid can correct market failures, thereby improving the functioning of markets and enhancing competitiveness. It can also help to promote sustainable development, irrespective of the correction of market failures (2). The State Aid Action Plan also stressed that environmental protection can provide opportunities for innovation, create new markets and increase competitiveness through resource efficiency and new investment opportunities. Under some conditions, State aid can be conducive to these objectives, thus contributing to the core Lisbon strategy objectives of more sustainable growth and jobs. Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (3) (hereafter referred to as the 'Sixth Environment Action Programme') identifies the priority areas for actions to protect the environment (4).

(6) The primary objective of State aid control in the field of environmental protection is to ensure that State aid measures will result in a higher level of environmental protection than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking account of the polluter pays principle (hereafter 'PPP') established by Article 174 of the EC Treaty.

(7) Economic activities can harm the environment not least through pollution. In certain cases, in the absence of government intervention, undertakings can avoid bearing the full cost of the environmental harm arising from their activities. As a result, the market fails to allocate resources in an efficient manner, since the (negative) external effects of production are not taken into account by the producer, but are borne by society as a whole.

(8) According to the PPP, these negative externalities can be tackled by ensuring that the polluter pays for its pollution, which implies full internalisation of environmental costs by the polluter. This is intended to ensure that the private costs (borne by the undertaking) reflect the true social costs of the economic activity. Full implementation of the PPP would thus lead to correction of the market failure. The PPP can be implemented either by setting mandatory environmental standards or by market-based instruments (5). Some of the market-based instruments may involve the granting of State aid to all or some of the undertakings which are subject to them.

(2) See State Aid Action Plan, para. 10.

(3) OJ L 242, 10.9.2002, p. 1.

(4) The priority areas are: climate change, nature and biodiversity, environment and health and natural resources and waste. Health is not covered by these guidelines.

(5) With regard to the latter see the Green Paper on market-based instruments for environment and related policy purposes, 28 March 2007, COM(2007) 140 final.

(1) COM(2005) 107 final.

- (9) Although there are currently limits to the application of the PPP, this regulatory failure should not prevent Member States from imposing requirements for environmental protection that go beyond Community requirements and from reducing negative externalities to the greatest possible extent.
- (10) In order to increase the level of environmental protection, Member States may want to use State aid to create incentives on an individual level (at the level of the undertaking) to achieve a higher level of environmental protection than required by Community standards or to increase the environmental protection in the absence of Community standards. They may also set national standards or environmental taxation at a higher level than required by Community legislation or they may use environmental taxation to implement PPP unilaterally in the absence of Community legislation.
- (11) The Commission considers that it is necessary to revise the State aid guidelines on environmental protection in order to meet the objectives set out in the State Aid Action Plan, in particular to ensure better targeted aid, improved economic analysis and more effective procedures. Furthermore, the Commission considers it necessary to take into account developments in environmental policy and environmental technologies and to adjust the rules in the light of experience.
- (12) The Commission will apply these Guidelines in the assessment of environmental aid, thereby increasing legal certainty and the transparency of its decision-making. Aid for environmental protection will primarily be justified on the basis of Article 87(3)(c) of the EC Treaty. These Guidelines replace the Community guidelines on State aid for environmental protection ⁽⁶⁾ that came into force in 2001.
- (13) Guidelines are given for two types of assessments: a standard assessment for measures involving aid under a certain threshold or aid granted to installations with a production capacity below a certain threshold (Chapter 3) and a detailed assessment for measures involving aid above that threshold or aid granted to installations with a production capacity above that threshold as well as for aid granted to new plants producing renewable energy where the aid amount is based on a calculation of the external costs avoided (Chapter 5).
- (14) These Guidelines will be applied to all measures notified to the Commission (either because the measure is not covered by a block exemption regulation (hereafter 'BER') or a BER imposes an obligation to notify aid individually, or because the Member State concerned decides to notify a measure which could in principle have been exempted under a BER), as well as in the assessment of all non-notified aid after the publication of these Guidelines.
- 1.3. The balancing test and its application to aid for environmental protection**
- 1.3.1. *The State Aid Action Plan: less and better targeted aid, balancing test for the assessment of aid*
- (15) In the State Aid Action Plan, the Commission announced that 'to best contribute to the re-launched Lisbon Strategy for growth and jobs, the Commission will, when relevant, strengthen its economic approach to State aid analysis. An economic approach is an instrument to better focus and target certain State aid towards the objectives of the re-launched Lisbon Strategy'.
- (16) In assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. The State Aid Action Plan, building on existing practice, has formalised this balancing exercise in what has been termed a 'balancing test' ⁽⁷⁾. It operates in three steps; the first two steps address the positive effects of the State aid and the third addresses the negative effects and resulting balancing of the positive and negative effects. The balancing test is structured as follows:
- 1) Is the aid measure aimed at a well-defined objective of common interest? (for example: growth, employment, cohesion, environment, energy security). In the context of these Guidelines, the relevant common interest objective is the protection of the environment.
 - 2) Is the aid well designed to deliver the objective of common interest that is to say, does the proposed aid address the market failure or other objective?
 - a) is State aid an appropriate policy instrument?
 - b) is there an incentive effect, namely does the aid change the behaviour of undertakings?
 - c) is the aid measure proportional, namely could the same change in behaviour be obtained with less aid?
 - 3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

⁽⁶⁾ OJ C 37, 3.2.2001, p. 3.

⁽⁷⁾ Cf. State Aid Action Plan, para. 11 and 20, as elaborated in more detail in the Communication on innovation (COM(2005) 436 final 21.9.2005).

(17) This balancing test is applicable to the design of State aid rules as well as to the assessment of cases.

1.3.2. *The objective of common interest addressed by the Guidelines*

(18) The first indent of Article 2 of the Treaty on European Union stipulates that sustainable development is one of the objectives in the European Union. This should be based on economic prosperity, social cohesion and a high level of protection of the environment. Promoting environmental protection is thus an important objective of common interest. In addition, Article 6 of the EC Treaty mentions the need to integrate protection of the environment into all Community policies and Article 174(2) of the EC Treaty states that environment policy is to be based on the principles of precaution, prevention, rectifying pollution⁽⁸⁾ at source and 'polluter pays'.

(19) These Guidelines lay down the conditions for authorising the granting of State aid to address those market failures which lead to a sub-optimal level of environmental protection.

(20) The most common market failure in the field of environmental protection is related to negative externalities. Undertakings acting in their own interest have no incentive to take the negative externalities arising from production into account either when they decide on a particular production technology or when they decide on the production level. In other words, the production costs that are borne by the undertaking are lower than the costs borne by society. Therefore undertakings have no incentive to reduce their level of pollution or to take individual measures to protect the environment.

(21) Governments confronted with this market failure tend to use regulation in order to ensure that the negative externalities arising from production are accounted for. Through the introduction of standards, taxation, economic instruments and other regulation, the undertakings producing pollution have to pay for the cost to society of pollution in accordance with the PPP. Internalising these negative externalities will consequently raise the private costs borne by those undertakings, thereby negatively affecting their revenue. Moreover, since the generation of pollution is unevenly spread among industries and undertakings, the costs of any environmentally friendly regulation tend to be

differentiated, not only between undertakings, but also between Member States. Member States may furthermore have a different appreciation of the need to introduce high environmental targets.

(22) In the absence of Community standards and market-based instruments fully reflecting the PPP level (regulatory failure), Member States may thus decide unilaterally to pursue a higher level of environmental protection. This may in turn create additional costs for the undertakings active in their territory. For that reason, in addition to regulation, Member States may use State aid as a positive incentive to achieve higher levels of environmental protection. They can do this in two ways:

— **positive individual incentives to reduce pollution and other negative impacts on the environment:**

First, Member States can create positive incentives on an individual level (at the level of the undertaking) to go beyond Community standards. In this case, the aid beneficiary reduces pollution because it receives aid to change its behaviour, and not because it has to pay for the costs of this pollution. The objective of State aid here is to address directly the market failure linked with the negative effects of pollution;

— **positive incentives to introduce national environmental regulation going beyond Community standards:**

Second, Member States can impose national regulation going beyond the Community standards. However, this may lead to additional costs for certain undertakings, and thus affect their competitive conditions. Moreover, such costs may not represent the same burden for all undertakings given their size, market position, technology and other specificities. In this case, State aid may be necessary, to lessen the burden on the most affected undertakings and thereby enable Member States to adopt national environmental regulation that is stricter than Community standards.

1.3.3. *Appropriate instrument*

(23) There is a role for government intervention to ensure more adequate environmental protection. Regulation and market-based instruments are the most important tools to achieve environmental objectives. Soft instruments, such as voluntary eco-labels, and the diffusion of environmentally friendly technologies may also play an important role. However, even if finding the optimal mix of policy instruments can be complicated, the existence of market failures or political objectives does not automatically justify the use of State aid.

⁽⁸⁾ This can include activities such as the release of chemical pollutants into the environment, or for instance physically altering the aquatic environment, and thereby causing disturbances of ecosystems or activities having a negative impact on the status of water resources.

(24) According to the PPP, the polluter should pay all the costs of its pollution, including the indirect costs borne by society. For this purpose, environmental regulation can be a useful instrument to increase the burden on the polluter. Respect for the PPP ensures, in theory, that the market failure linked to negative externalities will be rectified. Consequently, if the PPP were fully implemented, further government intervention would not be necessary to ensure a market-efficient outcome. The PPP remains the main rule and State aid is in fact a second-best option. Using State aid in the context of the PPP would relieve the polluter of the burden of paying the cost of its pollution. Therefore, State aid may not be an appropriate instrument in such cases.

(25) However, on account, in particular, of incomplete implementation of the PPP, the existing level of environmental protection is often considered to be unsatisfactory for the following reasons:

a) first, the exact cost of pollution is not easy to establish. It is technically complicated to calculate the extra costs for society for all types of production, and it may sometimes be inefficient to take account of the fact that different producers have different levels of pollution if the associated administrative costs are very high. Different sensitivities towards changes in consumer prices (price elasticity) also play a role. Furthermore, the valuation of the cost of pollution can differ among individuals and societies, depending on societal choices as regards, for instance, the effect of current policies on future generations. In addition, some costs are difficult to express without some uncertainty in monetary terms, such as shorter life expectancy or environmental damage. There will therefore always be a degree of uncertainty involved in calculating the costs of pollution.

b) second, raising the price of a series of (industrial) products too abruptly in order to internalise the cost of pollution may act as an external shock and create disturbances in the economy. Governments may therefore consider it more desirable to progress with moderation towards integrating the full price of pollution into certain production processes.

(26) In the context of an unsatisfactory level of environmental protection, State aid, although it does not resolve all the above-mentioned problems, may provide positive incentives for undertakings to carry out activities or make investments which are not mandatory and would otherwise not be undertaken by profit-seeking companies. In addition, State aid may be an appropriate instrument to enable Member States to adopt national environmental regulation going beyond Community standards, by lowering the burden on the undertakings most affected by that regulation, and thus making the regulation possible.

1.3.4. *Incentive effect and necessity of aid*

(27) State aid for environmental protection must result in the recipient of the aid changing its behaviour so that the level of environmental protection will be higher than if the aid had not been granted. However, investments which increase the level of environmental protection may at the same time increase revenues ⁽⁹⁾ and/or decrease costs ⁽¹⁰⁾ and thus be economically attractive in their own right. Therefore, it needs to be verified that the investment concerned would not have been undertaken without any State aid.

(28) The objective is to be sure that undertakings would not, without the aid, engage in the same activity because of its intrinsic benefits. The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid. Correct identification of the counterfactual scenario is key to determining whether or not State aid has an incentive effect. It is also essential for the calculation of the extra investment or production costs incurred to achieve the higher level of environmental protection.

(29) Investment may be necessary in order to meet mandatory Community standards. Since the company would have to comply with those standards in any event, State aid to meet mandatory Community standards that are already in force cannot be justified.

1.3.5. *Proportionality of the aid*

(30) Aid is considered to be proportional only if the same result could not be achieved with less aid. In addition, proportionality may also depend on the degree of selectivity of a measure.

(31) In particular, the aid amount must be limited to the minimum needed to achieve the environmental protection sought. Therefore, eligible costs for investment aid are based on the notion of the extra (net) cost necessary to meet the environmental objectives. This concept implies that, in order to establish how much aid can be granted, all the economic benefits which the investment gives the company must in principle be subtracted from the additional investment costs.

⁽⁹⁾ More environmentally friendly production may result, for example, in more possibilities for recycling waste materials, thus generating additional revenues. It may also be possible to increase the price or the sales of products that are perceived as more environmentally-friendly and thus more appealing to consumers.

⁽¹⁰⁾ More environmentally friendly production may result notably in reduced consumption of energy and input materials.

- (32) However, it is difficult to fully take into account all economic benefits which a company will derive from an additional investment. For example, according to the methodology for calculating eligible costs set out in points 80 to 84, operating benefits are not taken into account beyond a certain initial period following the investment. Likewise, certain kinds of benefits which are not always easy to measure — such as the 'green image' enhanced by an environmental investment — are not taken into account in this context either. Consequently, in order for the aid to be proportionate, the Commission considers that the aid amount must normally be less than the eligible investment costs, see Annex. It is only in cases where investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria — effectively ensuring that the aid is limited to the minimum necessary for achieving the environmental gain — that the aid amount may reach 100 % of the eligible investment cost. This is because under such circumstances it can be assumed that the respective bids reflect all possible benefits that might flow from the additional investment.
- (33) Moreover, for some measures, it is not possible to calculate the amount of aid on the basis of the extra costs; this is the case for aid in the form of environmental tax exemptions or reductions and aid in the form of tradable permit schemes. In those cases, proportionality has to be ensured through conditions and criteria for granting the exemptions and reductions, which ensure that the beneficiary does not receive excessive advantages, and that the selectivity of the measure is limited to the strict minimum.
- (34) The cost of achieving environmental protection is often higher for small and medium-sized enterprises in relative terms compared to the size of their activity. In addition, the ability of small and medium-sized enterprises to bear such costs is often restricted by capital market imperfections. For this reason, and in view of the reduced risk of serious distortions of competition when the beneficiary is a small or medium-sized enterprise, a bonus can be justified for such enterprises for some types of aid.
- (35) In addition, Member States are encouraged to ensure cost-effectiveness in achieving environmental benefits, for example by choosing measures for which the external costs avoided are significant in relation to the amount of aid. However, since there is no direct link between the external costs avoided and the cost incurred by the undertaking, only in exceptional cases may external costs avoided be used as a basis to determine State aid amounts. Normally, in order to ensure an adequate incentive for the undertaking to change its behaviour, the aid amount must be linked directly to the cost borne by the undertaking.

1.3.6. *Negative effects of environmental aid must be limited so that the overall balance is positive*

- (36) If environmental State aid measures are well targeted to counterweigh only the actual extra costs linked to a higher level of environmental protection, the risk that the aid will

unduly distort competition is normally rather limited. Consequently, it is crucial that environmental State aid measures are well targeted. In cases where aid is not necessary or proportionate to achieve its intended objective it will harm competition. This may in particular be the case if aid leads to:

- a) maintaining inefficient firms afloat;
- b) distorting dynamic incentives/crowding out;
- c) creating market power or exclusionary practices;
- d) artificially altering trade flows or the location of production.

- (37) In some cases, the purpose of the measure is to intervene in the functioning of the market with a view to favouring, to the overall benefit of the environment, certain environmentally friendly productions at the expense of other, more polluting ones. As a result of such measures, the producers of the environmentally friendly products concerned will be able to improve their market position in relation to competitors offering environmentally less beneficial products. In such cases, the Commission will take into account the overall environmental effect of the measure when looking at its negative impact on the market position, and thus on the profits, of non-aided firms. The lower the expected environmental effect of the measure in question, the more important the verification of its effect on market shares and profits of competing products.

1.4. **Implementing the balancing test: legal presumptions and need for more detailed assessment**

- (38) Without prejudice to Articles 4 to 7 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 ⁽¹¹⁾, the legal presumptions applied by the Commission differ according to the type of State aid measure notified.
- (39) In Chapter 3 of these Guidelines, the Commission has identified a series of measures in respect of which it considers *a priori* that State aid will address a market failure hampering environmental protection or improve on the level of environmental protection. The Commission also sets out a series of conditions and parameters, which are intended to ensure that State aid actually has an incentive effect, is proportionate and has a limited negative impact on competition and trade. Chapter 3 thus contains parameters in respect of the aided activity, aid intensities and conditions attached to compatibility.

⁽¹¹⁾ 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).

(40) However, for aid amounts above certain thresholds as well as for certain specific situations, additional scrutiny is necessary, because of higher risks of distortion of competition and trade. The additional scrutiny will generally consist in further and more detailed factual analysis of the measure in accordance with Chapter 5. These measures will be declared compatible if the balancing test pursuant to Chapter 5 results in an overall positive evaluation. In the context of this analysis, no compatibility criteria will be presumed to be fulfilled at the outset. Tax exemptions and reductions from environmental taxes will be subject only to the assessment laid down in Chapter 4 ⁽¹²⁾.

(41) As a result of this detailed assessment, the Commission may approve the aid, declare it incompatible with the common market or take a compatibility decision subject to conditions.

1.5. Reasons for specific measures covered by these Guidelines

(42) The Commission has identified a series of measures for which State aid may, under specific conditions, be compatible with Article 87(3)(c) of the EC Treaty.

1.5.1. *Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards*

(43) This type of aid provides individual incentives to companies to achieve higher environmental protection. Normally, an undertaking does not have an incentive to go beyond mandatory standards if the cost of doing so exceeds the benefit for the undertaking. In such cases State aid may be granted to give an incentive to undertakings to improve environmental protection. In accordance with the Community objective to support eco-innovation, more favourable treatment can be accepted for eco-innovation projects that address the double market failure linked to the higher risks of innovation, coupled with the environmental aspect of the project. Aid for eco-innovation thus aims to accelerate the market diffusion of eco-innovations.

1.5.2. *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*

(44) Transport is responsible for a large share of overall greenhouse gas emissions (approximately 30 %), as well as for local pollution by dust, particulates, NO_x and SO_x. Hence, it is important to encourage clean modes of transport, both in order to fight global climate change and in order to reduce local pollution, in particular in cities. In this context, it is particularly important to encourage the acquisition of clean transport vehicles (including clean ships).

1.5.3. *Aid for early adaptation to future Community standards*

(45) These Guidelines do not authorise aid to assist undertakings to comply with Community standards already in force, because such aid would not lead to a higher level of environmental protection. However, State aid may ensure significantly quicker implementation of newly adopted Community standards which are not yet in force and thereby contribute to reducing pollution at a faster pace than would have been the case without the aid. In such situations, State aid may therefore create individual incentives for enterprises to counterbalance the effects of the negative externalities linked to pollution.

1.5.4. *Aid for environmental studies*

(46) Aid to companies for studies on investments aimed at achieving a level of environmental protection going beyond Community standards or increasing the level of environmental protection in the absence of Community standards, as well as studies on energy saving and production of renewable energy, addresses the market failure linked to asymmetric information. Often undertakings underestimate the possibilities and benefits related to energy saving and renewable energy, which leads to under-investment.

1.5.5. *Aid for energy saving*

(47) This type of aid addresses the market failure linked to negative externalities by creating individual incentives to attain environmental targets for energy saving and for the reduction of greenhouse gas emissions. At Community level, in the Communication from the Commission to the European Council and the European Parliament — an Energy Policy for Europe ⁽¹³⁾ the aim has been set to achieve at least a 20 % reduction in greenhouse gas emissions by 2020 compared to 1990, as endorsed by the European Council of 8 and 9 March 2007. Furthermore, Member States are obliged to adopt and aim to achieve an overall national indicative energy savings target of 9 % over nine years in accordance with Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC ⁽¹⁴⁾. State aid may be appropriate where the investments resulting in energy savings are not compulsory pursuant to applicable Community standards and where they are not profitable, that is to say where the cost of energy saving is higher than the related private economic benefit. In the case of small and medium-sized enterprises, more favourable support may be needed to take into account the fact that these enterprises often under-estimate the benefits related to energy savings over long periods, which leads to their under-investment in energy-saving measures.

⁽¹²⁾ Aid granted in the form of fiscal aid in accordance with Chapter 3 will be subject to a detailed assessment if the thresholds in Chapter 5 are exceeded.

⁽¹³⁾ COM(2007) 1 final.

⁽¹⁴⁾ OJ L 114, 27.4.2006, p. 64.

1.5.6. *Aid for renewable energy sources*

(48) This type of aid addresses the market failure linked to negative externalities by creating individual incentives to increase the share of renewable sources of energy in total energy production. Increased use of renewable energy sources is one of the Community's environmental priorities as well as an economic and energy-related priority. It is expected to play an important role in meeting the targets for the reduction of greenhouse gas emissions. At Community level, in the Communication from the Commission to the European Council and the European Parliament — an energy policy for Europe the target has been set for renewable energy to account for 20 % of overall EU energy consumption by 2020. State aid may be justified if the cost of production of renewable energy is higher than the cost of production based on less environmentally friendly sources and if there is no mandatory Community standard concerning the share of energy from renewable sources for individual undertakings. The high cost of production of some types of renewable energy does not allow undertakings to charge competitive prices on the market and thus creates a market-access barrier for renewable energy. However, due to technological developments in the field of renewable energy and to gradually increasing internalisation of environmental externalities (resulting, for example, from Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control ⁽¹⁵⁾, air quality legislation and the emissions trading scheme), the cost difference has shown a decreasing trend over the past years, thus reducing the need for aid.

(49) In addition, as highlighted in the Biofuel Progress Report ⁽¹⁶⁾, biofuel promotion should benefit both security of supply and climate change policy in a sustainable way. Therefore, State aid may be an appropriate instrument only for those uses of renewable energy sources where the environmental benefit and sustainability is evident. More particularly, biofuels not 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 ⁽¹⁷⁾ will not be considered eligible for State aid. When designing their support systems, Member States may encourage the use of biofuels which give additional benefits — including the benefits of diversification offered by biofuels made from wastes, residues, cellulosic and ligno-cellulosic material — by taking due account of the different costs of producing

energy from traditional biofuels, on the one hand, and of those biofuels which give additional benefits, on the other hand.

(50) With regard 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. Therefore, they can play an important part in the overall energy mix. On the other hand, such installations might also have a negative impact, for example on water systems and biodiversity ⁽¹⁸⁾.

1.5.7. *Aid for cogeneration and aid for district heating (DH)*

(51) These types of aid address market failure linked to negative externalities by creating individual incentives to meet environmental targets in the field of energy savings. Cogeneration of heat and electricity (hereafter 'CHP') is the most efficient way of producing electricity and heat simultaneously. By producing both electricity and heat together, less energy is wasted in production. The Community strategy outlined in the Commission's cogeneration strategy of 1997 sets an overall indicative target of doubling the share of electricity production from cogeneration to 18 % by 2010. Since then the importance of CHP for the EU energy strategy has been underlined by the adoption of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC ⁽¹⁹⁾ and by a chapter on cogeneration in the Commission Action Plan for Energy Efficiency: Realising the Potential ⁽²⁰⁾. The latter document also points to the potential of waste heat, for example from industry or utilities, for useful applications, for example in district heating (hereafter 'DH'). Further, DH may be more energy-efficient than individual heating and may provide a significant improvement in urban air quality. Therefore, provided that DH is shown to be less polluting and more energy efficient in the generation process and the distribution of the heat, but more costly than individual heating, State aid can be granted with a view to giving incentives to attain environmental targets. However, as in the case of renewable energies, the progressive internalisation of environmental externalities in the costs of other technologies can be expected to reduce the need for aid by bringing about a gradual convergence of these costs with those of CHP and DH.

⁽¹⁵⁾ OJ L 24, 29.1.2008, p. 8.

⁽¹⁶⁾ COM(2006) 845 final.

⁽¹⁷⁾ COM(2008) 19 final. Once the Directive has been adopted by the European Parliament and the Council, the Commission will apply the sustainability criteria in the final text.

⁽¹⁸⁾ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1). Directive as last amended by Decision No 2455/2001/EC (OJ L 331, 15.12.2001, p. 1). In particular Article 4(7) lays down criteria in relation to allowing new modifications of bodies of water.

⁽¹⁹⁾ OJ L 52, 21.2.2004, p. 50.

⁽²⁰⁾ COM(2006) 545 final.

1.5.8. *Aid for waste management*

- (52) This type of aid aims to give individual incentives to reach environmental targets linked to waste management ⁽²¹⁾. The Sixth Environment Action Programme identifies waste prevention and management as one of the four top priorities. Its primary objective is to separate waste generation from economic activity, so that EU growth will not lead to more and more waste. In this context, State aid may be granted to the producer of the waste (under section 3.1.1) as well as to undertakings managing or recycling waste created by other undertakings (under section 3.1.9). However, the positive effects on the environment must be ensured, the PPP must not be circumvented and the normal functioning of secondary materials markets should not be distorted.

1.5.9. *Aid for the remediation of contaminated sites*

- (53) This type of aid is intended to create an individual incentive to counterbalance the effects of negative externalities, where it is not possible to identify the polluter and make it pay for repairing the environmental damage it has caused. In such cases, State aid may be justified if the cost of remediation is higher than the resulting increase in the value of the site.

1.5.10. *Aid for the relocation of undertakings*

- (54) This type of investment aid aims to create individual incentives to reduce negative externalities by relocating undertakings that create major pollution to areas where such pollution will have a less damaging effect, which will reduce external costs. In line with the precautionary principle, these Guidelines introduce the possibility of granting aid for the relocation of *high risk establishments* in accordance with Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances ⁽²²⁾ (hereafter the 'Seveso II Directive'). Past accidents have shown that the location of an establishment covered by the Seveso II Directive is of crucial importance as regards both the prevention of accidents and limitation of the consequences of accidents on people and the environment. State aid may therefore be justified if the relocation is made for environmental reasons. To ensure that aid is not granted for relocation for other purposes, an administrative or judicial decision of a competent public authority or an agreement between the competent public authority and the undertaking to relocate the firm is required. The eligible costs must take into account any advantages that the firm may obtain due to the relocation.

⁽²¹⁾ Waste management includes re-utilisation, recycling and recovery.

⁽²²⁾ OJ L 10, 14.1.1997, p. 13. Directive as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

1.5.11. *Aid involved in tradable permit schemes*

- (55) Tradable permit schemes may involve State aid in various ways, for example, when Member States grant permits and allowances below their market value and this is imputable to Member States. This type of aid may be used to target negative externalities by allowing market-based instruments targeting environmental objectives to be introduced. If the global amount of permits granted by the Member State is lower than the global expected needs of undertakings, the overall effect on the level of environmental protection will be positive. At the individual level of each undertaking, if the allowances granted do not cover the totality of expected needs of the undertaking, the undertaking must either reduce its pollution, thus contributing to the improvement of the level of environmental protection, or buy supplementary allowances on the market, thus paying a compensation for its pollution. To limit the distortion of competition, no over-allocation of allowances can be justified and provision must be made to avoid undue barriers to entry.

- (56) The criteria set out in point 55 form the basis for the Commission's assessment of situations arising during the trading period ending on 31 December 2012. With respect to situations arising during the trading period after that date, the Commission will assess the measures according to whether they are both necessary and proportional. Finally, this will inform the revision of these Guidelines taking into account, in particular, the new Directive on the EU CO₂ Emission Trading System, for the trading period after 31 December 2012.

1.5.12. *Aid in the form of reductions of or exemptions from environmental taxes*

- (57) Reductions of and exemptions from environmental taxes concerning certain sectors or categories of undertakings may make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation, and to create further incentives to improve on environmental protection. Accordingly, this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation. For aid to be compatible, it must be shown that the exemptions or reductions are necessary for all the suggested categories of beneficiaries and that they are proportional in size. This is assumed to be the case if beneficiaries pay at least the Community minimum tax level set by the applicable Directive, if any. Otherwise, the necessity will depend on the extent to which the national tax impacts on production costs as well as on the possibility to pass on the tax to consumers and reduce profit margins. Proportionality will depend on the extent to which the beneficiaries can further reduce their consumption or emission, pay a part of the national tax or enter into environmental agreements to reduce pollution ⁽²³⁾.

⁽²³⁾ The Commission may re-evaluate the approach towards this kind of aid when Directive 2003/96/EC is reviewed.

2. SCOPE OF APPLICATION AND DEFINITIONS

2.1. Scope of application of the Guidelines

- (58) These Guidelines apply to State aid for environmental protection. They will be applied in accordance with other Community policies on State aid, other provisions of the Treaty establishing the European Community and the Treaty on European Union and legislation adopted pursuant to those Treaties.
- (59) These Guidelines apply to aid ⁽²⁴⁾ to support environmental protection in all sectors governed by the EC Treaty. They also apply to those sectors which are subject to specific Community rules on State aid (steel processing, shipbuilding, motor vehicles, synthetic fibres, transport, coal agriculture and fisheries) unless such specific rules provide otherwise.
- (60) The design and manufacture of environmentally friendly products, machines or means of transport with a view to operating with fewer natural resources and action taken within plants or other production units with a view to improving safety or hygiene are not covered by these Guidelines.
- (61) For agriculture and fisheries, these Guidelines apply to aid for environmental protection in favour of undertakings active in the processing and marketing of products. For undertakings active in the processing and marketing of fisheries products, if the aid concerns expenses eligible under Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund ⁽²⁵⁾, the maximum aid rate allowed is the higher of the aid rate provided for in these Guidelines and the aid rate laid down in that Regulation. In the field of agricultural primary production, these Guidelines apply only to measures which are not already governed by the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ⁽²⁶⁾, and in the field of fisheries and aquaculture primary production, they apply only where no specific provisions dealing with environmental aid exist.
- (62) The financing of environmental protection measures relating to air, road, railway, inland waterway and maritime transport infrastructure, including any project of common interest as identified in Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network ⁽²⁷⁾ is not covered by these Guidelines.
- (63) State aid for research, development and innovation in the environmental field is subject to the rules set out in the Community framework for State aid for research and development and innovation ⁽²⁸⁾. However, the market diffusion stage of eco-innovation (acquisition of an eco-innovation asset) is covered by these Guidelines.
- (64) The characteristics of aid for environmental training activities do not justify separate rules to those on aid for training activities generally, and the Commission will therefore examine such aid in accordance with 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 ⁽²⁹⁾.
- (65) Consultancy services play an important role in helping small and medium-sized enterprises to make progress in environmental protection. In particular, they can be used to conduct eco-audits or to evaluate the economic benefits of an environmentally friendly investment for the undertaking and thus give an incentive to those enterprises to undertake the investment supporting environmental protection. Aid to small and medium-sized enterprises for advisory/consultancy services in the environmental field may be granted under 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 for small and medium-sized enterprises ⁽³⁰⁾.
- (66) These Guidelines do not apply to stranded costs as defined in the Commission Communication relating to the methodology for analysing State aid linked to stranded costs ⁽³¹⁾.
- (67) Furthermore, to the extent that the provisions relating to energy saving set out in section 3.1.5 are not applicable, these Guidelines do not apply to State aid to investments in infrastructure related to district heating, which will be assessed under Article 87(3)(c) of the EC Treaty.
- (68) In some Member States, companies may be subject to environmental taxes and, at the same time, participate in tradable permit schemes. The Commission has not gathered sufficient experience in assessing the compatibility of reductions of environmental taxes in such situations. Consequently, it is too early for the Commission to provide general guidance thereon. Instead, the assessment of such cases, to the extent that they constitute State aid within the meaning of Article 87(1) of the EC Treaty, will take place on the basis of Article 87(3)(c) of the EC Treaty.

⁽²⁴⁾ These guidelines do not discuss the concept of State aid, which derives from Article 87(1) of the EC Treaty and from the case law of the Court of Justice of the European Communities.

⁽²⁵⁾ OJ L 223, 15.8.2006, p. 1.

⁽²⁶⁾ OJ C 319, 27.12.2006, p. 1.

⁽²⁷⁾ OJ L 228, 9.9.1996, p. 1. Decision as last amended by Council Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽²⁸⁾ OJ C 323, 30.12.2006, p. 1.

⁽²⁹⁾ OJ L 10, 13.1.2001, p. 20. Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85). When the new block exemption regulation covering training aid is adopted, the new regulation will apply.

⁽³⁰⁾ OJ L 10, 13.1.2001, p. 33. Regulation as last amended by Regulation (EC) No 1976/2006. When the new block exemption regulation covering aid to SMEs is adopted, the new regulation will apply.

⁽³¹⁾ Adopted by the Commission on 26 July 2001 and communicated to Member States by letter ref. SG(2001) D/290869, 6 August 2001.

(69) Finally, some of the means to support fossil fuel power plants or other industrial installations equipped with CO₂ capture, transport and storage facilities, or individual elements of the Carbon Capture Storage chain, envisaged by Member States, could constitute State aid but, in view of the lack of experience, it is too early to lay down guidelines relating to the authorisation of any such aid. Given the strategic importance of this technology for the Community in terms of energy security, reduction of greenhouse gas emissions and achievement of its agreed long-term objective to limit climate change to 2 °C above pre-industrial levels and given also the Commission's stated support for the construction of industrial-scale demonstration plants up to 2015, provided that they are environmentally safe and contribute to environmental protection, the Commission will have a generally positive attitude towards State aid for such projects⁽³²⁾. Projects could be assessed under Article 87(3)(c) of the EC Treaty or be eligible as important projects of common European interest under the conditions set out in Article 87(3)(b) of the Treaty and point 147 of these Guidelines.

2.2. Definitions

(70) For the purpose of these Guidelines the following definitions shall apply:

- 1) *environmental protection* means any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy⁽³³⁾;
- 2) *energy-saving measure* means any action which enables undertakings to reduce the amount of energy used in particular in their production cycle;
- 3) *Community standard* means
 - i) a mandatory Community standard setting the levels to be attained in environmental terms by individual undertakings⁽³⁴⁾, or
 - ii) the obligation under Directive 2008/1/EC 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;

⁽³²⁾ See Commission proposal for a Directive of the European Parliament and of the Council on the geological storage of carbon dioxide COM(2008) 18 final.

⁽³³⁾ See in particular the Sixth Environment Action Programme.

⁽³⁴⁾ Consequently, standards or targets set at Community level which are binding for Member States but not for individual undertakings are not deemed to be 'Community standards'.

4) *eco-innovation* means all forms of innovation activities resulting in or aimed at significantly improving environmental protection. Eco-innovation includes new production processes, new products or services, and new management and business methods, whose use or implementation is likely to prevent or substantially reduce the risks for the environment, pollution and other negative impacts of resources use, throughout the life cycle of related activities.

The following are not considered innovations:

- i) minor changes or improvements;
 - ii) an increase in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use;
 - iii) changes in business practices, workplace organisation or external relations that are based on organisational methods already in use in the undertaking;
 - iv) changes in management strategy;
 - v) mergers and acquisitions;
 - vi) ceasing to use a process;
 - vii) simple capital replacement or extension;
 - viii) changes resulting purely from changes in factor prices, customisation, regular seasonal and other cyclical changes;
 - ix) trading of new or significantly improved products;
- 5) *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;
 - 6) *biomass* means the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste;
 - 7) *biofuels* means liquid or gaseous fuel for transport produced from biomass;
 - 8) *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⁽³⁵⁾;

⁽³⁵⁾ COM(2008) 19 final. Once the Directive has been adopted by the European Parliament and the Council, the Commission will apply the sustainability criteria in the final text.

- 9) *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;
- 10) *cogeneration* means the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy;
- 11) *high-efficiency cogeneration* means cogeneration meeting the criteria of Annex III to Directive 2004/8/EC and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC of 21 December 2006 establishing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2004/8/EC of the European Parliament and of the Council ⁽³⁶⁾;
- 12) *district heating* means the supply of heat, either in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating;
- 13) *energy-efficient district heating* means district heating which, with regard to generation, either complies with the criteria for high-efficiency cogeneration or, in the case of heat-only boilers, meets the reference values for separate heat production laid down in Decision 2007/74/EC;
- 14) *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;
- 15) *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 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ⁽³⁷⁾;
- 16) *small and medium-sized enterprises* (hereafter 'SMEs'), *small enterprises* and *medium-sized enterprises* (or 'undertakings') mean such enterprises within the meaning of Regulation (EC) No 70/2001 or any regulation replacing it;
- 17) *large enterprises* and *large undertakings* means enterprises which are not within the definition of small and medium-sized enterprises;
- 18) *aid* means any measure fulfilling all the criteria laid down in Article 87(1) of the EC Treaty;
- 19) *aid intensity* means the gross aid amount expressed as a percentage of the eligible costs. All figures used must be taken before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount must be the grant equivalent of the aid. Aid payable in several instalments must be calculated at its value at the moment of granting. The interest rate to be used for discounting purposes and for calculating the aid amount in a soft loan must be the reference rate applicable at the time of grant. The aid intensity is calculated per beneficiary;
- 20) *operating benefits* means, for the purposes of calculating eligible costs, in particular cost savings or additional ancillary production directly linked to the extra investment for environmental protection and, where applicable, benefits accruing from other support measures whether or not they constitute State aid (operating aid granted for the same eligible costs, feed-in tariffs or other support measures). By contrast, proceeds flowing from the sale by the undertaking of tradable permits issued under the European Trading System will not be deemed to constitute operating benefits;
- 21) *operating costs* means, for the purposes of calculating eligible costs, in particular additional production costs flowing from the extra investment for environmental protection;
- 22) *tangible assets* means, for the purposes of calculating eligible costs, 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;
- 23) *intangible assets* means, for the purposes of calculating eligible costs, spending on technology transfer through the acquisition of operating licences or of patented and non-patented know-how where the following conditions are complied with:

- i) the intangible asset concerned must be regarded as a depreciable asset,

⁽³⁶⁾ OJ L 32, 6.2.2007, p. 183.

⁽³⁷⁾ 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).

- ii) it must be purchased on market terms, from an undertaking in which the acquirer has no power of direct or indirect control,
- iii) it must be included in the assets of the undertaking, and remain in the establishment of the recipient of the aid and be used there for at least five years. This condition does not apply if the intangible asset is technically out of date. If it is sold during those five years, the yield from the sale must be deducted from the eligible costs and all or part of the amount of aid must, where appropriate, be reimbursed;

24) *internalisation of costs* means the principle that all costs associated with the protection of the environment should be included in the polluting undertakings' production costs;

25) *the polluter pays principle* means that the costs of measures to deal with pollution should be borne by the polluter who causes the pollution, unless the person responsible for the pollution cannot be identified or cannot be held liable under Community or national legislation or may not be made to bear the costs of remediation. Pollution in this context is the damage caused by the polluter by directly or indirectly damaging the environment, or by creating conditions leading to such damage⁽³⁸⁾, to physical surroundings or natural resources;

26) *polluter* means someone who directly or indirectly damages the environment or who creates conditions leading to such damage⁽³⁹⁾;

27) *contaminated site* means a site where there is a confirmed presence, caused by man, of dangerous substances of such a level that they pose a significant risk to human health or the environment taking into account current and approved future use of the land.

3. COMPATIBILITY OF AID UNDER ARTICLE 87(3) OF THE EC TREATY

3.1. Compatibility of aid under Article 87(3)(c) of the EC Treaty

(71) State aid for environmental protection is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty if, on the basis of the balancing test, it leads to increased environmental protection activities without adversely affecting trading conditions to an extent

⁽³⁸⁾ Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters (OJ L 194, 25.7.1975, p. 1).

⁽³⁹⁾ Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters.

contrary to the common interest. In this context, the duration of aid schemes should be subject to reasonable time limits, without prejudice to the possibility for a Member State to re-notify a measure after the time limit set by the Commission decision has passed. Member States may support notifications of aid measures by rigorous evaluations of similar past aid measures demonstrating the incentive effect of the aid.

(72) The measures described in points 73 to 146 may be found to be compatible under Article 87(3)(c).

3.1.1. Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards

(73) Investment aid enabling undertakings to go beyond Community standards for environmental protection or to increase the level of environmental protection in the absence of Community standards will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty provided that the conditions set out in points 74 to 84 and section 3.2 are fulfilled.

(74) The aided investment must fulfil one of the following two conditions:

a) the investment enables 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 standard, or

b) the investment enables the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

(75) Aid may not be granted where improvements bring undertakings into compliance with Community standards already adopted and not yet in force⁽⁴⁰⁾.

Aid intensity

(76) The aid intensity must not exceed 50 % of the eligible investment cost as defined in points 80 to 84.

⁽⁴⁰⁾ However, aid for early adaptation to future standards and for the acquisition of new transport vehicles is possible under the conditions developed in sections 3.1.3 and 3.1.2.

(77) Where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria, effectively ensuring that the aid is limited to the minimum necessary for achieving the environmental gain, the aid intensity may amount to up to 100 % of the eligible investment cost as defined in points 80 to 84. Such a bidding process must be non-discriminatory and provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid. Finally, the aid must be granted on the basis of the initial bid submitted by the bidder, thus excluding subsequent negotiations.

(78) Where the investment concerns the acquisition of an eco-innovation asset or the launching of an eco-innovation project, the aid intensity may be increased by 10 percentage points, provided that following conditions are fulfilled:

- a) the eco-innovation asset or project must be new or substantially improved compared to the state of the art in its industry in the Community. The novelty could, for example, be demonstrated by the Member States on the basis of a precise description of the innovation and of market conditions for its introduction or diffusion, comparing it with state-of-the-art processes or organisational techniques generally used by other undertakings in the same industry;
- b) the expected environmental benefit must be significantly higher than the improvement resulting from the general evolution of the state of the art in comparable activities ⁽⁴¹⁾;
- c) the innovative character of these assets or projects involves a clear degree of risk, in technological, market or financial terms, which is higher than the risk generally associated with comparable non-innovative assets or projects. This risk could be demonstrated by the Member State for instance in terms of: costs in relation to the undertaking's turnover, time required for the development, expected gains from the eco-innovation in comparison with the costs, probability of failure.

(79) Where the investment aid for undertakings going beyond Community standards or increasing the level of environmental protection in the absence of such Community standards is to be given to SMEs, the aid intensity may be

⁽⁴¹⁾ When assessing point 78(b), if quantitative parameters can be used to compare eco-innovative activities with standard, non-innovative activities, 'significantly higher' means that the marginal improvement expected from eco-innovative activities, in terms of reduced environmental risk or pollution, or improved efficiency in energy or resources, should be at least twice as high as the marginal improvement expected from the general evolution of comparable non-innovative activities.

Where the proposed approach is not appropriate for a given case, or if no quantitative comparison is possible, the application file for State aid should contain a detailed description of the method used to assess this criterion, ensuring a standard comparable to that of the proposed method.

increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for aid to undertakings going beyond Community standards or increasing the level of environmental protection in the absence of Community standards <i>except for eco-innovation</i>	Aid intensity for aid to undertakings going beyond Community standards or increasing the level of environmental protection in the absence of Community standards <i>in the field of eco-innovation</i>
Small enterprises	70 %	80 %
Medium-sized enterprises	60 %	70 %
Large enterprises	50 %	60 %

Calculation of eligible costs — methodology

(80) Eligible costs must be limited to the extra investment costs necessary to achieve a higher level of environmental protection than required by the Community standards and will be calculated in two steps. First, the cost of the investment directly related to environmental protection will be established by reference to the counterfactual situation, where appropriate. Second, operating benefits will be deducted and operating costs will be added.

(81) Identifying the part of the investment directly related to environmental protection:

a) where the cost of investing in environmental protection can be easily identified in the total investment cost, this precise environmental protection-related cost constitutes the eligible costs ⁽⁴²⁾;

b) in all other cases the extra investment costs must be established by comparing the investment with the counterfactual situation in the absence of State aid. The correct counterfactual is 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.

⁽⁴²⁾ This could be the case, for example, where an existing production process is up-graded and where the very parts which improve the environmental performance can be clearly identified.

- (82) Identifying operating benefits/costs: eligible costs must, unless specified otherwise in this chapter, be calculated net of any operating benefits and operating costs related to the extra investment for environmental protection and arising during the first five years of the life of the investment concerned. This means that such operating benefits must be deducted and such operating costs may be added to the extra investment costs.
- (83) The eligible investment may take the form of investment in tangible assets and/or in intangible assets.
- (84) In the case of investments aiming at obtaining a level of environmental protection higher than Community standards the counterfactual should be chosen as follows:
- where the undertaking is adapting to national standards adopted in the absence of Community standards**, the eligible costs consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
 - where the undertaking is adapting to, or goes beyond, national standards which are more stringent than the relevant Community standards or goes beyond Community standards**, the eligible costs 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 is not eligible;
 - where no standards exist**, eligible costs 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.

3.1.2. *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*

- (85) The general rules set out in points 73 to 84 apply to aid for undertakings improving on Community standards or increasing the level of environmental protection in the absence of Community standards in the transport sector. By derogation from point 75, aid for acquisition of new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards is permissible, when such acquisition occurs

before their entry into force and where the new Community standards, once mandatory, will not apply retroactively to already purchased vehicles.

- (86) For retrofitting operations with an environmental protection objective in the transport sector the eligible costs are the total extra net costs involved according to the methodology of calculating eligible costs set out in points 80 to 84 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.

3.1.3. *Aid for early adaptation to future Community standards*

- (87) Aid for complying with new Community standards which increase the level of environmental protection and are not yet in force will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty if the Community standards have been adopted, provided that the investment is implemented and finalised at least one year before the entry into force of the standard.

Aid intensity

- (88) The maximum aid intensities are 25 % for small enterprises, 20 % for medium-sized enterprises and 15 % for large enterprises if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force. The aid intensity is 20 % for small enterprises, 15 % for medium-sized enterprises and 10 % for large enterprises if the implementation and finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

	Aid intensity for aid for early adaptation to Community standards when the implementation and finalisation take place	
	More than three years before the entry into force of the standard	Between one and three years before the entry into force of the standard
Small enterprises	25 %	20 %
Medium-sized enterprises	20 %	15 %
Large Enterprises	15 %	10 %

Eligible costs

- (89) Eligible costs must be limited to 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.
- (90) Eligible costs must be calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of this investment, as set out in points 81, 82 and 83.

3.1.4. *Aid for environmental studies*

(91) Aid to companies for studies directly linked to investments for the purposes of achieving standards under the conditions set out in section 3.1.1, of achieving energy saving under the conditions set out in section 3.1.5, of producing renewable energy under the conditions set out in section 3.1.6 will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty if the conditions set out in this chapter are fulfilled. This will also apply in cases where, following the findings of a preparatory study, the investment under investigation is not undertaken.

(92) The aid intensity must not exceed 50 % of the costs of the study.

(93) Where the study is undertaken on behalf of an SME, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Environmental studies
Small enterprises	70 %
Medium-sized enterprises	60 %
Large enterprises	50 %

3.1.5. *Aid for energy saving*

(94) Investment and/or operating aid enabling undertakings to achieve energy savings will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, if the following conditions are fulfilled:

3.1.5.1. *Investment aid**Aid intensity*

(95) The aid intensity must not exceed 60 % of the eligible investment costs.

(96) Where the investment aid for energy saving is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for energy saving
Small enterprises	80 %
Medium-sized enterprises	70 %
Large enterprises	60 %

(97) Where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria, effectively ensuring that the aid is limited to the minimum necessary for achieving the maximum energy saving, the aid intensity may amount

to up to 100 % of the eligible investment cost as defined in point 98. Such a bidding process must be non-discriminatory and must provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid. Finally, the aid must be granted on the basis of the initial bid submitted by the bidder, thus excluding subsequent negotiations.

Eligible costs

(98) Eligible costs must be limited to the extra investment costs necessary to achieve energy savings beyond the level required by the Community standards.

The calculation of extra costs must respect the following rules:

a) *the part of the investment directly related to energy saving* must be identified in accordance with the rules laid down in points 81 and 83 of these Guidelines;

b) *a level of energy saving higher than Community standards* must be identified in accordance with the rules laid down in point 84 of these Guidelines;

c) *identifying operating benefits/costs*: eligible costs must be calculated net of any operating benefits and operating 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 CO₂ Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO₂ Emission Trading System. For large undertakings this period can 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.

3.1.5.2. *Operating aid*

(99) Operating aid for energy saving shall be granted only if the following conditions are met:

a) the aid is limited to compensating for net extra production costs resulting from the investment, taking account of benefits resulting from energy saving⁽⁴³⁾. In determining the amount of operating aid, any investment aid granted to the undertaking in question in respect of the new plant must be deducted from production costs;

⁽⁴³⁾ The concept of production costs must be understood as being net of any aid but inclusive of a normal level of profit.

b) the aid is subject to a limited duration of five years.

- (100) In the case of aid which is gradually reduced, the aid intensity must not exceed 100 % of the extra costs in the first year but must have fallen in a linear fashion to zero by the end of the fifth year. In the case of aid which does not decrease gradually, the aid intensity must not exceed 50 % of the extra costs.

3.1.6. Aid for renewable energy sources

- (101) Environmental investment and operating aid for the promotion of energy from renewable sources will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, if the conditions in points 102 to 111 are fulfilled. State aid may be justified if there is no mandatory Community standard concerning the share of energy from renewable sources for individual undertakings. Aid for investment and/or operating aid for the production of biofuels shall be allowed only with regard to sustainable biofuels.

3.1.6.1. Investment aid

Aid intensity

- (102) The aid intensity must not exceed 60 % of the eligible investment costs.
- (103) Where the investment aid for renewable energy sources is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for renewable energy sources
Small enterprises	80 %
Medium-sized enterprises	70 %
Large enterprises	60 %

- (104) Where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria, effectively ensuring that the aid is limited to the minimum necessary for delivering maximum renewable energy, the aid intensity may amount to up to 100 % of the eligible investment cost as defined in points 105 and 106. Such a bidding process must be non-discriminatory and must provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid. Finally, the aid must be granted on the basis of the initial bid submitted by the bidder, thus excluding subsequent negotiations.

Eligible costs

- (105) For renewable energy, eligible investment costs must be limited to the extra investment 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.

- (106) Eligible costs must be calculated net of any operating benefits and operating costs related to the extra investment for renewable sources of energy and arising during the first five years of the life of this investment, as set out in points 81, 82 and 83.

3.1.6.2. Operating aid

- (107) Operating aid for the production of renewable energy may be justified in order to cover the difference between the cost of producing energy from renewable energy sources and the market price of the form of energy concerned. That applies to the production of renewable energy for the purposes of subsequently selling it on the market as well as for the purposes of the undertaking's own consumption.

- (108) Member States may grant aid for renewable energy sources as follows:

(109) **Option 1**

- a) Member States may grant operating aid to compensate for the difference between the cost of producing energy from renewable sources, including depreciation of extra investments for environmental protection, and the market price of the form of energy concerned. Operating aid may then be granted until the plant has been fully depreciated according to normal accounting rules. Any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.
- b) Where aid is granted in accordance with point (a) any investment aid granted to the undertaking in question in respect of the new plant must be deducted from production costs when determining the amount of operating aid. When notifying aid schemes to the Commission, Member States must state the precise support mechanisms and in particular the methods of calculating the amount of aid.
- c) Unlike most other renewable sources of energy, biomass requires relatively low investment costs, but higher operating costs. The Commission will, therefore, be amenable to operating aid for the production of renewable energy from biomass exceeding the amount of investment where Member States can show that the aggregate costs borne by the undertakings after plant depreciation are still higher than the market prices of the energy.

(110) Option 2

- a) Member States may also grant support for renewable energy sources by using market mechanisms such as green certificates or tenders. These market mechanisms allow all renewable energy producers to benefit indirectly from guaranteed demand for their energy, at a price above the market price for conventional power. The price of these green certificates is not fixed in advance but depends on supply and demand.
- b) Where the market mechanisms constitute State aid, they may be authorised by the Commission if Member States can show that support is essential to ensure the viability of the renewable energy sources concerned, does not in the aggregate result in overcompensation and does not dissuade renewable energy producers from becoming more competitive. The Commission will authorise such aid systems for a period of ten years.

(111) Option 3

Furthermore, Member States may grant operating aid in accordance with the provisions set out in point 100.

3.1.7. Aid for cogeneration

(112) Environmental investment and operating aid for cogeneration will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, provided that the cogeneration unit satisfies the definition of high-efficiency cogeneration set out in point 70(11), and provided that for investment aid:

- (a) a new cogeneration unit will overall make primary energy savings compared to separate production as defined by Directive 2004/8/EC and Decision 2007/74/EC;
- (b) improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit will result in primary energy savings compared to the original situation.

(113) For operating aid, an existing cogeneration must satisfy both the definition of high-efficiency cogeneration set out in point 70(11) and the requirement that there are overall primary energy savings compared to separate production as defined by Directive 2004/8/EC and Decision 2007/74/EC.

3.1.7.1. Investment aid*Aid intensity*

- (114) The aid intensity must not exceed 60 % of the eligible investment costs.
- (115) Where the investment aid for cogeneration is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for high-efficiency cogeneration
Small enterprises	80 %
Medium-sized enterprises	70 %
Large enterprises	60 %

(116) Where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria, effectively ensuring that the aid is limited to the minimum necessary for achieving the maximum energy saving, the aid intensity may amount to up to 100 % of the eligible investment cost as defined in points 117 and 118. Such a bidding process must be non-discriminatory and must provide for the participation of a sufficient number of companies. In addition, the budget related to the bidding process must be a binding constraint in a sense that not all participants can receive aid. Finally, the aid must be granted on the basis of the initial bid submitted by the bidder, thus excluding subsequent negotiations.

Eligible costs

(117) Eligible costs must be limited to the extra investment costs necessary to realise a high-efficiency cogeneration plant as compared to the reference investment.

(118) Eligible costs must be calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of this investment, as set out in points 81 to 83.

3.1.7.2. Operating aid

(119) Operating aid for high-efficiency cogeneration may be granted in accordance with the rules for operating aid for renewable energy laid down in section 3.1.6.2:

- a) to undertakings distributing electric power and heat to the public where the costs of producing such electric power or heat exceed its market price. The decision as to whether the aid is necessary will take account of the costs and revenue resulting from the production and sale of the electric power or heat;
- b) for the industrial use of the combined production of electric power and heat where it can be shown that the production cost of one unit of energy using that technique exceeds the market price of one unit of conventional energy. The production cost may include the plant's normal return on capital, but any gains by the undertaking in terms of heat production must be deducted from production costs.

3.1.8. *Aid for energy-efficient district heating*

- (120) Environmental investment aid in energy-efficient district heating installations ⁽⁴⁴⁾ will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, provided that it leads to primary energy savings and that the beneficiary district heating installation satisfies the definition of energy-efficient district heating set out in point 70(13) and that:
- the combined operation of the generation of heat (as well as electricity in the case of cogeneration) and the distribution of heat will result in primary energy savings; or
 - the investment is meant for the use and distribution of waste heat for district heating purposes.

Aid intensity

- (121) The aid intensity for district heating installations must not exceed 50 % of the eligible investment costs. If the aid is intended solely for the generation part of a district heating installation, energy-efficient district heating installations using renewable sources of energy or cogeneration will be covered by the rules set out in sections 3.1.6 and 3.1.7 respectively.
- (122) Where the investment aid for energy-efficient district heating is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for energy-efficient district heating using conventional sources of energy
Small enterprises	70 %
Medium-sized enterprises	60 %
Large enterprises	50 %

- (123) Where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria, effectively ensuring that the aid is limited to the minimum necessary for achieving the maximum energy saving, the aid intensity may amount to up to 100 % of the eligible investment cost as defined in points 124 and 125. Such a bidding process must be non-discriminatory and must provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid. Finally, the aid must be granted on the basis of the initial bid submitted by the bidder, thus excluding subsequent negotiations.

⁽⁴⁴⁾ To the exclusion of district heating infrastructure the financing of which does not fall within the scope of the present Guidelines but which will be assessed only under Article 87(3)(c).

Eligible costs

- (124) Eligible costs must be limited to the extra investment costs necessary to realise an investment leading to energy-efficient district heating as compared to the reference investment.
- (125) Eligible costs must be calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of this investment, as set out in points 81 to 83.

3.1.9. *Aid for waste management*

- (126) Environmental investment aid for the management of waste of other undertakings, including activities of re-utilisation, recycling and recovery, will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, provided that such management is in accordance with the hierarchical classification of the principles of waste management ⁽⁴⁵⁾ and is in accordance with the conditions set out in point 127.
- (127) Investment aid for waste management shall be granted only if each of the following conditions are met:
- the investment is aimed at reducing pollution generated by other undertakings ('polluters') and does not extend to pollution generated by the beneficiary of the aid;
 - the aid does not indirectly relieve the polluters from a burden that should be borne by them under Community law, or from a burden that should be considered a normal company cost for the polluters;
 - the investment goes beyond the 'state of the art' ⁽⁴⁶⁾ or uses conventional technologies in an innovative manner;
 - the materials treated would otherwise be disposed of, or be treated in a less environmentally friendly manner;

⁽⁴⁵⁾ Classification given in the Communication from the Commission on the review of the Community Strategy for Waste Management (COM(96) 399 final, 30.7.1996). In that communication, the Commission stresses that waste management is a priority objective for the Community in order to reduce the risks to the environment. The concept of waste treatment must be looked at from three angles: re-utilisation, recycling and recovery. Waste whose production is unavoidable must be treated and eliminated without danger. In its Communication on a Thematic Strategy for the prevention and recycling of waste (COM(2005) 666), the Commission reiterated its commitment to these principles and allows for concrete measures towards promoting prevention, such as eco-design of processes and products or incentives to SMEs to put in place waste prevention measures, and recycling.

⁽⁴⁶⁾ 'State of the art' shall mean a process in which the use of a waste product to manufacture an end product is economically profitable normal practice. Where appropriate, the concept of 'state of the art' must be interpreted from a Community technological and common market perspective.

- e) the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials.

Aid intensity

- (128) The aid intensity must not exceed 50 % of the eligible investment costs.
- (129) Where the investment aid for waste management is to be given to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for waste management
Small enterprises	70 %
Medium-sized enterprises	60 %
Large enterprises	50 %

Eligible costs

- (130) Eligible costs must be limited to the extra investment costs necessary to realise an investment leading to waste management and borne by the beneficiary compared to the reference investment, that is to say, a conventional production not involving waste management with the same capacity. The cost of such reference investment must be deducted from the eligible cost.
- (131) Eligible costs must be calculated net of any operating benefits and operating costs related to the extra investment for waste management and arising during the first five years of the life of this investment ⁽⁴⁷⁾, as set out in points 81 to 83.

3.1.10. *Aid for the remediation of contaminated sites*

- (132) Investment aid to undertakings repairing environmental damage by remediating contaminated sites will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty ⁽⁴⁸⁾ provided that it leads to an improvement of environmental protection. The environmental damage concerned covers damage to the quality of the soil or of surface water or groundwater.

Where the polluter is clearly identified, that person must finance the remediation in accordance with the 'polluter pays' principle, and no State aid may be granted. In this

⁽⁴⁷⁾ If the investment is concerned solely with environmental protection without any other economic benefits, no additional reduction will be applied in determining the eligible costs.

⁽⁴⁸⁾ Remediation work carried out by public authorities on their own land is not as such subject to Article 87 of the Treaty. Problems of State aid may, however, arise if the land is sold after remediation at a price below its market value. In this respect, the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3) is still applicable.

context, 'polluter' refers to the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter.

Where the polluter is not identified or cannot be made to bear the costs, the person responsible for the work may receive aid.

Aid intensity

- (133) Aid for the remediation of contaminated sites may amount to up to 100 % of the eligible costs.

The total amount of aid may under no circumstances exceed the actual expenditure incurred by the undertaking.

Eligible costs

- (134) The eligible costs are equal to the cost of the remediation work less the increase in the value of the land. All expenditure incurred by an undertaking in remediating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, ranks as eligible investment in the case of the remediation of contaminated sites

3.1.11. *Aid for the relocation of undertakings*

- (135) Investment aid for relocation of undertakings to new sites for environmental protection reasons will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty provided that the following conditions are met:

- a) the change of location must be dictated by environmental protection or prevention grounds and must have been ordered by the administrative or judicial decision of a competent public authority or agreed between the undertaking and the competent public authority;
- b) the undertaking must comply with the strictest environmental standards applicable in the new region where it is located.

- (136) The beneficiary can be:

- a) an undertaking established in an urban area or in a special area of conservation designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ⁽⁴⁹⁾, which lawfully carries out (that is to say, it complies with all legal requirements including all environmental standards applicable to it) an activity that creates major pollution and must, on account of that location, move from its place of establishment to a more suitable area; or

⁽⁴⁹⁾ OJ L 206, 22.7.1992, p. 7. Directive as last amended by Directive 2006/105/EC (OJ L 363, 20.12.2006, p. 368).

- b) an establishment or installation falling within the scope of the Seveso II Directive.

Aid intensity

- (137) The aid intensity must not exceed 50 % of the eligible investment costs. The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table.

	Aid intensity for relocation
Small enterprises	70 %
Medium-sized enterprises	60 %
Large enterprises	50 %

Eligible costs

- (138) In order to determine the amount of eligible costs in the case of relocation aid, the Commission will take into account, in particular:

- a) the following benefits:
- i) the yield from the sale or renting of the plant or land abandoned;
 - ii) the compensation paid in the event of expropriation;
 - iii) any other gains connected with the transfer of the plant, notably gains resulting from an improvement, on the occasion of the transfer, in the technology used and accounting gains associated with better use of the plant;
 - iv) investments relating to any capacity increase;
- b) the following costs:
- i) the costs connected with the purchase of land or the construction or purchase of new plant of the same capacity as the plant abandoned;
 - ii) any penalties imposed on the undertaking for having terminated the contract for the renting of land or buildings, if the administrative or judicial decision ordering the change of location results in the early termination of this contract.

3.1.12. *Aid involved in tradable permit schemes*

- (139) Tradable permit schemes may involve State aid in various ways, for example when permits and allowances are granted for less than their market value and such granting is imputable to Member States.

- (140) State aid involved in tradable permit schemes may be declared compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty, provided that the conditions in points (a) to (d) of this point and point 141 are fulfilled. By derogation point 141 does not apply for the trading period ending on 31 December 2012 for tradable permit schemes in accordance with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC⁽⁵⁰⁾ (hereafter 'EU ETS')⁽⁵¹⁾:

- a) the tradable permit schemes must be set up in such a way as to achieve environmental objectives beyond those intended to be achieved on the basis of Community standards that are mandatory for the undertakings concerned;
- b) the allocation must be carried out in a transparent way, based on objective criteria and on data sources of the highest quality available, and the total amount of tradable permits or allowances granted to each undertaking for a price below their market value must not be higher than its expected needs as estimated for the situation in absence of the trading scheme;
- c) the allocation methodology must not favour certain undertakings or certain sectors, unless this is justified by the environmental logic of the scheme itself or where such rules are necessary for consistency with other environmental policies;
- d) in particular, new entrants shall not in principle receive permits or allowances on more favourable conditions than existing undertakings operating on the same markets. Granting higher allocations to existing installations compared to new entrants should not result in creating undue barriers to entry.

- (141) The Commission will assess the necessity and the proportionality of State aid involved in a tradable permit scheme according to the following criteria:

- a) the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation;
- b) full auctioning must lead to a substantial increase in production costs for each sector or category of individual beneficiaries;

⁽⁵⁰⁾ OJ L 275, 25.10.2003, p. 32. Directive as last amended by Directive 2004/101/EC (OJ L 338, 13.11.2004, p. 18).

⁽⁵¹⁾ The Commission has assessed the State aid involved in the National Allocation Plans under the EU ETS for the trading period ending on 31 December 2012 on the basis of the criteria set out in point 140.

- c) the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions. This analysis may be conducted on the basis of estimations of *inter alia* the product price elasticity of the sector concerned. These estimations will be made in the relevant geographic market. To evaluate whether the cost increase from the tradable permit scheme cannot be passed on to customers, estimates of lost sales as well as their impact on the profitability of the company may be used;
- d) it is not possible for individual undertakings in the sector to reduce emission levels in order to make the price of the certificates bearable. Irreducible consumption may be demonstrated by providing the emission levels derived from best performing technique in the European Economic Area (hereafter 'EEA') and using it as a benchmark. Any undertaking reaching the best performing technique can benefit at most from an allowance corresponding to the increase in production cost from the tradable permit scheme using the best performing technique, and which cannot be passed on to customers. Any undertaking having a worse environmental performance shall benefit from a lower allowance, proportionate to its environmental performance.

3.2. Incentive effect and necessity of aid

- (142) State aid must have an incentive effect. State aid for environmental protection must result in the aid recipient changing its behaviour so that the level of environmental protection is increased.
- (143) The Commission considers that aid does not present an incentive effect for the beneficiary in all cases in which the project has already started prior to the aid application by the beneficiary to the national authorities.
- (144) If the aided project has not started before the aid application, the requirement of incentive effect is presumed to be automatically met for all categories of aid granted to an SME, except in cases where the aid must be assessed in accordance with the detailed assessment in chapter 5.
- (145) For all other aided projects, the Commission will require that the incentive effect is demonstrated by the notifying Member State.
- (146) To demonstrate the incentive effect, the Member State concerned must prove that without the aid, that is to say, in the counterfactual situation, the more environmentally friendly alternative would not have been retained. For this purpose, the Member State concerned must provide information demonstrating:
 - a) that the counterfactual situation is credible;

- b) that the eligible costs have been calculated in accordance with the methodology set out in points 81, 82 and 83, and
- c) that the investment would not be sufficiently profitable without aid, due account being taken of the benefits associated with the investment without aid, including the value of tradable permits which may become available to the undertaking concerned following the environmentally friendly investment.

3.3. Compatibility of aid under Article 87(3)(b) of the EC Treaty

- (147) Aid to promote the execution of important projects of common European interest which are an environmental priority may be considered compatible with the common market according to Article 87(3)(b) of the EC Treaty provided that the following conditions are fulfilled:
 - a) the aid proposal concerns a project which is specific and clearly defined in respect of the terms of its implementation including its participants, its objectives and effects and the means to achieve the objectives. The Commission may also consider a group of projects as together constituting a project;
 - b) the project must be in the common European interest: the project must contribute in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection, such as by being of great importance for the environmental strategy of the European Union. The advantage achieved by the objective of the project must not be limited to the Member State or the Member States implementing it, but must extend to the Community as a whole. The project must present a substantive contribution to the Community objectives. The fact that the project is carried out by undertakings in different Member States is not sufficient;
 - c) the aid is necessary and presents an incentive for the execution of the project, which must involve a high level of risk;
 - d) the project is of great importance with regard to its volume: it must be substantial in size and produce substantial environmental effects.
- (148) In order to allow the Commission to properly assess such projects, the common European interest must be demonstrated in practical terms: for example, it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental objectives of the Community.
- (149) The Commission will consider notified projects more favourably if they include a significant own contribution of the beneficiary to the project. It will equally consider more favourably notified projects involving undertakings from a significant number of Member States.

(150) When the aid is considered to be compatible with the common market in accordance with Article 87(3)(b) of the EC Treaty, the Commission may authorise aid at higher rates than otherwise laid down in these Guidelines.

4. AID IN THE FORM OF REDUCTIONS OF OR EXEMPTIONS FROM ENVIRONMENTAL TAXES

(151) Aid in the form of reductions of or exemptions from environmental taxes will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reductions and exemptions do not undermine the general objective pursued.

(152) In order to be approved under Article 87 of the EC Treaty, reductions of or exemptions from harmonised taxes, in particular those harmonised through Directive 2003/96/EC, must be compatible with the relevant applicable Community legislation and comply with the limits and conditions set out therein.

(153) Aid in the form of tax reductions and exemptions from harmonised environmental taxes is considered to be compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty for a period of 10 years provided the beneficiaries pay at least the Community minimum tax level set by the relevant applicable Directive ⁽⁵²⁾.

(154) Aid in the form of reductions of or exemptions from environmental taxes other than those referred to in point 153 ⁽⁵³⁾ is considered to be compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty for a period of 10 years provided that the conditions set out in points 155 to 159 are fulfilled.

(155) When analysing tax schemes which include elements of State aid in the form of reductions of or exemptions from such tax, the Commission will analyse in particular the necessity and proportionality of the aid and its effects at the level of the economic sectors concerned.

(156) For this purpose the Commission will rely on information provided by Member States. Information should include, on the one hand, the respective sector(s) or categories of beneficiaries covered by the exemptions/reductions and, on the other hand, the situation of the main beneficiaries in each sector concerned and how the taxation may contribute to environmental protection. The exempted sectors should be properly described and a list of the largest beneficiaries for each sector should be provided (considering notably turnover, market shares and size of the tax base). For each sector, information should be provided as to the best performing techniques within the EEA regarding the reduction of the environmental harm targeted by the tax.

⁽⁵²⁾ See point 70(15).

⁽⁵³⁾ For example, reductions of or exemptions from taxes which are not covered by Community legislation or which are below the Community minimum tax level.

(157) In addition, aid in the form of reductions of or exemptions from environmental taxes must be necessary and proportional.

(158) The Commission will consider the aid to be necessary if the following cumulative conditions are met:

- a) the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market ⁽⁵⁴⁾ if they are in a similar factual situation;
- b) the environmental tax without reduction must lead to a substantial increase in production costs for each sector or category of individual beneficiaries ⁽⁵⁵⁾;
- c) the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions. In this respect, Member States may provide estimations of *inter alia* the product price elasticity of the sector concerned in the relevant geographic market ⁽⁵⁶⁾ as well as estimates of lost sales and/or reduced profits for the companies in the sector/category concerned.

(159) The Commission will consider the aid to be proportional if one of the following conditions is met:

- a) the scheme lays down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. Under the aid scheme any undertaking reaching the best performing technique can benefit, at most, from a reduction corresponding to the increase in production costs from the tax, using the best performing technique, and which cannot be passed on to customers. Any undertaking having a worse environmental performance shall benefit from a lower reduction, proportionate to its environmental performance;
- b) aid beneficiaries pay at least 20 % of the national tax, unless a lower rate can be justified in view of a limited distortion of competition;

⁽⁵⁴⁾ As defined in the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

⁽⁵⁵⁾ With regard to energy products and electricity, 'energy-intensive business' as defined in Article 17(1)(a) of Directive 2003/96/EC shall be regarded as fulfilling this criterion as long as that provision remains in force.

⁽⁵⁶⁾ As defined in the Commission notice on the definition of the relevant market for the purposes of Community competition law.

- c) the reductions or exemptions are conditional on the conclusion of agreements between the Member State and the recipient undertakings or associations of undertakings whereby the undertakings or associations of undertakings commit themselves to achieve environmental protection objectives which have the same effect as if point (a) or (b) or the Community minimum tax level were applied. Such agreements or commitments may relate, among other things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure and must satisfy the following conditions:
- i) the substance of the agreements must be negotiated by each Member State and must specify in particular the targets and fix a time schedule for reaching the targets;
 - ii) Member States must ensure independent ⁽⁵⁷⁾ and timely monitoring of the commitments concluded in these agreements;
 - iii) these agreements must be revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met.
- ii) *operating aid for energy saving*: where the aid amount exceeds EUR 5 million per undertaking for five years;
- iii) *operating aid for the production of renewable electricity and/or combined production of renewable heat*: when the aid is granted to renewable electricity installations in sites where the resulting renewable electricity generation capacity exceeds 125 MW;
- iv) *operating aid for the production of biofuel*: when the aid is granted to a biofuel production installation in sites where the resulting production exceeds 150 000 t per year;
- v) *operating aid for cogeneration*: where aid is granted to cogeneration installation with the resulting cogeneration electricity capacity exceeding 200 MW. Aid for the production of heat from cogeneration will be assessed in the context of notification based on electricity capacity.

5. COMPATIBILITY OF AID SUBJECT TO A DETAILED ASSESSMENT

5.1. Measures subject to a detailed assessment

(160) In order to enable the Commission to carry out a more detailed assessment of any substantial amounts of aid granted under authorised schemes and to decide whether such aid is compatible with the common market, Member States must notify it in advance of any individual case of investment or operating aid granted under an authorised scheme or individually where the aid satisfies the following conditions ⁽⁵⁸⁾:

- a) **for measures covered by a BER**: all cases notified to the Commission pursuant to a *duty to notify aid individually* as prescribed in the BER;
- b) **for individual measures covered by these Guidelines** ⁽⁵⁹⁾: all the following cases:
 - i) *investment aid*: where the aid amount exceeds EUR 7.5 million for one undertaking (even if part of an approved aid scheme);

⁽⁵⁷⁾ It is irrelevant for these purposes whether the monitoring is done by a public or a private body.

⁽⁵⁸⁾ This also applies irrespective of whether the individual beneficiary benefits at the same time from a tax exemption or reduction assessed under chapter 4.

⁽⁵⁹⁾ Tax exemptions and reductions from environmental taxes falling under chapter 4 of these guidelines will not be subject to a detailed assessment. However, aid granted in accordance with chapter 3 in the form of fiscal aid will be subject to a detailed assessment if the thresholds in this point are exceeded.

(161) Member States may grant operating aid to new plants producing renewable energy on the basis of a calculation of the external costs avoided. Where this method is used to determine the aid amount, the measure must be notified and be subject to detailed assessment, regardless of the thresholds in point 160(b)(iii). The external costs avoided represent a monetary quantification of the additional socio-environmental damage that society would experience if the same quantity of energy were produced by a production plant operating with conventional forms of energy. They will be calculated on the basis of the difference between, on the one hand, the external costs produced and not paid by renewable energy producers and, on the other hand, the external costs produced and not paid by non-renewable energy producers. To carry out these calculations, the Member State will have to use a method of calculation that is internationally recognised and has been validated by the Commission. It will have to provide among other things a reasoned and quantified comparative cost analysis, together with an assessment of competing energy producers' external costs, so as to demonstrate that the aid does genuinely compensate for external costs avoided.

(162) In any event, the amount of aid granted to producers that exceeds the amount of aid resulting from option 1 set out in point 109 for operating aid for renewable sources of energy must be reinvested by the firms in renewable sources of energy in accordance with section 3.1.6.1.

(163) Provided that Member States ensure full cooperation and supply adequate information in a timely manner, the Commission will use its best endeavours to conduct the investigation in a timely manner. Member States are invited to provide all the elements that they consider useful for the assessment of the case. The Member States may, in particular, rely on evaluations of past State aid schemes or measures, impact assessments made by the granting authority and other studies related to environmental protection.

(164) The detailed assessment is a proportionate assessment, depending on the distortion potential of the case. Accordingly, the fact that a detailed assessment is carried out does not necessarily mean that a formal investigation procedure needs to be opened, although this may be the case for certain measures.

5.2. Criteria for economic assessment of individual cases

(165) The detailed assessment will be conducted on the basis of the positive and negative elements specified in sections 5.2.1 and 5.2.2 which will be used in addition to the criteria set out in Chapter 3. The aid intensities set out therein must in any event not be exceeded. Furthermore, the detailed assessment will be conducted on the basis of the specific positive and negative elements, when they are relevant for the type or form of aid.

5.2.1. Positive effects of the aid

(166) The fact that the aid induces undertakings to pursue environmental protection which they would not otherwise have pursued constitutes the main positive element to be taken into consideration when assessing the compatibility of the aid.

5.2.1.1. Existence of a market failure

(167) The Commission will in general not question whether there are negative externalities related to certain types of conduct or the use of certain goods which have harmful effects on the environment. However, the Commission will verify whether the State aid is targeted at this market failure by having a substantial impact on environmental protection. In this context, the Commission will pay attention in particular to the expected contribution of the measure to environmental protection (in quantifiable terms) and the level of environmental protection targeted, as compared to existing Community standards and/or standards in other Member States.

(168) The Commission will also examine the considerations that may justify aid for adapting to national standards going beyond Community standards. The Commission will take into account in particular the nature, type and location of the main competitors of the aid beneficiary, the cost of implementation of the national standards (or tradable permit schemes) for the aid beneficiary had no aid been given, and the comparative costs of implementation of those standards for the main competitors of the aid beneficiary.

5.2.1.2. Appropriate instrument

(169) Account will be taken of whether State aid is an appropriate instrument to obtain the objective of environmental protection, given that other less distortive instruments may achieve the same results and since State aid may breach the PPP.

(170) In its compatibility analysis, the Commission will in particular take account of any impact assessment of the proposed measure which the Member State may have made, including considerations of using policy options other than State aid, and take account of evidence that the PPP will be respected.

5.2.1.3. Incentive effect and necessity of aid

(171) State aid must always have an incentive effect, when it is provided for environmental purposes, that is to say it must result in the recipient changing its behaviour to increase the level of environmental protection. Aid cannot be considered necessary solely because the level of environmental protection is increased. The advantages of new investments or production methods are normally not limited to their environmental effects.

(172) In addition to the calculation of extra costs outlined in Chapter 3, the Commission will take into account the following elements in its analysis:

a) **counterfactual situation:** evidence must be provided about the specific action(s) that would not have been taken by the undertaking without the aid, for instance, a new investment, a more environmentally friendly production process and/or a new product that is more environmentally friendly;

b) **expected environmental effect linked to the change in behaviour:** at least one of the following elements must be present:

i) *increase in the level of environmental protection:* reduction of a specific type of pollution that would not be reduced without the aid;

ii) *increase in speed of the implementation of future standards:* reduction in pollution starting at an earlier point in time owing to the aid;

c) **production advantages:** if there are other advantages linked to the investment in terms of increased capacity, productivity, cost reductions or quality, the incentive effect is normally lower. This is in particular the case if the benefits over the life time of the investment are substantial, possibly to the extent that the extra environmental costs can be recouped even without aid;

- d) **market conditions:** in some markets, notably due to product image and the labelling of production methods, there may be competitive pressure to maintain a high level of environmental protection. If there is evidence that the level of environmental protection resulting from the aid goes beyond the normal behaviour in the market, it is more likely that the aid has an incentive effect;
- e) **possible future mandatory standards:** if there are negotiations at Community level to introduce new or higher mandatory standards which the measure concerned would seek to target, the incentive effect of aid is normally lower;
- f) **level of risk:** if there is a particular risk that the investment will be less productive than expected, the incentive effect of aid will normally be higher;
- g) **level of profitability:** if the level of profitability of the action pursued is negative over the time horizon by which the investment is fully depreciated or the operating aid is intended to be in force, account being taken of all the advantages and risks identified in this point, aid will normally have an incentive effect.
- (173) Where the undertaking is adapting to a national standard going beyond Community standards or adopted in the absence of Community standards, the Commission will verify that the aid beneficiary would have been affected substantially in terms of increased costs and would not have been able to bear the costs associated with the immediate implementation of national standards.

5.2.1.4. Proportionality of the aid

- (174) The Member State should provide evidence that the aid is necessary, that the amount is kept to the minimum and that the selection process is proportional. In its analysis the Commission will consider the following elements:
- a) **accurate calculation of the eligible costs:** evidence that the eligible costs are indeed limited to the extra costs necessary to achieve the level of environmental protection;
- b) **selection process:** the **selection** process should be conducted in a non-discriminatory, transparent and open manner, without unnecessarily excluding companies that may compete with projects to address the same environmental objective. The selection process should lead to the selection of beneficiaries that can address the environmental objective using the least amount of aid or in the most cost-effective way;
- c) **aid limited to the minimum:** evidence that the aid amount does not exceed the expected lack of profitability including a normal return over the time horizon for which the investment is fully depreciated.

5.2.2. Analysis of the distortion of competition and trade

- (175) In assessing the negative effects of the aid measure, the Commission will focus its analysis of the distortions of competition on the foreseeable impact the environmental aid has on competition between undertakings in the product markets affected ⁽⁶⁰⁾.
- (176) If the aid is proportional, notably if the calculation of the extra investment or operating costs has taken into account all advantages to the undertaking, the negative impact of the aid is likely to be limited. However, as mentioned in section 1.3.6 even where aid is necessary and proportional for the specific undertaking to increase the environmental protection, the aid may result in a change in behaviour of the beneficiary which distorts competition. A profit-seeking undertaking will normally only increase the level of environmental protection beyond mandatory requirements if it considers that this will result at least marginally in some sort of advantage for the undertaking.
- (177) As a starting point, the Commission will assess the likelihood that the beneficiary will be able to increase or maintain sales as a result of the aid. The Commission will in particular consider the following elements:
- a) **reduction in or compensation of production unit costs:** if the new equipment ⁽⁶¹⁾ will lead to reduced costs per unit produced compared to the situation without the aid or if the aid compensates a part of the operating cost, it is likely that the beneficiary will increase its sales. The more price elastic the product, the greater the competition distortion;
- b) **more environmentally friendly production process:** if the beneficiary obtains a more environmentally friendly production process and if it is common through labelling or image to differentiate the product towards consumers on the basis of the level of environmental protection, it is likely that the beneficiary can increase its sales. The greater the consumer preference for environmental product characteristics, the greater the competition distortion;
- ⁽⁶⁰⁾ A number of markets may be affected by the aid, because the impact of the aid may not be restricted to the market corresponding to the activity that is supported but may extend to other markets, which are connected to that market either because they are upstream, downstream or complementary, or because the beneficiary is already present on them or may be so present in the near future.
- ⁽⁶¹⁾ The calculation of extra costs may not fully capture all operating benefits, since the benefits are not deducted over the life time of the investment. In addition, certain types of benefits, for example linked to increased productivity and increased production with unaltered capacity, may be difficult to take into account.

- c) **new product:** if the beneficiary obtains a new or higher quality product it is likely that it will increase its sales and possibly gain a 'first mover' advantage. The greater the consumer preference for environmental product characteristics, the greater the competition distortion.

5.2.2.1. Dynamic incentives/crowding out

- (178) State aid for environmental protection may be used strategically to promote innovative environmentally friendly technologies with the aim of giving domestic producers a 'first mover' advantage. Consequently, the aid may distort the dynamic incentives and crowd out investments in the specific technology in other Member States and lead to a concentration of this technology in one Member State. This effect is higher the more competitors reduce their innovative effort as compared to the no-aid counterfactual.

- (179) In its analysis, the Commission will consider the following elements:

- a) **amount of aid:** the higher the amount of aid, the more likely it is that part of the aid can be used to distort competition. This is in particular the case if the aid amount is high compared to the size of the general activity of the beneficiary;
- b) **frequency of aid:** if an undertaking receives aid repeatedly, it is more likely that this will distort dynamic incentives;
- c) **duration of the aid:** if operating aid is granted for a long period, this is more likely to distort competition;
- d) **gradual decrease of aid:** if operating aid is reduced over time, the undertaking will have an incentive to improve efficiency and the distortion of dynamic incentives will therefore be reduced over time;
- e) **readiness to meet future standards:** if the aid will enable the undertaking concerned to meet new Community standards expected to be adopted in the foreseeable future, the aided investment will reduce the costs of investments that the undertaking would have had to make in any event;
- f) **level of the regulatory standards in relation to the environmental objectives:** the lower the level of mandatory requirements the higher the risk that aid to go beyond mandatory requirements is not necessary and will crowd out investments or be used in a way that distorts dynamic incentives;

- g) **risk of cross-subsidisation:** where the undertaking produces a wide range of products or produces the same product using a conventional and an environmentally friendly process, the risk of cross-subsidisation is higher;

- h) **technological neutrality:** where a measure focuses on one technology only, the risk of distorting dynamic incentives is higher;

- i) **competing innovation:** where foreign competitors develop competing technologies (innovation competition), the more likely the aid will distort dynamic incentives.

5.2.2.2. Maintaining inefficient firms afloat

- (180) State aid for environmental protection may be justified as a transitional mechanism to move towards a full allocation of environmentally negative externalities. It should not be used to grant unnecessary support to undertakings which are unable to adapt to more environmentally friendly standards and technologies because of their low levels of efficiency. In its analysis, the Commission will consider the following elements:

- a) **type of beneficiaries:** where the beneficiary has a relatively low level of productivity and is in poor financial health, it is more likely that the aid will contribute to artificially maintaining the undertaking in the market;
- b) **overcapacity in the sector targeted by the aid:** in sectors where there is **overcapacity**, the risk is higher that investment aid will sustain the overcapacity and maintain inefficient market structures;
- c) **normal behaviour in the sector targeted by the aid:** if other undertakings in the sector have reached the same level of environmental protection without aid, it is more likely that the aid will serve to maintain inefficient market structures. Thus, the weaker the evidence that PPP is respected by the beneficiary and the greater the fraction of external environmental cost internalised by the beneficiary's competitors, the more significant the competition distortion;
- d) **relative importance of the aid:** the greater the reduction/compensation to variable production costs, the greater the **competition** distortion;

- e) **selection process:** if the selection process is conducted in a non-discriminatory, transparent and open manner it is less likely that the aid will contribute to artificially maintaining the undertaking in the market. The more extensive (in terms of relevant market coverage) and the more competitive (in terms of auctioning/procurement) the allocation of a subsidy, the lower the competition distortion;
- f) **selectivity:** if the measure under which the aid is granted covers a relatively high number of potential beneficiaries, if it covers all undertakings in the relevant market and if it does not exclude companies that could address the same environmental objective, it is less likely that the aid will maintain inefficient firms in the market.

5.2.2.3. Market power/exclusionary behaviour

(181) Aid for environmental protection given to a beneficiary may be used to strengthen or maintain its market power in the given product market. The Commission will assess the market power of the beneficiary concerned before the aid is granted, and the change in market power which can be expected as a result of the aid. Aid for environmental protection given to a beneficiary with substantial market power may be used by this beneficiary to strengthen or maintain its market power, by further differentiating its products or excluding rivals. The Commission is unlikely to identify competition concerns related to market power in markets where each aid beneficiary has a market share below 25 % and in markets whose Herfindahl-Hirschman Index of market concentration is below 2 000.

(182) In its analysis, the Commission will consider the following elements:

- a) **market power of aid beneficiary and market structure:** Where the recipient is already dominant on the affected market ⁽⁶²⁾, the aid measure may reinforce this dominance by further weakening the competitive constraint that competitors can exert on the recipient undertaking;
- b) **new entry:** where the aid concerns product markets or technologies that compete with products where the aid recipient is an incumbent and has market power, the aid may be used strategically to prevent new entry. Thus, if the aid is not available to potential new entrants, the risk that the aid distorts competition is higher;

⁽⁶²⁾ A number of markets may be affected by the aid, because the impact of the aid may not be restricted to the market corresponding to the activity that is supported but may extend to other markets, which are connected to that market either because they are upstream, downstream or complementary, or because the beneficiary is already present on them or may be present in the near future.

- c) **product differentiation and price discrimination:** the aid may have the negative effect of facilitating product differentiation and price discrimination by the aid recipient, to the detriment of consumers;
- d) **buyer power:** where there are strong buyers in the market, it is less likely that an aid beneficiary with market power can increase prices vis-à-vis the strong buyers. Thus, the stronger the buyer power the less likely it is that the aid will harm consumers.

5.2.2.4. Effects on trade and location

(183) State aid for environmental protection may result in some territories benefiting from more favourable production conditions, notably because of comparatively lower production costs as a result of the aid or because of higher production standards achieved through the aid. This may result in companies re-locating to the aided territories, or to displacement of trade flows towards the aided area.

(184) Consequently, the aid will shift profits to the Member State in the product market concerned by the aid as well as in input markets.

(185) In its analysis, the Commission will consider whether there is evidence that the beneficiary had considered other locations for its investment, in which case it is more likely that the aid significantly distorts competition.

5.2.3. Balancing and decision

(186) In the light of these positive and negative elements, the Commission will balance the effects of the measure and determine whether the resulting distortions adversely affect trading conditions to an extent contrary to the common interest. Ideally, the positive effects and the negative effects should be expressed using the same referential (for example external cost avoided versus the loss of competitor's profits in monetary unit).

(187) In general, the higher the environmental benefit and the more clearly it is established that the aid amount is limited to the minimum necessary, the more likely a positive appraisal. On the other hand, the larger the indication that the aid will significantly distort competition, the less likely a positive appraisal. If the expected positive effects are extensive and the distortions are likely to be very significant, the appraisal will depend on the extent to which the positive effects are considered to outweigh the negative effects.

(188) The Commission may raise no objections to the notified aid measure without initiating the formal investigation procedure or, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999, may decide to close the procedure with a decision in accordance with Article 7 of that Regulation. Where it takes a conditional decision within the meaning of Article 7(4) of that Regulation, it may, for instance, consider attaching the following conditions, which must reduce the resulting distortions or effect on trade and be proportionate:

- a) **lower aid intensities** than the maximum intensities allowed in Chapter 3;
- b) **separation of accounts** in order to avoid cross-subsidisation from one market to another market, when the beneficiary is active in multiple markets;
- c) **additional requirements to be met to improve the environmental effect** of the measure;
- d) **no discrimination** against other potential beneficiaries (reduced selectivity).

6. CUMULATION

(189) The aid ceilings fixed under these Guidelines shall apply regardless of whether the support for the aided project is financed entirely from State resources or is partly financed by the Community.

(190) Aid authorised under these Guidelines may not be combined with other State aid within the meaning of Article 87(1) of the EC Treaty or with other forms of Community financing if such overlapping results in an aid intensity higher than that laid down in these Guidelines. However, where the expenditure eligible for aid for environmental protection is eligible in whole or in part for aid for other purposes, the common portion will be subject to the most favourable aid ceiling under the applicable rules.

(191) Aid for environmental protection must not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in these Guidelines.

7. FINAL PROVISIONS

7.1. Annual reporting

(192) In accordance with the requirements of Regulation (EC) No 659/1999 and 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 ⁽⁶³⁾, Member States must submit annual reports to the Commission.

⁽⁶³⁾ OJ L 140, 30.4.2004, p. 1. Regulation as last amended by Regulation (EC) No 1935/2006 (OJ L 407, 30.12.2006, p. 1).

(193) Beyond the requirements stipulated in those provisions, annual reports for environmental aid measures must contain, for each approved scheme, the following information as regards large undertakings:

- the names of the beneficiaries,
- the aid amount per beneficiary,
- the aid intensity,
- a description of the objective of the measure and of what type of environmental protection it is intended to promote,
- the sectors of activity where the aided projects are undertaken,
- an explanation of how the incentive effect has been respected, notably using the indicators and criteria mentioned in Chapter 5.

(194) In the case of tax exemptions or reductions, the Member State need provide only the legislative and/or regulatory text(s) establishing the aid and details of the categories of undertakings benefiting from tax reductions or exemptions and the sectors of the economy most affected by those tax exemptions/reductions.

(195) The annual reports will be published on the internet site of the Commission.

7.2. Transparency

(196) The Commission considers that further measures are necessary to improve the transparency of State aid in the Community. In particular, it is necessary to ensure that the Member States, economic operators, interested parties and the Commission itself have easy access to the full text of all applicable environmental aid schemes.

(197) This can easily be achieved through the establishment of linked internet sites. For this reason, when examining environmental aid schemes, the Commission will systematically require the Member State concerned to publish the full text of all final aid schemes on the internet and to communicate the internet address of the publication to the Commission. The scheme must not be applied before the information is published on the internet.

7.3. Monitoring and evaluation

(198) Member States must ensure that detailed records regarding the granting of aid for all environmental measures are maintained. Such records, which must contain all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed, must be maintained for 10 years from the date on which the aid was granted and be provided to the Commission upon request.

(199) The Commission will ask Member States to provide this information in order to carry out an evaluation of these Guidelines four years after their publication ⁽⁶⁴⁾.

7.4. Appropriate measures

(200) The Commission herewith proposes to Member States, on the basis of Article 88(1) of the EC Treaty, the following appropriate measures concerning their respective existing environmental aid schemes:

Member States should amend, where necessary, such schemes in order to bring them into line with these Guidelines within 18 months after their publication, with the following exceptions:

- i) Member States should amend, where necessary, schemes concerning aid in the form of tax reduction or exemption covered by Directive 2003/96/EC before 31 December 2012;
 - ii) the new thresholds mentioned in point 160 for individual projects will apply as from the first day following the publication of these Guidelines in the *Official Journal of the European Union*;
 - iii) the duty to provide more detailed annual reports will apply to aid granted under existing aid schemes as of 1 January 2009.
- (201) The Member States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of publication of these Guidelines in the *Official Journal of the European Union*. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

7.5. Application, validity and revision

- (202) These Guidelines will be applied from the first day following their publication in the *Official Journal of the European Union* and will replace the Community Guidelines on State aid for environmental protection of 3 February 2001 ⁽⁶⁵⁾.
- (203) These Guidelines will be applicable until 31 December 2014. After consulting the Member States, the Commission may amend them before that date on the basis of important competition policy or environmental policy considerations or in order to take account of other Community policies or international commitments. Such amendments might in particular be necessary in the light of future international agreements in the area of climate change and future European climate change legislation. Four years after the date of their publication, the Commission will undertake an evaluation of these Guidelines based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided by the Member States. The results of the evaluation will be made available to the European Parliament, the Committee of the Regions and the European Economic and Social Committee and to the Member States.
- (204) The Commission will apply these Guidelines to all notified aid measures in respect of which it is called upon to take a decision after the Guidelines are published in the *Official Journal*, even where the projects were notified prior to their publication. This includes individual aid granted under approved aid schemes and notified to the Commission pursuant to an obligation to notify such aid individually.
- (205) In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁶⁶⁾, the Commission will apply, in the case of non-notified aid,
- a) these Guidelines, if the aid was granted after their publication;
 - b) the guidelines applicable when the aid was granted, in all other cases.

⁽⁶⁷⁾ In that process, Member States may want to assist the Commission by providing their own ex post assessment of schemes and individual measures.

⁽⁶⁸⁾ OJ C 37, 3.2.2001, p. 3.

⁽⁶⁹⁾ OJ C 119, 22.5.2002, p. 22.

ANNEX

TABLE ILLUSTRATING THE AID INTENSITIES FOR INVESTMENT AID AS A PART OF ELIGIBLE COSTS

	Small enterprise	Medium-sized enterprise	Large enterprise
Aid for undertakings going beyond Community standards or increasing the level of environmental protection in the absence of Community standards	70 % 80 % if eco-innovation 100 % if bidding process	60 % 70 % if eco-innovation 100 % if bidding process	50 % 60 % if eco-innovation 100 % if bidding process
Aid for environmental studies	70 %	60 %	50 %
Aid for early adaptation to future Community standards			
— more than 3 years	25 %	20 %	15 %
— between 1 and 3 years	20 %	15 %	10 %
before the entry into force			
Aid for waste management	70 %	60 %	50 %
Aid for renewable energies	80 % 100 % if bidding process	70 % 100 % if bidding process	60 % 100 % if bidding process
Aid for energy saving Aid for cogeneration installations	80 % 100 % if bidding process	70 % 100 % if bidding process	60 % 100 % if bidding process
Aid for district heating using conventional energy	70 % 100 % if bidding process	60 % 100 % if bidding process	50 % 100 % if bidding process
Aid the remediation of contaminated sites	100 %	100 %	100 %
Aid for relocation of undertakings	70 %	60 %	50 %

ANNEX

PART III.10

SUPPLEMENTARY INFORMATION SHEET ON STATE AID FOR ENVIRONMENTAL PROTECTION

This supplementary information sheet must be used for the notification of any aid covered by the Community Guidelines on State aid for environmental protection (thereinafter the Environmental aid guidelines) ⁽¹⁾. It must also be used for individual aid for environmental protection which does not fall under any block exemption or is subject to individual notification obligation as it exceeds the individual notification thresholds laid down in the block exemption.

1. Basic characteristics of the notified measure

Please fill in the relevant parts of the notification form corresponding to the character of the notified measure. Please find below a basic guidance.

(A) Please specify the type of aid and fill in the appropriate subsections of **Section 3** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, fill in Section 3.1
- 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, fill in Section 3.1
- Aid for SMEs for early adaptation to future Community standards, fill in Section 3.2
- Aid for environmental studies, fill in Section 3.3
- Aid for energy saving, fill in Section 3.4
- Aid for renewable energy sources, fill in Section 3.5
- Aid for the cogeneration, fill in Section 3.6
- Aid for energy-efficient district heating, fill in Section 3.7
- Aid for waste management, fill in Section 3.8
- Aid for the remediation of contaminated sites, fill in Section 3.9
- Aid for the relocation of undertakings, fill in Section 3.10
- Aid involved in tradable permit schemes, fill in Section 3.11
- Aid in the form of reductions of or exemptions from environmental taxes, fill in Section 6.

Furthermore, please fill in: **Section 4** (Incentive effect and necessity of aid), **Section 7** (Criteria triggering a detailed assessment), **Section 8** (Additional information for detailed assessment) ⁽²⁾, and **Section 10** (Reporting and monitoring).

⁽¹⁾ OJ C 82, 1.4.2008, p. 1. For details concerning the use of this supplementary notification sheet in agriculture and fisheries sectors see Section 2.1 (points 59 and 61) of the Environmental aid guidelines.

⁽²⁾ Please note that Sections 4, 7 and 8 do not have to be filled in, in the case of tax exemptions and reductions from environmental taxes falling under Chapter 4 of the Environmental aid guidelines.

(B) Please explain the main characteristics (objective, likely effects of the aid, aid instrument, aid intensity, beneficiaries, budget etc.) of the notified measure.

(C) Can the aid be combined with other aid?

- yes
- no

If yes, fill in **Section 9** (Cumulation) of this supplementary information sheet.

(D) Is the aid granted in order to promote the execution of an important project of common European interest?

- yes
- no

If yes, please fill in **Section 5** (Compatibility of aid under Article 87(3)(b) of the EC Treaty) of this supplementary information sheet.

(E) In case the notified individual aid is based on an approved scheme, please provide details concerning that scheme (case number, title of the scheme, date of Commission approval):

.....

.....

(F) Please confirm that if the aid/bonus for small enterprises is granted, the beneficiaries comply with the definition for small enterprises as defined by the Community legislation:

- yes

(G) Please confirm that if the aid/bonus for medium enterprises is granted, the beneficiaries comply with the definition for medium enterprises as defined by the Community legislation:

- yes

(H) If applicable, please indicate the exchange rate which has been used for the purposes of the notification:

.....

.....

(I) Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

2. Objective of the aid

(A) In the light of the objectives of common interest addressed by the Environmental aid guidelines (Section 1.2) please indicate the environmental objectives pursued by the notified measure. Please give a detailed description of each distinct type of aid to be granted under the notified measure:

.....

.....

(B) If the notified measure has already been applied in the past please indicate its results in terms of environmental protection (please indicate the relevant case number and date of Commission approval and, if possible, attach national evaluation reports on the measure):

.....

.....

(C) If the measure is new, please indicate the expected results and the period over which they will be achieved:

.....
.....

3. **Compatibility of aid under Article 87(3)(c) of the EC Treaty**

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

3.1. *Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards* ⁽³⁾

3.1.1. Nature of the supported investments, applicable standards

(A) Please specify if the aid is granted for:

- investments enabling the beneficiary to increase the level of environmental protection resulting from its activities by improving on the applicable Community standards ⁽⁴⁾, irrespective of the presence of mandatory national standards that are more stringent than the Community standard;

or

- investments enabling the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

(B) Please provide details, including, where applicable, information on the relevant Community standards:

.....
.....

(C) If the aid is granted for reaching the national standard exceeding the Community standards, please indicate the applicable national standards and attach a copy:

.....
.....

3.1.2. Aid intensities and bonuses

In the case of aid schemes, the aid intensity must be calculated for each beneficiary of aid.

(A) What is the maximum aid intensity applicable to the notified measure ⁽⁵⁾?

(B) Is the aid granted in a genuinely competitive bidding process ⁽⁶⁾?

- yes no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....
.....

⁽³⁾ Cf. Environmental aid guidelines, Section 3.1.1.
⁽⁴⁾ Please note that aid may not be granted where improvements bring companies into line with Community standards already adopted and not yet in force.
⁽⁵⁾ The maximum aid intensity is 50 % of the eligible investment cost.
⁽⁶⁾ For details of the genuinely competitive bidding process required, see point 77 of the Environmental aid guidelines.

(C) Bonuses:

Do the supported projects benefit from a bonus?

- yes
- no

If yes, please specify below.

— Is an SME bonus applied under the notified measure?

- yes
- no

If yes, please specify the level of bonus applicable ⁽⁷⁾:

— Is the bonus for eco-innovation ⁽⁸⁾ applied under the notified measure?

- yes
- no

If yes, please describe how the following conditions are fulfilled:

- the eco-innovation asset or project is new or substantially improved compared to the state of the art in its industry in the Community;
- the expected environmental benefit is significantly higher than the improvement resulting from the general evolution of the state of the art in comparable activities;
- the innovative character of these assets or projects involves a clear degree of risk, in technological, market or financial terms, which is higher than the risk generally associated with comparable non-innovative assets or projects.

Please provide details demonstrating the compliance with the abovementioned conditions:

.....
.....

Specify the level of bonus applicable ⁽⁹⁾:

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

3.1.3. Eligible costs ⁽¹⁰⁾

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to achieve a higher level of environmental protection than required by the Community standards:

- yes

(B) Please further confirm that:

- the precise environmental protection related cost constitutes the eligible costs, if the cost of investing in environmental protection can be easily identified;
- or
- the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽¹¹⁾;
- and
- the eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for environmental protection and arising during the first five years of the life of the investment concerned.

⁽⁷⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽⁸⁾ Cf. for details see point 78 of the Environmental aid guidelines.

⁽⁹⁾ The aid intensity may be increased by 10 percentage points.

⁽¹⁰⁾ For details see points 80 to 84 of the Environmental aid guidelines.

⁽¹¹⁾ The correct counterfactual is 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. See point 81(b) of the Environmental aid guidelines.

- (C) What form do the eligible costs take?
 - investments in tangible assets;
 - investments in intangible assets.

- (D) In case of investments in tangible assets please indicate the form(s) of investments concerned:
 - investments in land which are strictly necessary in order to meet environmental objectives;
 - investments in buildings intended to reduce or eliminate pollution and nuisances;
 - investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
 - investments to adapt production methods with a view to protecting the environment.

- (E) In case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
 - it is regarded as a depreciable asset;
 - it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
 - it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽¹²⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;
- and
- all or part of the amount of aid will, where appropriate, be reimbursed.

- (F) In case of investments aiming at obtaining a level of environmental protection higher than Community standards, please confirm the relevant statements:
 - if the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
 - if the undertaking is adapting to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards ⁽¹³⁾;
 - if no standards exist, the eligible costs 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;

- (G) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

⁽¹²⁾ Please note that this condition does not apply if the intangible asset is technically out of date.
⁽¹³⁾ Please note that the cost of investments needed to reach the level of protection required by the Community standards is not eligible.

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

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

3.1.4. Specific rules on 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 ⁽¹⁴⁾

In the case of 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, in addition to sections 3.1.-3.1.3:

(A) Please confirm that new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards have been acquired before their entry into force and that the Community standards, once mandatory, do not apply retroactively to already purchased vehicles.

- yes

Please provide details:

.....
.....

(B) For retrofitting operations with an environmental protection objective in the transport sector, please confirm that:

- the existing means of transport are upgraded to environmental standards that were not yet in force at the date of the entry into operation of those means of transport;

or

- the means of transport are not subject to any environmental standards.

3.2. Aid for early adaptation to future Community standards ⁽¹⁵⁾

3.2.1. Basic conditions

(A) Please confirm that the investment is implemented and finalised at least one year before the entry into force of the standard.

- yes no

If yes, in the case of aid schemes, please provide details on how compliance with this condition is ensured:

.....
.....

If yes, in the case of individual aid please provide details and relevant evidence:

.....
.....

(B) Please provide details of the relevant Community standards, including the dates relevant for ensuring compliance with condition (A):

.....
.....

⁽¹⁴⁾ Cf. Environmental aid guidelines, Section 3.1.2.

⁽¹⁵⁾ Cf. Environmental aid guidelines, Section 3.1.3.

3.2.2. Aid intensities

What is the basic aid intensity applicable to the notified measure?

- for small enterprises ⁽¹⁶⁾:
- for medium-sized enterprises ⁽¹⁷⁾:
- for large enterprises ⁽¹⁸⁾:

3.2.3. Eligible costs

(A) Please confirm that the eligible costs are limited to 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:

- yes

(B) Please further confirm that:

- the precise environmental protection related cost constitutes the eligible costs, if the cost of investing in environmental protection can be easily identified;

or

- the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽¹⁹⁾;

and

- eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for environmental protection and arising during the first five years of the life of the investment concerned.

(C) What form do the eligible costs take?

- investments in tangible assets
- investments in intangible assets

(D) In case of investments in tangible assets please indicate the form(s) of investments concerned:

- investments in land which are strictly necessary in order to meet environmental objectives;
- investments in buildings intended to reduce or eliminate pollution and nuisances;
- investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- investments to adapt production methods with a view to protecting the environment.

⁽¹⁶⁾ The maximum aid intensity is 25 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 20 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

⁽¹⁷⁾ The maximum aid intensity is 20 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 15 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

⁽¹⁸⁾ The maximum aid intensity is 15 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 10 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

⁽¹⁹⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

(E) In case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:

- it is regarded as a depreciable asset;
- it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
- it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽²⁰⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;
- and
- all or part of the amount of aid will, where appropriate, be reimbursed.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

.....

3.3. Aid for environmental studies ⁽²¹⁾

3.3.1. Studies directly linked to investments aiming at achieving standards which go beyond Community standards, or increase the level of environmental protection in the absence of Community standards

(A) Please confirm if the aid is granted for studies directly linked to investments for the purposes of achieving standards which go beyond Community standards, or increase the level of environmental protection in the absence of Community standards.

- yes no

If yes, please specify which of the following purposes the investment serves:

- it enables the beneficiary to increase the level of environmental protection resulting from its activities by improving on the applicable Community standards, irrespective of the presence of mandatory national standards that are more stringent than the Community standard;
- or
- it enables the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

⁽²⁰⁾ Please note that this condition does not apply if the intangible asset is technically out of date.
⁽²¹⁾ Cf. Environmental aid guidelines, Section 3.1.4.

(B) Please provide details, including, where applicable, the information on the relevant Community standards:

.....
.....

(C) If the aid is granted for studies directly linked to investments aiming at reaching national standards which go beyond Community standards, please indicate the applicable national standards and attach a copy:

.....
.....

(D) Please describe the types of studies that will be supported:

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

3.3.2. Studies directly linked to investments for the purposes of achieving energy saving

Please confirm that the aid is granted for studies directly linked to investments for the purposes of achieving energy saving.

yes no

If yes, please provide evidence on how the purpose of the relevant investment complies with the definition of energy savings as laid down in point 70(2) of the Environmental aid guidelines:

.....
.....

3.3.3. Studies directly linked to investments of producing renewable energy

(A) Please confirm if the aid is granted for studies directly linked to investments for the purposes of producing renewable energy.

yes no

If yes, please provide evidence on how the purpose of the relevant investment complies with the definition of production from renewable energy sources, as laid down in point 70(5) and (9) of the Environmental aid guidelines:

.....
.....

(B) Please specify the type(s) of renewable energy sources which are intended to be supported under the investment linked to the environmental study and provide details:

.....
.....

3.3.4. Aid intensities and bonuses

(A) What is the maximum aid intensity applicable to the notified measure ⁽²²⁾?

.....

⁽²²⁾ The maximum aid intensity is 50 % of the costs of the study.

(B) Is an SME bonus applied under the notified measure?

- yes
- no

If yes please specify the level of bonus applicable ⁽²³⁾:

3.4. Aid for energy saving ⁽²⁴⁾

3.4.1. Basic conditions

(A) Please confirm that the notified measure complies with the definition of energy savings in point 70(2) of the Environmental aid guidelines.

- yes

(B) Please specify the type(s) of the supported measures leading to energy saving, as well as the level of energy saving to be attained, and provide details:

.....
.....

3.4.2. Investment aid

3.4.2.1. Aid intensities and bonuses

(A) What is the basic aid intensity applicable to the notified measure ⁽²⁵⁾:

(B) Bonuses:

— Is an SME bonus applied under the notified measure?

- yes
- no

If yes, please specify the level of bonus applicable ⁽²⁶⁾:

(C) Is the aid granted in a genuinely competitive bidding process ⁽²⁷⁾?

- yes
- no

If yes, please provide details regarding the competitive process and attach a copy of the tender notice or its draft:

.....

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....
.....

3.4.2.2. Eligible costs ⁽²⁸⁾

(A) As regards the calculation of the eligible costs, please confirm that the eligible costs are limited to the extra investment costs necessary to achieve energy savings beyond the level required by the Community standards:

- yes

⁽²³⁾ When the aid is undertaken on behalf of an SME, the aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽²⁴⁾ Cf. Environmental aid guidelines, Section 3.1.5.

⁽²⁵⁾ The maximum aid intensity is 60 % of the eligible investment costs.

⁽²⁶⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽²⁷⁾ For details of the genuinely competitive bidding process required, see point 97 of the Environmental aid guidelines.

⁽²⁸⁾ For details see point 98 of the Environmental aid guidelines.

- (B) Please further clarify whether:
- the precise energy saving related cost constitutes the eligible costs, in case the costs of investing in energy saving can be easily identified;
- or
- the part of the investment directly related to energy saving is established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽²⁹⁾;
- and
- eligible costs are calculated net of any operating benefits and operating 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 CO₂ Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO₂ Emission Trading System ⁽³⁰⁾.
- (C) In the case of investment aid for achieving a level of energy saving higher than Community standards, please confirm which one of the following statements is applicable:
- if the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
 - if the undertaking is adapting to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards ⁽³¹⁾;
 - if no standards exist, the eligible costs 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;
- (D) What form do the eligible costs take?
- investments in tangible assets;
 - investments in intangible assets.
- (E) In the case of investments in tangible assets please indicate the form(s) of investments concerned:
- investments in land which are strictly necessary in order to meet environmental objectives;
 - investments in buildings intended to reduce or eliminate pollution and nuisances;
 - investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
 - investments to adapt production methods with a view to protecting the environment.
- (F) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
- it is regarded as a depreciable asset;

⁽²⁹⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

⁽³⁰⁾ Please note that for large undertakings, this period can be reduced to the first three years of the life of the investment, where the depreciation time of the investment can be demonstrated not to exceed three years.

⁽³¹⁾ Please note that the cost of investments needed to reach the level of protection required by the Community standards is not eligible.

- it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
- it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽³²⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;
- and
- all or part of the aid amount will be, where appropriate, reimbursed.

(G) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation ⁽³³⁾, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

If the notification concerns an individual aid measure, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....

3.4.3. Operating aid

(A) Please provide information/calculations demonstrating that the aid is limited to compensating for net extra production costs resulting from the investment taking account of benefits resulting from energy saving ⁽³⁴⁾:

.....

(B) What is the duration of the operating aid measure ⁽³⁵⁾?

(C) Is the aid degressive?

- yes no

What is the aid intensity of the:

- degressive aid (please indicate the degressive rates for each year) ⁽³⁶⁾:
- non-degressive aid ⁽³⁷⁾:

⁽³²⁾ Please note that this condition does not apply if the intangible asset is technically out of date.
⁽³³⁾ See point 81(b) of the Environmental aid guidelines.
⁽³⁴⁾ Please note that any investment aid granted to the undertaking in respect of the new plant must be deducted from production costs.
⁽³⁵⁾ Please note that the duration must be limited to maximum five years.
⁽³⁶⁾ The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.
⁽³⁷⁾ The maximum aid intensity is 50 % of the extra costs.

3.5. *Aid for renewable energy sources* ⁽³⁸⁾

3.5.1. Basic conditions

(A) Please confirm that the aid is granted exclusively for the promotion of renewable energy sources as defined by the Environmental aid guidelines ⁽³⁹⁾.

yes no

(B) In the case of biofuel promotion, please confirm that the aid is granted exclusively for the promotion of sustainable biofuels within the meaning of those guidelines.

yes no

(C) Please specify the type(s) of renewable energy sources ⁽⁴⁰⁾ supported under the notified measure and provide details:

.....

3.5.2. Investment aid

3.5.2.1. Aid intensities and bonuses

(A) What is the basic aid intensity applicable to each renewable energy source supported by the notified measure ⁽⁴¹⁾:

(B) Is an SME bonus applied under the notified measure?

yes no

If yes, please specify the level of bonus applicable ⁽⁴²⁾:

(C) Is the aid granted in a genuinely competitive bidding process ⁽⁴³⁾?

yes no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

(D) In the case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

3.5.2.2. Eligible costs ⁽⁴⁴⁾

(A) Please confirm that the eligible costs are limited to the extra investment 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;

yes

(B) Please further confirm that:

the precise renewable energy related cost constitutes the eligible costs, in case the cost of investing renewable energy can be easily identified;

or

⁽³⁸⁾ Cf. Environmental aid guidelines, Section 3.1.6.

⁽³⁹⁾ See point 70(5) to (9) of the Environmental aid guidelines.

⁽⁴⁰⁾ Please note that aid for investment and/or operating aid for the production of biofuels shall be allowed only with regard to sustainable biofuels.

⁽⁴¹⁾ The maximum aid intensity is 60 % of the eligible investment costs.

⁽⁴²⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽⁴³⁾ For details of the genuinely competitive bidding process required, see point 104 of the Environmental aid guidelines.

⁽⁴⁴⁾ For details see points 105 and 106 of the Environmental aid guidelines.

- the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽⁴⁵⁾;

and

- eligible costs are calculated net of any operating benefits and costs related to the extra investment for renewable sources of energy and arising during the first five years of the life of the investment concerned.

(C) What form do the eligible costs take?

- investments in tangible assets;
- investments in intangible assets.

(D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:

- investments in land which are strictly necessary in order to meet environmental objectives;
- investments in buildings intended to reduce or eliminate pollution and nuisances;
- investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- investments to adapt production methods with a view to protecting the environment.

(E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:

- it is regarded as a depreciable asset;
- it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control;
- it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽⁴⁶⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;
- and
- all or part of the aid amount will be, where appropriate, reimbursed.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

⁽⁴⁵⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

⁽⁴⁶⁾ Please note that this condition does not apply if the intangible asset is technically out of date.

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

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

3.5.3. Operating aid

Following the choice of the operating aid assessment option ⁽⁴⁷⁾, please fill in the relevant part of the section below.

3.5.3.1. Option 1

(A) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted in order to cover the difference between the cost of producing energy from renewable sources and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy from each of the relevant renewable sources ⁽⁴⁸⁾:

.....
.....

— detailed analysis of the market price of the form of energy concerned:

.....
.....

(B) Please demonstrate that the aid will be granted only until the plant has been fully depreciated according to normal accounting rules ⁽⁴⁹⁾ and provide a detailed analysis of the depreciation of each type ⁽⁵⁰⁾ of the investments for environmental protection:

.....
.....

For aid schemes, please specify how the compliance with this condition will be ensured:

.....
.....

For individual aid, please provide a detailed analysis demonstrating that this condition is fulfilled:

.....
.....

(C) When determining the amount of operating aid, please demonstrate how any investment aid granted to the undertaking in question in respect of a new plant is deducted from production costs:

.....
.....

⁽⁴⁷⁾ For details on Option 1 see point 109 of the Environmental aid guidelines, for Option 2 see point 110 of the Environmental aid guidelines and for Option 3 see point 111 of the Environmental aid guidelines.

⁽⁴⁸⁾ For aid schemes the information can be provided in the form of a (theoretical) calculation example (preferably with the amounts in net present values). The production costs should at least be specified separately for each type of renewable energy source. Specific information may also be useful for different plant capacities and for different types of production installation where the cost structure varies significantly (for example for land based and/or off shore wind power).

⁽⁴⁹⁾ Please note that any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.

⁽⁵⁰⁾ The depreciation should at least be specified separately for each type of renewable energy source (preferably with the amounts in net present values). Specific information may also be useful for different plant capacities and land based and/or off shore windpower.

(D) Does the aid also cover a normal return on capital?

- yes
- no

If yes, please provide details and the information/calculations showing the rate of the normal return and give reasons why the chosen rate is appropriate:

.....

.....

(E) For aid for the production of renewable energy from biomass, where the operating aid would exceed the amount of investment, please provide data/evidence (based on calculation examples for aid schemes or detailed calculation for individual aid) demonstrating that the aggregate costs borne by the undertakings after plant depreciation are still higher than the market prices of the energy:

.....

.....

(F) Please specify the precise support mechanisms (taking into account the requirements described above) and, in particular, the methods of calculating the amount of aid:

- for aid schemes based on a (theoretical) example of an eligible project:

.....

.....

Furthermore, please confirm that the calculation methodology described above will be applied to all individual aid grants based on the notified aid scheme:

- yes

- for individual aid please provide a detailed calculation of the aid amount (taking into account the requirements described above):

.....

.....

(G) What is the duration of the notified measure?

.....

.....

It is the practice of the Commission to limit its authorisation to 10 years. If yes, could you please undertake to re-notify the measure within a period of 10 years?

- yes
- no

3.5.3.2. Option 2

(A) Please provide a detailed description of the green certificate or tender system (including, *inter alia*, the information on the level of discretionary powers, the role of the administrator, the price determination mechanism, the financing mechanism, the penalty mechanism and re-distribution mechanism):

.....

.....

(B) What is the duration of the notified measure ⁽⁵¹⁾?

.....

.....

(C) Please provide data/calculations showing that the aid is essential to ensure the viability of the renewable energy sources:

.....

.....

⁽⁵¹⁾ Please note that the Commission can authorise such notified measure for a period of 10 years.

(D) Please provide data/calculations showing that the aid does not in the aggregate result in overcompensation for renewable energy:

.....
.....

(E) Please provide information/calculations showing that the aid does not dissuade renewable energy producers from becoming more competitive:

.....
.....

3.5.3.3. Option 3 ⁽⁵²⁾

(A) What is the duration of the operating aid measure ⁽⁵³⁾?

(B) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted to compensate for the difference between the cost of producing energy from renewable sources and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy from each of the relevant renewable sources ⁽⁵⁴⁾:

.....
.....

— detailed analysis of the market price of the form of energy concerned:

.....
.....

(C) Is the aid degressive?

yes no

What is the aid intensity of the:

— degressive aid (please indicate the degressive rates for each year) ⁽⁵⁵⁾:
.....;

— non-degressive aid ⁽⁵⁶⁾:

3.6. Aid for cogeneration ⁽⁵⁷⁾

3.6.1. Basic conditions

Please confirm that the aid for cogeneration is granted exclusively to cogeneration units satisfying the definition of high efficiency cogeneration as set out in point 70(11) of the Environmental aid guidelines:

yes no

3.6.2. Investment aid

Please confirm that:

the new cogeneration unit will overall make primary energy savings compared to separate production as defined by Directive 2004/8/EC and Commission Decision 2007/74/EC.

⁽⁵²⁾ Member States may grant operating aid in accordance with the provisions set out in point 100 of the Environmental aid guidelines.

⁽⁵³⁾ Please note that the duration must be limited to maximum five years.

⁽⁵⁴⁾ For aid schemes the information can be provided in the form of a (theoretical) calculation example (preferably with the amounts in net present values). The production costs should at least be specified separately for each type of renewable energy source. Specific information may also be useful for different plant capacities and land based and/or off shore wind power.

⁽⁵⁵⁾ The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.

⁽⁵⁶⁾ The maximum aid intensity is 50 % of the extra costs.

⁽⁵⁷⁾ Cf. Environmental aid guidelines, Section 3.1.7.

- the improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit will result in primary energy savings compared to the original situation.

Please provide details and evidence demonstrating the compliance with the above mentioned conditions:

.....

3.6.2.1. Aid intensities and bonuses

(A) What is the basic aid intensity applicable to the notified measure ⁽⁵⁸⁾?

(B) Bonuses:

— Is an SME bonus applied under the notified measure?

- yes no

If yes, please specify the level of bonus applicable ⁽⁵⁹⁾:

(C) Is the aid granted in a genuinely competitive bidding process ⁽⁶⁰⁾?

- yes no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

3.6.2.2. Eligible costs ⁽⁶¹⁾

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise a high efficiency cogeneration plant:

- yes

(B) Please further confirm that:

- the precise cogeneration related cost constitutes the eligible costs, if the cost of investing in cogeneration can be easily defined;

or

- the extra investment costs directly related to cogeneration are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽⁶²⁾;

and

- eligible costs are calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment concerned.

⁽⁵⁸⁾ The maximum aid intensity is 60 % of the eligible investment costs.

⁽⁵⁹⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽⁶⁰⁾ For details of the genuinely competitive bidding process required, see point 116 of the Environmental aid guidelines.

⁽⁶¹⁾ For details see points 117 and 118 of the Environmental aid guidelines.

⁽⁶²⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

(C) What form do the eligible costs take?

- investments in tangible assets;
- investments in intangible assets.

(D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:

- investments in land which are strictly necessary in order to meet environmental objectives;
- investments in buildings intended to reduce or eliminate pollution and nuisances;
- investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- investments to adapt production methods with a view to protecting the environment.

(E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:

- it is regarded as a depreciable asset;
- it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,
- it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽⁶³⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;
- and
- all or part of the aid amount will be, where appropriate, reimbursed.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

.....

⁽⁶³⁾ Please note that this condition does not apply if the intangible asset is technically out of date.

3.6.3. Operating aid

(A) Please confirm that the existing cogeneration unit satisfies both the definition of high-efficiency cogeneration set out in point 70(11) of the Environmental aid guidelines and the requirement that there are overall primary savings compared to separate production as defined by Directive 2004/8/EC and Decision 2007/74/EC:

yes

(B) Please confirm further that the operating aid for high efficiency cogeneration is granted exclusively to:

- undertakings distributing electric power and heat to the public, where the costs of producing such electric power or heat exceed its market price ⁽⁶⁴⁾;
- for the industrial use of the combined production of electric power and heat where it can be shown that the production cost of one unit of energy using that technique exceeds the market price of one unit of conventional energy ⁽⁶⁵⁾.

Please provide details and evidence that the relevant condition(s) is/are complied with:

.....
.....

3.6.3.1. Option 1

(A) Please provide the following information demonstrating that the operating aid is granted in order to cover the difference between the cost of producing energy in cogeneration units and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy in cogeneration units ⁽⁶⁶⁾:

.....
.....

— detailed analysis of the market price of the form of energy concerned:

.....
.....

(B) Please demonstrate that the aid will be granted only until the plant has been fully depreciated according to normal accounting rules ⁽⁶⁷⁾ and provide a detailed analysis of the depreciation of each type of the investments for environmental protection:

.....
.....

For aid schemes, please specify how the compliance with this condition will be ensured:

.....
.....

For individual aid, please provide a detailed analysis demonstrating that this condition is fulfilled:

.....
.....

⁽⁶⁴⁾ The decision as to whether the aid is necessary will take account of the costs and revenue resulting from the production and sale of the electric power or heat.

⁽⁶⁵⁾ The production cost may include the plant's normal return on capital, but any gains by the undertaking in terms of heat production must be deducted from production costs.

⁽⁶⁶⁾ For aid schemes the information can be provided in the form of an (theoretical) calculation example.

⁽⁶⁷⁾ Please note that any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.

(C) When determining the amount of operating aid, please demonstrate how any investment aid granted to the undertaking in question in respect of a new plant is deducted from production costs:

.....
.....

(D) Does the aid also cover a normal return on capital?

- yes no

If yes, please provide details and information/calculations showing the rate of normal return and give reasons why the chosen rate is appropriate:

.....
.....

(E) For aid supporting biomass-based CHP units, if the operating aid would exceed the amount of investment, please provide data/evidence (based on calculation examples for aid schemes or detailed calculation for individual aid) demonstrating that the aggregate costs borne by the undertakings after plant depreciation are still higher than the market prices of the energy:

.....
.....

(F) Please specify the precise support mechanisms (taking into account the requirements described above) and in particular the methods of calculating the amount of aid:

- for aid schemes based on a (theoretical) example of an eligible project:

.....
.....

Furthermore, please confirm that the calculation methodology describe above will be applied to all individual aid grants based on the notified aid scheme:

- yes

- for individual aid please provide a detailed calculation of the amount of aid (taking into account the requirements described above):

.....
.....

(G) What is the duration of the notified measure?

.....
.....

It is the Commission practice to limit its decisions to 10 years. If yes, could you please undertake to re-notify the measure within a period of 10 years?

- yes no

3.6.3.2. Option 2

(A) Please provide a detailed description of the certificate or tender system (including , *inter alia*, the information on the level of discretionary powers, the role of the administrator, the price determination mechanism):

.....
.....

- (B) What is the duration of the notified measure ⁽⁶⁸⁾?
.....
.....
- (C) Please provide data/calculations showing that the aid is essential to ensure the viability of the production of energy in cogeneration plants:
.....
.....
- (D) Please provide data/calculations showing that the aid does not in the aggregate result in overcompensation for energy produced in cogeneration plants:
.....
.....
- (E) Please provide information/calculations showing that the aid does not dissuade producers of energy in cogeneration from becoming more competitive:
.....
.....

3.6.3.3. Option 3

- (A) What is the duration of the operating aid measure ⁽⁶⁹⁾?
- (B) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted in order to compensate for the difference between the cost of producing energy in cogeneration plants and the market price of the form of energy concerned:
 - detailed analysis of the cost of producing energy in cogeneration plants:
.....
.....
 - detailed analysis of the market price of the form of energy concerned:
.....
.....
- (C) Is the aid degressive?
 - yes no
 What is the aid intensity of the:
 - degressive aid (please indicate the degressive rates for each year) ⁽⁷⁰⁾:
.....;
 - non-degressive aid ⁽⁷¹⁾:

3.7. Aid for energy efficient district heating ⁽⁷²⁾

3.7.1. Basic conditions

Please confirm that:

- the environmental investment aid in energy-efficient district heating installations leads to primary energy savings
- and

⁽⁶⁸⁾ Please note that the Commission can authorise such notified measure for a period of 10 years.
⁽⁶⁹⁾ Please note that the duration must be limited to maximum five years.
⁽⁷⁰⁾ The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.
⁽⁷¹⁾ The maximum aid intensity is 50 % of the extra costs.
⁽⁷²⁾ Cf. Environmental aid guidelines, Section 3.1.8.

- the beneficiary district heating installation satisfies the definition of energy efficient district heating set out in point 70(13) of the Environmental aid guidelines

and

- the combined operation of the generation of heat (as well as electricity in the case of cogeneration) and the distribution of heat will result in primary energy savings

or

- the investment is meant for the use and distribution of waste heat for district heating purposes.

In the case of aid schemes, please provide details on how compliance with this condition is ensured:

.....
.....

In the case of individual aid, please provide details and relevant evidence:

.....
.....

3.7.2. Aid intensities and bonuses

(A) What is the basic aid intensity applicable to the notified measure ⁽⁷³⁾?

(B) Is an SME bonus applied under the notified measure?

- yes no

If yes, please specify the level of bonus applicable ⁽⁷⁴⁾:

(C) Is the aid granted in a genuinely competitive bidding process ⁽⁷⁵⁾?

- yes no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

3.7.3. Eligible costs ⁽⁷⁶⁾

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise an investment leading to energy-efficient district heating as compared to the reference investment:

- yes

(B) Please further confirm that:

- the precise energy efficient district heating related cost constitutes the eligible costs, if the costs of investing in environmental protection can be easily identified;

or

⁽⁷³⁾ The maximum aid intensity is 50 % of the eligible costs. If the aid is intended solely for the generation part of a district heating installation, energy efficient district heating installations using renewable sources of energy or cogeneration, the maximum aid intensity is 60 % of the eligible costs.

⁽⁷⁴⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

⁽⁷⁵⁾ For details of the genuinely competitive bidding process required, see point 123 of the Environmental aid guidelines.

⁽⁷⁶⁾ For details see points 124 and 125 of the Environmental aid guidelines.

- the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽⁷⁷⁾;

and

- eligible costs are calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment concerned.

(C) What form do the eligible costs take?

- investments in tangible assets;
- investments in intangible assets.

(D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:

- investments in land which are strictly necessary in order to meet environmental objectives;
- investments in buildings intended to reduce or eliminate pollution and nuisances;
- investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- investments to adapt production methods with a view to protecting the environment.

(E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how), please confirm that any such intangible asset satisfies the following conditions:

- it is regarded as a depreciable asset;
- it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,
- it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽⁷⁸⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- the yield from the sale will be deducted from the eligible costs;

and

- all or part of the aid amount will be, where appropriate, reimbursed.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

⁽⁷⁷⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

⁽⁷⁸⁾ Please note that this condition does not apply if the intangible asset is technically out of date.

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

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

3.8. Aid for waste management ⁽⁷⁹⁾

3.8.1. General conditions

Please confirm that the following conditions are met:

- the aid is granted for the management of waste of other undertakings, including activities of re-utilisation, recycling and recovery, which is in accordance with the hierarchical classification of the principles of waste management ⁽⁸⁰⁾.
- the investment is aimed at reducing pollution generated by other undertakings (polluters) and does not extend to pollution generated by the beneficiary of the aid;
- the aid does not indirectly relieve the polluters from a burden that should be borne by them under Community law, or from a burden that should be considered as a normal company cost for the polluters;
- the investment goes beyond the “state of the art” ⁽⁸¹⁾ or uses conventional technologies in an innovative manner;
- the treated materials would otherwise be disposed of, or be treated in a less environmentally friendly manner;
- the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials.

Furthermore, please provide details and evidence demonstrating compliance with the above mentioned conditions:

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

3.8.2. Aid intensities

(A) What is the basic aid intensity applicable to the notified measure ⁽⁸²⁾?

(B) Is the SME bonus applied under the notified measure?

- yes no

If yes, please specify the level of bonus applicable ⁽⁸³⁾:

(C) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....
.....

⁽⁷⁹⁾ Cf. Environmental aid guidelines, Section 3.1.9.
⁽⁸⁰⁾ Classification given in the Communication from the Commission on the review of the Community Strategy for Waste Management (COM(96) 399 final, 30.7.1996). For details see footnote 45 of the Environmental aid guidelines.
⁽⁸¹⁾ For a definition see footnote 46 of the Environmental aid guidelines.
⁽⁸²⁾ The maximum aid intensity is 50 % of the eligible investment costs.
⁽⁸³⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

3.8.3. Eligible costs ⁽⁸⁴⁾

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise an investment leading to waste management and borne by the beneficiary compared to the reference investment, i.e. a conventional production not involving waste management with the same capacity:

yes

(B) Please further confirm that:

the precise waste management related costs constitute the eligible costs, if the cost of investing in waste management can be easily defined;

or

the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment ⁽⁸⁵⁾;

and

the cost of such reference investment is deducted from the eligible costs;

eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for waste management and arising during the first five years of the life of the investment concerned.

(C) What form do the eligible costs take?

investments in tangible assets;

investments in intangible assets.

(D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:

investments in land which are strictly necessary in order to meet environmental objectives;

investments in buildings intended to reduce or eliminate pollution and nuisances;

investments in plant and equipment intended to reduce or eliminate pollution and nuisances;

investments to adapt production methods with a view to protecting the environment.

(E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how), please confirm that any such intangible asset satisfies the following conditions:

it is regarded as a depreciable asset;

it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,

it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years ⁽⁸⁶⁾.

Furthermore, please confirm that if the intangible asset is sold during those five years:

the yield from the sale will be deducted from the eligible costs;

and

all or part of the amount of the aid will, where appropriate, be reimbursed.

⁽⁸⁴⁾ For details, see points 130 and 131 of the Environmental aid guidelines.

⁽⁸⁵⁾ The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

⁽⁸⁶⁾ Please note that this condition does not apply if the intangible asset is technically out of date.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

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

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

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

3.9. Aid for the remediation of contaminated sites ⁽⁸⁷⁾

3.9.1. General conditions

Please confirm that the following conditions are fulfilled:

- the investment aid to undertakings repairing environmental damage by remediating contaminated sites ⁽⁸⁸⁾, leads to an improvement of environmental protection.

Please describe in detail the relevant improvement of the environmental protection, including, if applicable or available, information on the site, the type of contamination, a description of the activity that caused the contamination, and the proposed remediation procedure:

.....
.....

- the polluter ⁽⁸⁹⁾ responsible for the contamination of the site can not be identified or cannot be made to bear the costs.

Please provide details and evidence demonstrating the compliance with the above mentioned condition:

.....
.....

3.9.2. Aid intensities and eligible costs

(A) What is the basic aid intensity applicable to the notified measure ⁽⁹⁰⁾?

(B) Please confirm that the total amount of aid will under no circumstances exceed the actual cost of the remediation work:

- yes

(C) Please specify the cost of the remediation work ⁽⁹¹⁾:

.....
.....

⁽⁸⁷⁾ Cf. Environmental aid guidelines, Section 3.1.10.
⁽⁸⁸⁾ The environmental damage concerned covers damage to the quality of the soil or of surface water or groundwater.
⁽⁸⁹⁾ In this context, "polluter" refers to the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter.
⁽⁹⁰⁾ The aid may amount up to 100 % of the eligible costs.
⁽⁹¹⁾ All expenditure incurred by an undertaking in remediating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, ranks as eligible investment in the case of the remediation of contaminated sites.

(D) Please confirm that the increase in the value of the land is deducted from the eligible costs:

- yes

Please provide details on how this is ensured:

.....

.....

(E) For aid schemes, please provide a calculation methodology, in line with the above mentioned principles, which will be applied to all individual aid grants based on the notified scheme and provide relevant evidence:

.....

.....

.....

.....

.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, complying with the above mentioned principles, and provide relevant evidence:

.....

.....

.....

.....

.....

3.10. Aid for relocation of undertakings ⁽⁹²⁾

3.10.1. General conditions

(A) Please confirm that:

- the change of location is dictated by environmental protection or prevention grounds and has been ordered by the administrative or judicial decision of a competent public authority or agreed between the undertaking and the competent public authority;
- the undertaking complies with the strictest environmental standards applicable in the new region where it is located.

Please provide details and evidence demonstrating compliance with the above mentioned conditions:

.....

.....

(B) Please confirm that the beneficiary:

- is an undertaking established in an urban area or in a special area of conservation designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ⁽⁹³⁾, which lawfully carries out an activity that creates major pollution and must, on account of this location, move from its place of establishment to a more suitable area;

or

- is an establishment or installation falling within the scope of Seveso II Directive ⁽⁹⁴⁾.

⁽⁹²⁾ Cf. Environmental aid guidelines, Section 3.1.11.

⁽⁹³⁾ OJ L 206, 22.7.1992, p. 7.

⁽⁹⁴⁾ Council Directive 96/82/EC on the control of major accidents hazards involving dangerous substances OJ L 10, 14.1.1997, p. 13.

Please provide details and evidence:

.....
.....

3.10.2. Aid intensities and eligible costs

(A) What is the basic aid intensity applicable to the notified measure ⁽⁹⁵⁾?

(B) Is an SME bonus applied under the notified measure?

- yes
- no

If yes, please specify the level of bonus applicable ⁽⁹⁶⁾:.....

(C) Please provide details and the relevant evidence (if applicable) on the following elements linked to the relocation aid:

(a) benefits:

— the yield from the sale or renting of the plant or land abandoned:

.....
.....

— the compensation paid in the event of expropriation:

.....
.....

— any other gains connected with the transfer of the plant, notably gains resulting from an improvement, on the occasion of the transfer, in the technology used and accounting gains associated with better use of the plant:

.....
.....

— investments relating to any capacity increase:

.....
.....

— other potential benefits:

.....
.....

(b) costs:

— the costs connected with the purchase of land or the construction of purchase of new plant of the same capacity as the plant abandoned:

.....
.....

— any penalties imposed on the undertaking for having terminated the contract for the renting of land or buildings, if the administrative or judicial decision ordering the change of location results in the early termination of this contract:

.....
.....

⁽⁹⁵⁾ The maximum aid intensity is 50 % of the eligible investment costs.

⁽⁹⁶⁾ The aid intensity may be increased by 10 percentage points for medium sized enterprises and by 20 percentage points for small enterprises.

— other potential costs:

.....
.....

(D) For aid schemes, please provide a calculation methodology (e.g. based on a theoretical example) for eligible costs/aid amount, including the benefit/cost elements mentioned in point C, which will be applied to all individual aid grants based on the notified scheme:

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

For individual aid measures, please provide a detailed calculation of the eligible costs/aid amount of the notified investment project, including the benefit/cost elements mentioned in point C, and provide the relevant evidence:

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

3.11. Aid involved in tradable permit schemes ⁽⁹⁷⁾

(A) Please describe in detail the tradable permit scheme, including, *inter alia*, the objectives, the granting methodology, the authorities/entities involved, the role of the State, the beneficiaries and the procedural aspects:

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

(B) Please explain how:

the tradable permit scheme is set up in such a way as to achieve environmental objectives beyond those intended to be achieved on the basis of Community standards that are mandatory for the undertakings concerned:

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

the allocation is carried out in a transparent way and based on objective criteria and on data sources of the highest quality available:

.....
.....

the total amount of tradable permits or allowances granted to each undertaking for a price below their market value is not higher than its expected needs as estimated for the situation in absence of the trading scheme:

.....
.....

⁽⁹⁷⁾ Cf. Environmental aid guidelines, Section 3.1.12.

- the allocation methodology does not favour certain undertakings or certain sectors;

In case the allocation methodology favours certain undertakings or certain sectors, please explain how this is justified by the environmental logic of the scheme itself or is necessary for consistency with other environmental policies:

.....

Furthermore, please explain how:

- new entrants shall not in principle receive permits or allowances on more favourable conditions than existing undertakings operating on the same markets:

.....

- granting higher allocations to existing installations compared to new entrants should not result in creating undue barriers to entry:

.....

Please provide details and evidence demonstrating compliance with the above mentioned conditions:

.....

(C) Please confirm that the following criteria ⁽⁹⁸⁾ are respected by the scheme:

- the choice of beneficiaries is based on objective and transparent criteria and the aid is granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation;

and

- full auctioning leads to a substantial increase in production costs for each sector or category of individual beneficiaries;

and

- the cost increase from the tradable permit scheme can not be passed on to customers without leading to important sales reductions ⁽⁹⁹⁾;

and

- the best performing technique in the EEA was used as a benchmark for the level of the allowance granted.

Please provide details demonstrating how these criteria are applied:

.....

⁽⁹⁸⁾ Please note that these criteria do not apply for the trading period ending on 31 December 2012 for tradable permit schemes in accordance with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁽⁹⁹⁾ This analysis may be conducted on the basis of estimations of, *inter alia*, the product price elasticity of the sector concerned. These estimations will be made in the relevant geographic market. Estimates of lost sales as well as their impact on the profitability of the company may be used.

4. **Incentive effect and necessity of aid** ⁽¹⁰⁰⁾

4.1. *General conditions*

(A) Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

- yes no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary ⁽¹⁰¹⁾.

(B) If no, specify the relevant dates:

— The environmental project commenced on:

— The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

4.2. *Evaluation of the incentive effect*

If the aid is granted to

- non-SMEs,
- SMEs but must be assessed in accordance with the detailed assessment,

the Commission will require that the incentive effect is demonstrated by means of an evaluation. Go to the next questions. Otherwise, the Commission considers that the incentive effect is automatically met for the measure at hand.

4.2.1. *General conditions*

If it is necessary to demonstrate an incentive effect for several beneficiaries participating in the notified project, please provide the information below for each of them.

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State in order to prove that without the aid, i.e. in the counterfactual situation, the more environmentally friendly alternative would not have been retained. Please fill in the information below

4.2.2. *Criteria*

(A) Please demonstrate how the counterfactual situation is credible:

.....
.....

(B) Have the eligible costs been calculated in accordance with the methodology set out in points 81, 82 and 83 of the Environmental aid guidelines?

- yes no

Please provide details and evidence demonstrating the methodology used:

.....
.....

⁽¹⁰⁰⁾ Cf. the Environmental aid guidelines, Section 3.2.
⁽¹⁰¹⁾ See point 143 of the Environmental aid guidelines.

(C) Would the investment have been sufficiently profitable without the aid?

- yes
- no

Please provide details and evidence of the relevant profitability ⁽¹⁰²⁾:

.....

.....

5. Compatibility of aid under Article 87(3)(b) of the EC Treaty

Aid for environmental protection to promote the execution of an important project ⁽¹⁰³⁾ of common European interest may be considered to be compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty.

5.1. General conditions (cumulative)

(A) Please provide details and evidence of the terms of implementation of the notified project, including its participants, its objectives and its effects and the means to achieve the objectives ⁽¹⁰⁴⁾:

.....

.....

(B) Please confirm that:

- the project is in the common European interest ⁽¹⁰⁵⁾: it contributes in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection ⁽¹⁰⁶⁾;
- and
- the advantage achieved by the objective of the project is not limited to one Member State or to the Member States implementing it, but extends to the Community as a whole ⁽¹⁰⁷⁾;
- and
- the project makes a substantive contribution to the Community objectives.

Please provide details and evidence:

.....

.....

(C) Please provide details and evidence illustrating that the aid is necessary AND presents an incentive for the execution of the project:

.....

.....

(D) Please provide details and evidence demonstrating that the project involves a high level of risk:

.....

.....

(E) Please provide details and evidence illustrating that the project is of great importance with regard to its volume ⁽¹⁰⁸⁾:

.....

.....

⁽¹⁰²⁾ Due account being taken of the benefits associated with the investment without aid, including the value of tradable permits which may become available to the undertaking concerned following the environmentally friendly investment.

⁽¹⁰³⁾ The Commission may also consider a group of projects as together constituting a project.

⁽¹⁰⁴⁾ Please note that the projects must be specific and clearly defined as regards these aspects.

⁽¹⁰⁵⁾ Please note that the common European interest must be demonstrated in practical terms, for example it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental Community objectives.

⁽¹⁰⁶⁾ Such as by being of great importance for the environmental strategy of the European Union.

⁽¹⁰⁷⁾ The fact that the project is carried out by undertakings in different Member States is not sufficient.

⁽¹⁰⁸⁾ Please note that it must be substantial in size and produce substantial environmental effects.

(F) Please indicate the beneficiary's own contribution ⁽¹⁰⁹⁾ to the project:

.....
.....

(G) Please list the Member States from which the undertakings involved in the notified project come ⁽¹¹⁰⁾.

.....
.....

5.2. *Description of the project*

Please provide a detailed description of the project, including, *inter alia*, structure/organisation, beneficiaries, budget, amount of aid, aid intensity ⁽¹¹¹⁾, investments concerned and eligible costs. For guidance, please see Section 3 of this supplementary information sheet.

.....
.....

6. **Aid in the form of reductions of or exemptions from environmental taxes**

6.1. *General conditions*

(A) Please explain how the tax reductions or exemptions contribute indirectly to an improvement of the level of the environmental protection and motivate why the tax reductions and exemptions do not undermine the general objective pursued:

.....
.....

(B) For reductions of or exemptions from harmonised taxes at Community level, please confirm that:

- the aid is granted for a maximum period of 10 years;
- and
- the beneficiaries pay at least the Community minimum tax level set by the relevant applicable directive ⁽¹¹²⁾.

Please provide for each category of beneficiaries evidence regarding the payable minimum tax level (rate actually paid preferably in EUR and in the same units as the applicable Community legislation):

.....
.....

- they are compatible with the relevant applicable Community legislation and comply with the limits and conditions set out therein:

Please refer to the relevant provision(s) and provide the relevant evidence:

.....
.....

(C) For reductions of or exemptions from environmental taxes which have not been harmonised or for those which have been harmonised but beneficiaries pay less than the Community minimum tax level, please confirm that the aid is granted for a maximum period of 10 years:

- yes no

⁽¹⁰⁹⁾ Please note that the Commission will consider the notified projects more favourably if they include a significant own contribution of the beneficiary to the projects.

⁽¹¹⁰⁾ Please note that the Commission will consider the notified projects more favourably if they involve undertakings from a significant number of Member States.

⁽¹¹¹⁾ Please note that the Commission may authorise aid at higher rates than otherwise laid down in the Environmental aid guidelines.

⁽¹¹²⁾ "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 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

Furthermore, please provide the following:

- a detailed description of the exempted sector(s):
.....
.....
- information for each sector, as to the best performing techniques within the EEA regarding the reduction of the environmental harm targeted by the tax:
.....
.....
- a list of the 20 largest beneficiaries covered by the exemptions/reductions as well as a detailed description of their situation, in particular their turnover, their market shares and the size of the tax base:
.....
.....

6.2. *Necessity of the aid*

Please confirm that:

- the choice of beneficiaries is based on objective and transparent criteria and the aid is granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation

and

- the environmental tax without reduction would lead to a substantial increase in production cost for each sector or category of individual beneficiaries ⁽¹¹³⁾;

and

- without the aid the substantial increase in production costs would lead to important sales reductions if it would be passed on to customers ⁽¹¹⁴⁾.

Please provide evidence related to the above mentioned conditions:

.....
.....

6.3. *Proportionality of the aid*

Please specify which one of the following conditions is met:

(A) Does the scheme lay down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA?

- yes no

Please provide details and evidence demonstrating the compliance with this condition:

.....
.....

(B) Are aid beneficiaries paying at least 20 % of the national tax?

- yes no

⁽¹¹³⁾ With regard to energy products and electricity "energy intensive business" as defined in Article 17(1)(a) of Directive 2003/96/EC shall be regarded as fulfilling this criterion as long as that provision remains in force.

⁽¹¹⁴⁾ In this respect, Member States may provide estimations of, *inter alia*, the product price elasticity of the sector concerned in the relevant geographic market as well as estimates of lost sales and/or reduced profits for the companies in the sector/category concerned.

If no, please demonstrate how a lower rate can be justified in view of a limited distortion of competition:

.....
.....

(C) Are the reductions or exemptions conditional on the conclusion of agreements between the Member State and the recipient undertakings or associations of undertakings?

- yes no

If yes, please provide details and evidence illustrating that the undertakings or associations of undertakings commit themselves to achieve environmental protection objectives which have the same effect as (i) the taxation linked to environmental performance ⁽¹¹⁵⁾, or (ii) 20 % of the national tax ⁽¹¹⁶⁾ or (iii) if the Community minimum tax level is applied.:

.....
.....

Please further confirm that:

- the substance of the agreements has been negotiated by the Member State and specifies the targets and fixes a time schedule for reaching targets;
- the Member State ensures independent and timely monitoring of the commitments concluded in these agreements;
- these agreements will be revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met.

Specify per sector the targets and time schedule and describe the monitoring and review mechanisms (for example by whom and with what periodicity) as well as the penalty mechanism:

.....
.....

7. **Criteria triggering a detailed assessment ⁽¹¹⁷⁾**

Please indicate if the notified measure falls within the following categories of aid:

- for measures covered by a Block Exemption Regulation, the case was notified to the Commission pursuant to a duty to notify aid individually as prescribed in the BER;
- investment aid, where the aid amount exceeds EUR 7,5 million for one undertaking, (even if part of an approved aid scheme);
- operating aid for energy saving, where the aid amount exceeds EUR 5 million per undertaking for five years;
- operating aid for the production of renewable electricity and/or combined production of renewable heat, when the aid is granted to renewable electricity installations in sites where the resulting renewable electricity generation capacity exceeds 125 MW;
- operating aid for the production of biofuel, when the aid is granted to a biofuel production installation in sites, where the resulting production exceeds 150 000 t per year;

⁽¹¹⁵⁾ Meaning the same effect as if the scheme laid down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each beneficiary compared to the performance related to the best performing technique within the EEA, see point 159(a) of the Guidelines.

⁽¹¹⁶⁾ Unless a lower rate can be justified in view of a limited distortion of competition, see point 159(b) of the Guidelines.

⁽¹¹⁷⁾ Cf. Environmental aid guidelines. Section 5.1.

- operating aid for cogeneration, where aid is granted to cogeneration installation with the resulting cogeneration electricity capacity exceeding 200 MW ⁽¹¹⁸⁾
- operating aid granted to new plants producing renewable energy on the basis of a calculation of the external costs avoided ⁽¹¹⁹⁾.

In this case please provide a reasoned and quantified comparative cost analysis, together with an assessment of competing energy producers' external costs, so as to demonstrate that the aid does genuinely compensate for external costs avoided ⁽¹²⁰⁾.

If the notified measure falls within at least one of these aid categories, it is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

8. Additional information for detailed assessment ⁽¹²¹⁾

If there are several beneficiaries participating in the notified project subject to a detailed assessment, please provide the information below for each of them. This is without prejudice to the full description of the notified project, including participants, in the previous sections of this supplementary sheet.

8.1. General observations

The purpose of this detailed assessment is to ensure that high amounts of aid for environmental protection do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of additional environmental benefits outweigh the harm for competition and trade ⁽¹²²⁾.

The detailed assessment is conducted on the basis of the positive and negative elements which are specified in Sections 5.2.1 and 5.2.2 of the Environmental aid guidelines and they apply in addition to the criteria set out in Chapter 3 of the Environmental aid guidelines.

Provisions below represent a guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States should provide all the elements that they consider useful for the assessment of the case.

The Member States are in particular invited to rely on the information sources listed below. Please indicate if these supporting documents are attached to the notification:

- evaluations of past State aid schemes or measures;
- impact assessments made by the granting authority;
- other studies related to the environmental protection.

8.2. Existence of a market failure ⁽¹²³⁾

(A) Please identify the expected contribution of the measure to environmental protection (in quantifiable terms) and provide the supporting documents:

.....

⁽¹¹⁸⁾ Please note that aid for the production of heat from cogeneration will be assessed in the context of notification based on electricity.

⁽¹¹⁹⁾ For details see point 161 of the Environmental aid guidelines.

⁽¹²⁰⁾ Please note that in order to calculate external avoided costs, the method of calculation used has to be internationally recognised and validated by the Commission. Please further note that in any event, the amount of aid granted to producers that exceeds the amount of aid resulting from option 1 (cf. point 109 of the Environmental aid guidelines) for operating aid for renewable sources of energy must be reinvested by the firms in renewable sources of energy in accordance with section 3.1.6.1.

⁽¹²¹⁾ Cf. Environmental aid guidelines, Section 5.2.

⁽¹²²⁾ For details on detailed assessment and balancing the positive and negative elements see Section 1.3, 5.2.1 (points 166 to 174) and 5.2.2 (points 175 to 188).

⁽¹²³⁾ Cf. Environmental aid guidelines, Section 5.2.1.1.

(B) Please identify the level of environmental protection targeted, as compared to existing Community standards and/or standards in other Member States and provide the supporting documents:

.....
.....

(C) In the case of the aid for adapting to national standards going beyond the Community standards, please provide the following information and (if relevant) supporting documents:

nature, type and location of the main competitors of the aid beneficiary:

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

the cost of implementation of the national standard (respectively tradable permit schemes) for the aid beneficiary had no aid been given:

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

the comparative costs of implementation of those standards for the main competitors of the aid beneficiary:

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

8.3. *Appropriate instrument* ⁽¹²⁴⁾

Please indicate on what basis the Member State decided to use a selective instrument such as State aid in order to increase environmental protection and provide supporting documents:

- impact assessment of the proposed measure;
- comparative analysis of other policy options considered by the Member State;
- evidence that the polluter pays principle is respected;
- others:

8.4. *Incentive effect and necessity of the aid* ⁽¹²⁵⁾

In addition to the calculation of extra costs outlined in Chapter 3 of the Environmental aid guidelines please specify the elements listed below.

(A) Please provide evidence of the specific action(s) ⁽¹²⁶⁾ that would not have been taken by the undertaking without the aid (counterfactual situation) and provide supporting documents:.

.....
.....

(B) At least one of the following elements must be present for the purposes of demonstration of the expected environmental effect linked to the change in behaviour. Please specify those relevant for the notified measure and provide supporting documents.

- increase in level of environmental protection;
- increase in speed of the implementation of future standards

⁽¹²⁴⁾ Cf. Environmental aid guidelines, Section 5.2.1.2.

⁽¹²⁵⁾ Cf. Environmental aid guidelines, Section 5.2.1.3.

⁽¹²⁶⁾ For instance, a new investment, a more environmentally friendly production process and/or a new product that is more environmentally friendly.

(C) The following elements may be used for the purposes of demonstration of an incentive effect. Please specify those relevant for the notified measure, and provide supporting documents ⁽¹²⁷⁾:

- production advantages;
- market conditions;
- possible future mandatory standards (if there are ongoing negotiations at Community level to introduce new or higher mandatory standards which the measure concerned would seek to target);
- level of risk;
- level of profitability

(D) In the case of aid granted to undertakings adapting to a national standard or going beyond Community standards or adopted in the absence of Community standards, please provide the information and supporting documents showing that the aid beneficiary would have been affected substantially in terms of increased costs and would not have been able to bear the costs associated with the immediate implementation of national standards:

.....
.....

8.5. *Proportionality of the aid* ⁽¹²⁸⁾

(A) Please provide an accurate calculation of the eligible costs demonstrating that they are indeed limited to the extra costs necessary to achieve the level of environmental protection:

.....
.....

(B) Were the beneficiaries selected in an open selection process?

- yes no

Please provide details ⁽¹²⁹⁾ and supporting documents:

.....
.....

(C) Please explain how it is ensured that the aid is limited to the minimum necessary and provide supporting documents:

.....
.....

8.6 *Analysis of the distortion of competition and trade* ⁽¹³⁰⁾

8.6.1. *Relevant markets and effects on trade*

(A) Please indicate whether the aid is likely to have impact on competition between undertakings in any product market.

- yes no

Please specify the product markets on which the aid is likely to have impact ⁽¹³¹⁾:

.....
.....

⁽¹²⁷⁾ For details on different types of advantages see Section 5.2.1.3 (point (172) of the Environmental aid guidelines.

⁽¹²⁸⁾ Cf. Environmental aid guidelines, Section 5.2.1.4.

⁽¹²⁹⁾ For example information on how non discrimination, transparency, openness are ensured.

⁽¹³⁰⁾ For details on negative effects of the aid measure see Section 5.2.2.

⁽¹³¹⁾ For details see footnote 60 of the Environmental aid guidelines.

(B) For each of these markets please provide some indicative market share of the beneficiary:

.....
.....

For each of these markets please provide some indicative market shares of the other companies present in the market. If possible, please provide the associated Herfindahl-Hirschman Index (HHI):

.....
.....

(C) Please describe the structure and dynamics of the relevant markets and provide supporting documents:

.....
.....

(D) If relevant, please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....
.....

(E) The following elements will be considered by the Commission when assessing the likelihood that the beneficiary may increase or maintain sales as a result of the aid. Please indicate those in relation to which supporting documents are provided ⁽¹³²⁾:

- reduction in or compensation of production unit costs.
- more environmentally friendly production process.
- new product.

8.6.2. Dynamic incentives/crowding out

The following elements will be considered by the Commission in its analysis of effects of the aid on competitors' dynamic incentives to invest ⁽¹³³⁾. Please indicate those in relation to which supporting documents are provided:

- amount of the aid;
- frequency of the aid;
- duration of the aid;
- gradual decrease of the aid;
- readiness to meet future standards;
- level of the regulatory standards in relation to the environmental objectives;
- the risk of cross subsidisation;
- technological neutrality;
- competing innovation.

8.6.3. Maintaining inefficient firms afloat ⁽¹³⁴⁾

The following elements will be considered by the Commission in its analysis of effects of the aid in order to prevent avoid unnecessary support to undertakings, which are unable to adapt to more environmentally friendly standards and technologies because of their low levels of efficiency ⁽¹³⁵⁾. Please, indicate those in relation to which details and supporting documents are provided:

- type of beneficiaries.

⁽¹³²⁾ For details see point 177 of the Environmental aid guidelines.
⁽¹³³⁾ For details see points 178 and 179 of the Environmental aid guidelines.
⁽¹³⁴⁾ For details see Section 5.2.2.2 of the Environmental aid guidelines.
⁽¹³⁵⁾ For details see Section 5.2.2.2. of the Environmental aid guidelines.

- overcapacity in the sector targeted by the aid.
- normal behaviour in the sector targeted by the aid.
- relative importance of the aid.
- selection process.
- selectivity.

8.6.4. Market power/exclusionary behaviour ⁽¹³⁶⁾

The following elements will be considered by the Commission in its analysis of effects of the aid on beneficiary's market power. Please, indicate those in relation to which details and supported documents are provided:

- market power of aid beneficiary and market structure
- new entry;
- product differentiation and price discrimination
- buyer power

8.6.5. Effects on trade and location ⁽¹³⁷⁾

Please provide evidence that the aid was not decisive for the choice of location for the investment:

.....

.....

9. Cumulation ⁽¹³⁸⁾

(A) Is the aid granted under the notified measure combined with other aid ⁽¹³⁹⁾?

- yes no

(B) If yes, please describe the cumulation rules applicable to the notified aid measure:

.....

.....

.....

.....

.....

(C) Please specify how the respect of cumulation rules will be verified under the notified aid measure:

.....

.....

.....

.....

.....

⁽¹³⁶⁾ For details see Section 5.2.2.3. of the Environmental aid guidelines.

⁽¹³⁷⁾ For details see Section 5.2.2.4. of the Environmental aid guidelines.

⁽¹³⁸⁾ Cf. Environmental aid guidelines, Chapter 6.

⁽¹³⁹⁾ Please note that aid for environmental protection must not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the Environmental aid guidelines.

10. Reporting and monitoring ⁽¹⁴⁰⁾10.1. *Annual reports*

Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 ⁽¹⁴¹⁾.

Please undertake to submit annual reports on the implementation of the notified environmental aid measure to the Commission, which shall contain for each approved scheme as regards large undertakings, all the elements listed below:

- names of the beneficiaries;
- aid amount per beneficiary;
- aid intensity;
- description of the objective of the measure and of what type of environmental protection it is intended to promote;
- sectors of activity where the aided projects are undertaken;
- explanation of how the incentive effect has been respected.
 - yes

In case of tax exemptions or reductions, please undertake to submit annual reports containing the elements listed below:

- legislative and/or regulatory text(s) establishing the aid;
- specification of the categories of undertakings benefiting from tax reductions or exemptions;
- specification of sectors of the economy most affected by these tax exemptions/reductions.
 - yes

10.2. *Monitoring and evaluation*

(A) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

- yes

(B) Please undertake to ensure that detailed records referred to in Section A above are maintained for 10 years from the date on which the aid was granted.

- yes

⁽¹⁴⁰⁾ Cf. Environmental aid guidelines, Section 7.1, 7.2 and 7.3.

⁽¹⁴¹⁾ 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).

(C) Please undertake to submit the records referred to in Section A above on request of the Commission.

yes

11. **Other information**

Please give any other information you consider necessary to assess the measure(s) in question under the Environmental aid guidelines.'

**COMMUNITY GUIDELINES ON STATE AID TO PROMOTE RISK CAPITAL INVESTMENTS IN
SMALL AND MEDIUM-SIZED ENTERPRISES**

(2006/C 194/02)

(Text with EEA relevance)

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1 INTRODUCTION

1.1 Risk capital as a Community objective

Risk capital relates to the equity financing of companies with perceived high-growth potential during their early growth stages. The demand for risk capital typically comes from companies with growth potential that do not have sufficient access to capital markets, while the offer of risk capital comes from investors ready to take high risk in exchange of potentially above average returns from the equity invested.

In its Communication to the Spring European Council, Working together for growth and jobs — A new start for the Lisbon strategy ⁽¹⁾, the Commission has recognised the insufficient level of risk capital available for start-up, innovative young businesses. The Commission has taken initiatives, like the Joint European Resources for Micro- to Medium Enterprises (JEREMIE) which is a joint initiative of the Commission and the European Investment Fund to tackle the lack of risk capital for small and medium-sized enterprises in some regions. Building on the experience gained with the financial instruments under the multiannual programme for enterprise and entrepreneurship, and in particular for small and medium-sized enterprises (MAP) adopted by Council Decision 2000/819/EC ⁽²⁾ the Commission has proposed a High Growth and Innovative SME Facility (GIF) under the Competitiveness and Innovation Programme (CIP), which is currently being adopted and will cover the period 2007-2013 ⁽³⁾. The Facility will increase the supply of equity to innovative SMEs by investing on market terms into venture capital funds focused on SMEs in their early stages and in the expansion phase.

⁽¹⁾ COM(2005) 24.

⁽²⁾ OJ L 333, 29.12.2000, p. 84. Decision as last amended by Decision No 1776/2005/EC of the European Parliament and of the Council (OJ L 289, 3.11.2005, p. 14).

⁽³⁾ COM(2005) 121 final.

The Commission addressed the issue of risk capital financing in its Communication on 'Financing SME Growth- Adding European Value' adopted on 29 June 2006 ⁽¹⁾. The Commission has also stressed the importance of reducing and redirecting State aids to address market failures in order to increase economic efficiency and to stimulate research, development and innovation. In this context, the Commission has undertaken to reform the State aid rules, inter alia, with the aim of facilitating access to finance and risk capital.

In fulfilment of its commitment, the Commission published the 'State Aid Action Plan — Less and better targeted State aid: A roadmap for State aid reform 2005-2009 ("the State Aid Action Plan")' ⁽²⁾ in June 2005. The State Aid Action Plan has highlighted the importance of improving the business climate and facilitating the rapid start-up of new enterprises. In this context, the State Aid Action Plan announced the review of the Communication on State aid and risk capital ⁽³⁾ to tackle the market failures affecting the provision of risk capital to start-ups and young, innovative small and medium-sized enterprises ('SMEs'), in particular by increasing the flexibility of the rules contained in the Communication on State aid and risk capital.

While it is the primary role of the market to provide sufficient risk capital in the Community, there is an 'equity gap' in the risk capital market, a persistent capital market imperfection preventing supply from meeting demand at a price acceptable to both sides, which negatively affects European SMEs. The gap concerns mainly high-tech innovative and mostly young firms with high growth potential. However, a wider range of firms of different ages and in different sectors with smaller growth potential that cannot find financing for their expansion projects without external risk capital may also be affected.

The existence of the equity gap may justify the granting of State aid in certain limited circumstances. If properly targeted, State aid in support of risk capital provision can be an effective means to alleviate the identified market failures in this field and to leverage private capital.

These guidelines replace the Communication on State aid and risk capital by setting out the conditions under which State aid supporting risk capital investments may be considered compatible with the common market. The guidelines explain the conditions under which State aid is present in accordance with Article 87(1) of the EC Treaty and the criteria that the Commission will apply in the compatibility assessment of the risk capital measures in accordance with Article 87(3) of the EC Treaty.

1.2 Experience in the field of State aid to risk capital

These guidelines have been prepared in the light of the experience gained in the application of the Communication on State aid and risk capital. Comments from public consultations of Member States and stakeholders on the revision of the Communication on State aid and risk capital, on the State aid Action Plan and on the Communication on State aid to innovation ⁽⁴⁾ have also been taken into account.

The experience of the Commission and the comments received in the consultations have shown that the Communication on State aid and risk capital has generally worked well in practice, but also revealed a need to increase the flexibility in the application of the rules and to adjust the rules to reflect the changed situation of the risk capital market. In addition, experience has shown that for some types of risk capital investments in some areas it was not always possible to fulfil the conditions set out in the Communication on State aid and risk capital, and, as a result, risk capital could not be adequately supported with State aid in these cases. Furthermore, experience has also shown a low overall profitability of the aided risk capital funds.

⁽¹⁾ COM(2006) 349.

⁽²⁾ COM(2005) 107 final – SEC(2005) 795.

⁽³⁾ OJ C 235, 21.8.2001, p. 3.

⁽⁴⁾ COM(2005) 436 final.

To remedy these problems, these guidelines adopt a more flexible approach in certain circumstances so as to allow Member States to better target their risk capital measures to the relevant market failure. These guidelines also set out a refined economic approach for the assessment of the compatibility of risk capital measures with the EC Treaty. Under the Communication on State aid and risk capital the assessment of the compatibility of schemes was already based on a relatively sophisticated economic analysis focussing on the size of the market failure and the targeting of the measure. Hence, the Communication on State aid and risk capital already reflected the key focus of a refined economic approach. However, some fine-tuning was still needed in respect of some of the criteria to ensure that the measure better target the relevant market failure. In particular, the guidelines contain elements to ensure that profit-driven and professional investment decisions are strengthened in order to further encourage private investors to co-invest with the State. Finally, an effort has been made to provide clarity where the experience with the Communication on State aid and risk capital has shown that this was needed.

1.3 The balancing test for State aid supporting risk capital investments

1.3.1 *The State Aid Action Plan and the balancing test*

In the State Aid Action Plan the Commission underlined the importance of strengthening the economic approach to State aid analysis. This translates into a balancing the potential positive effects of the measure in reaching an objective of common interest against its potential negative effects in terms of distortion of competition and trade. The balancing test, as outlined in the State Aid Action Plan, is composed of three steps, the first two relating to the positive effects and the last one to the negative effects and the resulting balance:

- (1) Is the aid measure aimed at a well-defined objective of common interest, such as growth, employment, cohesion and environment?
- (2) Is the aid well designed to deliver the objective of common interest, that is does the proposed aid address the market failure or other objective?
 - (i) Is State aid an appropriate policy instrument?
 - (ii) Is there an incentive effect, i.e. does the aid change the behaviour of firms and/or investors?
 - (iii) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

The balancing test is equally relevant for the design of State aid rules and for the assessment of cases falling within their scope.

1.3.2 *Market failures*

On the basis of the experience gained in applying the Communication on State aid and risk capital, the Commission considers that there is no general risk capital market failure in the Community. It does, however, accept that there are market gaps for some types of investments at certain stages of enterprises' development. These gaps result from an imperfect matching of supply and demand of risk capital and can generally be described as an equity gap.

The provision of equity finance, in particular to smaller businesses, presents numerous challenges both to the investor and to the enterprise invested in. On the supply side, the investor needs to make a careful analysis not merely of any collateral being offered (as is the case of a lender) but of the entire business strategy in order to estimate the possibilities of making a profit on the investment and the risks associated with it. The investor also needs to be able to monitor that the business strategy is well implemented by the enterprise's managers. The investor finally needs to plan and execute an exit strategy, in order to generate a risk-adjusted return on investment from selling its equity stake in the company in which the investment is made.

On the demand side, the enterprise must understand the benefits and risks associated with external equity investment to pursue the venture and to prepare sound business plans to secure the necessary resources and mentoring. Owing to a lack of internal capital or the collateral needed to obtain debt funding and/or a solid credit history, the enterprise may face very tight funding constraints. In addition, the enterprise must share control with an outside investor, who usually has an influence over company decisions in addition to a portion of the equity.

As a result, the matching of supply and demand of risk capital may be inefficient so that the level of risk capital provided in the market is too restricted, and enterprises do not obtain funding despite having a valuable business model and growth prospects. The Commission considers that the main source of market failure relevant to risk capital markets, which particularly affects access to capital by SMEs and companies at the early stages of their development and which may justify public intervention, relates to imperfect or asymmetric information.

Imperfect or asymmetric information may result notably in:

- (a) Transaction and agency costs: potential investors face more difficulties in gathering reliable information on the business prospects of an SME or a new company and subsequently in monitoring and supporting the enterprise's development. This is in particular the case for highly innovative projects or risky projects. Furthermore, small deals are less attractive to investment funds due to relatively high costs for investment appraisal and other transaction costs.
- (b) Risk aversion: investors may become more reluctant to provide risk capital to SMEs, the more the provision of risk capital is subject to imperfect or asymmetric information. In other words, imperfect or asymmetric information tends to exacerbate risk aversion.

1.3.3 *Appropriateness of the instrument*

The Commission considers that State aid to risk capital measures may constitute an appropriate instrument within the limits and conditions set out in these guidelines. However, it must be borne in mind that risk capital provision is essentially a commercial activity involving commercial decisions. In this context, more general structural measures not constituting State aid may also contribute to an increase in the provision of risk capital, such as promoting a culture of entrepreneurship, introducing a more neutral taxation of the different forms of SME financing (for example new equity, retained earnings and debt), fostering market integration, and easing regulatory constraints, including limitations on investments by certain types of financial institutions (for example, pension funds) and administrative procedures for setting up companies.

1.3.4 *Incentive effect and necessity*

State aid for risk capital must result in a net increase in the availability of risk capital to SMEs, in particular by leveraging investments by private investors. The risk of 'dead weight', or lack of incentive effect, means that some enterprises funded through publicly supported measures would have obtained finance on the same terms even in the absence of State aid (crowding out). There is evidence of this happening, although such evidence is inevitably anecdotal. In those circumstances public resources are ineffective.

The Commission considers that aid in the form of risk capital satisfying the conditions laid down in these guidelines ensures the presence of an incentive effect. The need to provide incentives depends on the size of the market failure related to the different types of measures and beneficiaries. Therefore different criteria are expressed in terms of size of investment tranches per target enterprise, degree of involvement of private investors, and consideration of notably the size of the company and the business stage financed.

1.3.5 Proportionality of aid

The need to provide incentives depends on the size of the market failure related to the different types of measures, beneficiaries and development stage of the SMEs. A risk capital measure is well designed if the aid is necessary in all its elements to create the incentives to provide equity to SMEs in their seed, start-up and early stages. State aid will be inefficient if it goes beyond what is needed to induce more risk capital provision. In particular, to ensure that aid is limited to the minimum, it is crucial that there is significant private participation and that the investments are profit-driven and are managed on a commercial basis.

1.3.6 Negative effects and overall balance

The EC Treaty requires the Commission to control State aid within the Community. This is why the Commission has to be vigilant in order to ensure that measures are well targeted and to avoid severe distortions of competition. When deciding whether the grant of public funds for measures designed to promote risk capital is compatible with the common market, the Commission will seek to limit as far as possible the following categories of risk:

- (a) the risk of 'crowding out'. The presence of publicly supported measures may discourage other potential investors from providing capital. This could, over the longer term, further discourage private investment in young SMEs and thus end up widening the equity gap, while at the same time creating the need for additional public funding;
- (b) the risk that advantages to the investors and/or investment funds create an undue distortion of competition in the venture capital market relative to their competitors that do not receive the same advantages;
- (c) the risk that an oversupply of public risk capital for target enterprises not invested according to a commercial logic could help inefficient firms stay afloat and could cause an artificial inflation of their valuations, making it all the less attractive for private investors to supply risk capital to these firms.

1.4 Approach for State aid control in the area of risk capital

Provision of risk capital funding to enterprises cannot be linked to the traditional concept of 'eligible costs' used for State aid control, which relies on certain specified costs for which aid is allowed and the setting of maximum aid intensities. The diversity of possible models for risk capital measures devised by Member States also means that the Commission is not in a position to define rigid criteria by which to determine whether such measures are compatible with the common market. The assessment of risk capital therefore implies a departure from the traditional way in which State aid control is carried out.

However, since the Communication on State aid and risk capital has proved to work well in practice in the area of risk capital, the Commission has decided to continue and thereby ensure continuity with the approach of the Communication.

2 SCOPE AND DEFINITIONS

2.1 Scope

These guidelines only apply to risk capital schemes targeting SMEs. They are not intended to constitute the legal basis for declaring an ad hoc measure providing capital to an individual enterprise compatible with the common market.

Nothing in these guidelines should be taken to call into question the compatibility of State aid measures which meet the criteria laid down in any other guidelines, frameworks or regulations adopted by the Commission.

The Commission will pay particular attention to the need to prevent the use of these guidelines to circumvent the principles laid down in existing frameworks, guidelines and Regulations.

Risk capital measures must specifically exclude the provision of aid to enterprises:

- (a) in difficulty, within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁾;
- (b) in the shipbuilding ⁽²⁾, coal ⁽³⁾ and steel industry ⁽⁴⁾.

These Guidelines do not apply to 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 expenditure linked to the export activity, as well as aid contingent upon the use of domestic in preference to imported goods.

2.2 Definitions

For the purposes of these guidelines, the following definitions shall apply:

- (a) **'equity'** means ownership interest in a company, represented by the shares issued to investors;
- (b) **'private equity'** means private (as opposed to public) equity investment in companies not listed on a stock-market, including venture capital, replacement capital and buy-outs;
- (c) **'quasi-equity investment instruments'** means instruments whose return for the holder (investor/lender) is predominantly based on the profits or losses of the underlying target company, are unsecured in the event of default. This definition is based on a substance over form approach;
- (d) **'debt investment instruments'** means loans and other funding instruments which provide the lender/investor with a predominant component of fixed minimum remuneration and are at least partly secured. This definition is based on a substance over form approach;
- (e) **'seed capital'** means financing provided to study, assess and develop an initial concept, preceding the start-up phase;
- (f) **'start-up capital'** means financing provided to companies, which have not sold their product or service commercially and are not yet generating a profit, for product development and initial marketing;
- (g) **'early-stage capital'** means seed and start-up capital;
- (h) **'expansion capital'** means financing provided for the growth and expansion of a company, 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;
- (i) **'venture capital'** means investment in unquoted companies by investment funds (venture capital funds) that, acting as principals, manage individual, institutional or in-house money and includes early-stage and expansion financing, but not replacement finance and buy-outs;

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽²⁾ For the purpose of these Guidelines, the definitions laid down in the Framework on State aid to shipbuilding OJ C 317, 30.12.2003, p. 11, apply.

⁽³⁾ For the purpose of these Guidelines, 'coal' means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe.

⁽⁴⁾ For the purpose of these Guidelines, the definition laid down in Annex I in the Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13) applies.

- (j) **'replacement capital'** means the purchase of existing shares in a company from another private equity investment organisation or from another shareholder or shareholders. Replacement capital is also called secondary purchase;
- (k) **'risk capital'** means equity and quasi-equity financing to companies during their early-growth stages (seed, start-up and expansion phases), including informal investment by business angels, venture capital and alternative stock markets specialised in SMEs including high-growth companies (hereafter referred to as investment vehicles);
- (l) **'risk capital measures'** means schemes to provide or promote aid in the form of risk capital;
- (m) **'Initial Public Offering' ('IPO')** means the process of launching the sale or distribution of a company's shares to the public for the first time;
- (n) **'follow-on investment'** means an additional investment in a company subsequent to an initial investment;
- (o) **'buyout'** means the purchase of at least a controlling percentage of a company's equity from the current shareholders to take over its assets and operations through negotiation or a tender offer;
- (p) **'exit strategy'** means a strategy for the liquidation of holdings by a venture capital or private equity fund according to 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);
- (q) **'small and medium-sized enterprises'** ('SMEs') means small enterprises and medium-sized enterprises within the meaning 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 ⁽¹⁾ or any Regulation replacing that Regulation;
- (r) **'target enterprise or company'** means an enterprise or company in which an investor or investment fund is considering investing;
- (s) **'business angels'** means wealthy private individuals who invest directly in young new and growing unquoted business (seed finance) and provide them with advice, usually in return for an equity stake in the business, but may also provide other long-term finance;
- (t) **'assisted areas'** means regions falling within the scope of the derogations contained in Article 87(3)(a) or (c) of the EC Treaty;

3 APPLICABILITY OF ARTICLE 87(1) IN THE FIELD OF RISK CAPITAL

3.1 General applicable texts

There are already a number of published Commission texts which provide interpretation on whether individual measures fall within the definition of State aid and which may be relevant to risk capital measures. These include the 1984 communication on government capital injections ⁽²⁾, the 1998 notice on the application of the State aid rules to measures relating to direct business taxation ⁽³⁾ and the notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽⁴⁾. The Commission will continue to apply these texts, when assessing whether risk capital measures constitute State aid.

⁽¹⁾ OJ L 10, 13.1.2001, p. 33; Regulation as last amended by Regulation (EC) No 1040/2006 (OJ L 187, 8.7.2006, p. 8).

⁽²⁾ Bulletin EC 9-1984, reproduced in 'Competition law in the European Communities', Volume IIA, p. 133.

⁽³⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁴⁾ OJ C 71, 11.3.2000, p. 14.

3.2 Presence of aid at three levels

Risk capital measures often involve complex constructions devised to promote risk capital because the public authorities create incentives for one set of economic operators (investors) in order to provide finance to another set (target SMEs). Depending on the design of the measure, and even if the intention of the public authorities may be only to provide benefits to the latter group, enterprises at either or both levels may benefit from State aid. Moreover, in most cases the measure provides for the creation of a fund or other investment vehicle which has an existence separate from that of the investors and the enterprises in which the investment is made. In such cases it is also necessary to consider whether the fund or vehicle can be considered to be an enterprise benefiting from State aid.

In this context, funding with resources, which are not State resources within the meaning of Article 87(1) of the EC Treaty, is considered to be provided by private investors. This is, in particular, the case for funding by the European Investment Bank and the European Investment fund.

The Commission will take into account the following specific factors in determining whether State aid is present at each of the different levels ⁽¹⁾.

Aid to investors. Where a measure allows private investors to effect equity or quasi-equity investments into a company or set of companies on terms more favourable than public investors, or than if they had undertaken such investments in the absence of the measure, then those private investors will be considered to receive an advantage. Such advantage may take different forms, as specified in section 4.2 of these guidelines. This remains the case even if the private investor is persuaded by the measure to confer an advantage on the company or companies concerned. In contrast, the Commission will consider the investment to be effected *pari passu* between public and private investors, and thus not to constitute State aid, where its terms would be acceptable to a normal economic operator in a market economy in the absence of any State intervention. This is assumed to be the case only if public and private investors share exactly the same upside and downside risks and rewards and hold the same level of subordination, and normally where at least 50 percent of the funding of the measure is provided by private investors, which are independent from the companies in which they invest.

Aid to an investment fund, investment vehicle and/or its manager. In general, the Commission considers that an investment fund or an investment vehicle is an intermediary vehicle for the transfer of aid to investors and/or enterprises in which investment is made, rather than being a beneficiary of aid itself. However, measures such as fiscal measures or other measures involving direct transfers in favour of an investment vehicle or an existing fund with numerous and diverse investors with the character of an independent enterprise may constitute aid unless the investment is made on terms which would be acceptable to a normal economic operator in a market economy and therefore provide no advantage to the beneficiary. Likewise, aid to the fund's managers or the management company will be considered to be present if their remuneration does not fully reflect the current market remuneration in comparable situations. On the other hand, there is a presumption of no aid if the managers or management company are chosen through an open and transparent public tender procedure or if they do not receive any other advantages granted by the State.

Aid to the enterprises in which investment is made. In particular, where aid is present at the level of the investors, the investment vehicle or the investment fund, the Commission will normally consider that it is at least partly passed on to the target enterprises and thus that it is also present at their level. This is the case even where investment decisions are being taken by the managers of the fund with a purely commercial logic.

⁽¹⁾ It should, however, be noted that guarantees granted by the State in favour of investments in risk capital are more likely to include an element of aid to the investor than is the case with traditional loan guarantees, which are normally considered to constitute aid to the borrower rather than to the lender.

In cases where the investment is made on terms which would be acceptable to a private investor in a market economy in the absence of any State intervention the enterprises in which the investment is made will not be considered as aid recipients. For this purpose, the Commission will consider whether such investment decisions are exclusively profit-driven and are linked to a reasonable business plan and projections, as well as to a clear and realistic exit strategy. Also important will be the choice and investment mandate of the fund's managers or the management company as well as the percentage and degree of involvement of private investors.

3.3 De minimis amounts

Where all financing in the form of risk capital provided to beneficiaries is *de minimis* within the meaning of 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 ⁽¹⁾ and Commission Regulation (EC) No 1860/2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors ⁽²⁾, then it is deemed not to fall under Article 87(1) of the EC Treaty. In risk capital measures the application of the *de minimis* rule is made more complicated by difficulties in the calculation of the aid and also by the fact that measures may provide aid not only to the target enterprises but also to other investors. Where these difficulties can be overcome, however, the *de minimis* rule remains applicable. Therefore, if a scheme provides public capital only up to the relevant *de minimis* threshold to each enterprise over a three-year period, then it is certain that any aid to these enterprises and/or the investors is within the prescribed limits.

4 ASSESSMENT OF THE COMPATIBILITY OF RISK CAPITAL AID UNDER ARTICLE 87(3) (C) OF THE EC TREATY

4.1 General principles

Article 87(3)(c) of the EC Treaty provides that aid to facilitate the development of certain economic activities may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. On the basis of the balancing test set out in section 1.3, the Commission will declare a risk capital measure compatible only if it concludes that the aid measure leads to an increased provision of risk capital without adversely affecting trading conditions to an extent contrary to the common interest. This section sets out a set of conditions under which the Commission will consider that aid in the form of risk capital is compatible with Article 87(3)(c).

Where the Commission is in possession of a complete notification which shows that all the conditions laid down in this section are met, it will try to make a rapid assessment of the aid within the time limits laid down 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 ⁽³⁾. For certain types of measures which do not fulfil all the conditions set out in this section, the Commission will undertake a more detailed assessment of the risk capital measure as set out in detail in section 5.

Where there is also aid at the level of target enterprises and the provision of risk capital is linked to costs which are eligible for aid under another regulation or framework or other guidelines, that text may be applied to consider whether the aid is compatible with the common market.

⁽¹⁾ OJ L 10, 13.1.2001, p. 30.

⁽²⁾ OJ L 325, 28.10.2004, p. 4.

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

4.2 Form of aid

The choice of form of an aid measure lies in general with the Member State and this applies equally to risk capital measures. However, the Commission's assessment of such measures will include whether they encourage market investors to provide risk capital to the target enterprises and are likely to result in investment decisions being taken on a commercial (that is, a profit-driven) basis, as further explained in section 4.3.

The Commission believes that the types of measure capable of producing this result include the following:

- (a) constitution of investment funds ('venture capital funds') in which the State is a partner, investor or participant, even if on less advantageous terms than other investors;
- (b) guarantees to risk capital investors or to venture capital funds against a proportion of investment losses, or guarantees given in respect of loans to investors/funds for investment in risk capital, provided the public cover for the potential underlying losses does not exceed 50 % of the nominal amount of the investment guaranteed;
- (c) other financial instruments in favour of risk capital investors or venture capital funds to provide extra capital for investment;
- (d) fiscal incentives to investment funds and/or their managers, or to investors to undertake risk capital investment.

4.3 Conditions for compatibility

To ensure that the incentive effect and the necessity of aid as set out in section 1.3.4 are present in a risk capital measure a number of indicators are relevant. The rationale is that State aid must target a specific market failure for the existence of which there is sufficient evidence. For this purpose, these guidelines lay down specific safe-harbour thresholds relating to tranches of investment in target SMEs in their early stages of business activity. Furthermore, so that aid is limited to the minimum necessary, it is crucial that aided investments into target SMEs are profit-driven and are managed on a commercial basis. The Commission will consider that the incentive effect, the necessity and proportionality of aid are present in a risk capital measure and that the overall balance is positive where all the following conditions are met.

Measures specifically involving investment vehicles will be assessed under section 5 of these guidelines and not under the conditions in this section.

4.3.1 *Maximum level of investment tranches*

The risk capital measure must provide for tranches of finance, whether wholly or partly financed through State aid, not exceeding EUR 1.5 million per target SME over each period of twelve months.

4.3.2 *Restriction to seed, start-up and expansion financing*

The risk capital measure must be restricted to provide financing up to the expansion stage for small enterprises, or for medium-sized enterprises located in assisted areas. It must be restricted to provide financing up to the start-up stage for medium-sized enterprises located in non-assisted areas.

4.3.3 *Prevalence of equity and quasi-equity investment instruments*

The risk capital measure must provide at least 70 % of its total budget in the form of equity and quasi-equity investment instruments into target SMEs. In assessing the nature of such instruments, the Commission will have regard to the economic substance of the instrument rather than to its name and the qualification attributed to it by the investors. In particular, the Commission will take into account the degree of risk in the target company's venture borne by the investor, the potential losses borne by the investor, the predominance of profit-dependent remuneration versus fixed remuneration, and the level of subordination of the investor in the event of the company's bankruptcy. The Commission may also take into account the treatment applicable to the investment instrument under the prevalent domestic legal, regulatory, financial, and accounting rules, if these are consistent and relevant for the qualification.

4.3.4 *Participation by private investors*

At least 50 % of the funding of the investments made under the risk capital measure must be provided by private investors, or for at least 30 % in the case of measures targeting SMEs located in assisted areas.

4.3.5 *Profit-driven character of investment decisions*

The risk capital measure must ensure that decisions to invest into target companies are profit-driven. This is the case where the motivation to effect the investment is based on the prospects of a significant profit potential and constant assistance to target companies for this purpose.

This criterion is considered to be met if all the following conditions are fulfilled:

- (a) the measures have significant involvement of private investors as described in section 4.3.4, providing investments on a commercial basis (that is, only for profit) directly or indirectly in the equity of the target enterprises; and
- (b) a business plan exists for each investment containing details of product, sales and profitability development and establishing the *ex ante* viability of the project; and
- (c) a clear and realistic exit strategy exists for each investment.

4.3.6 *Commercial management*

The management of a risk capital measure or fund must be effected on a commercial basis. The management team must behave as managers in the private sector, seeking to optimise the return for their investors. This criterion is considered to be present where all the following conditions are fulfilled:

- (a) there is an agreement between a professional fund manager or a management company 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 market investors are represented in decision-making, such as through an investors' or advisory committee; and
- (c) best practices and regulatory supervision apply to the management of funds.

4.3.7 *Sectoral focus*

To the extent that many private sector funds focus on specific innovative technologies or even sectors (such as health, information technology, biotechnology) the Commission may accept a sectoral focus for risk capital measures, provided the measure falls within the scope of these guidelines as set out in section 2.1.

5 COMPATIBILITY OF RISK CAPITAL AID MEASURES SUBJECT TO A DETAILED ASSESSMENT

This section applies to risk capital measures which do not satisfy all the conditions laid down in section 4. A more detailed compatibility assessment based on the balancing test outlined in section 1.3 is necessary for these measures due to the need to ensure the targeting of the relevant market failure and due to the higher risks of potential crowding-out of private investors and of distortion of competition.

The analysis of compatibility of the measures with the EC Treaty will be based on a number of positive and negative elements. No single element is determinant, nor can any set of elements be regarded as sufficient on its own to ensure compatibility. In some cases their applicability, and the weight attached to them, may depend on the form of the measure.

Member States will have to provide all the elements and the evidence they consider useful for the assessment of a measure. The level of evidence required and the Commission assessment will depend on the features of each case and will be proportionate to the level of market failure tackled and to the risk of crowding out private investment.

5.1 Aid measures subject to a detailed assessment

The following types of risk capital measures not complying with one or more of the conditions set out in section 4 will be subject to a more detailed assessment given the less obvious evidence of a market failure and the higher potential for crowding out of private investment and/or distortion of competition.

(a) ***Measures providing for investment tranches beyond the safe-harbour threshold of EUR 1.5 million per target SME over each period of twelve months***

The Commission is aware of the constant fluctuation of the risk capital market and of the equity gap over time, as well as of the different degree by which enterprises are affected by the market failure depending on their size, on their stage of business development, and on their economic sector. Therefore, the Commission is prepared to consider declaring risk capital measures providing for investment tranches exceeding the threshold of EUR 1.5 million per enterprise per year compatible with the common market, provided the necessary evidence of the market failure is submitted.

(b) ***Measures providing finance for the expansion stage for medium-sized enterprises in non-assisted areas***

The Commission recognises that certain medium-sized enterprises in non-assisted areas may have insufficient access to risk capital even in their expansion stage despite the availability of finance to enterprises having a significant turnover and/or total balance. Therefore, the Commission is prepared to consider declaring measures partly covering the expansion stage of medium-sized enterprises compatible with the common market in certain cases, provided the necessary evidence is submitted.

(c) ***Measures providing for follow-on investments into target companies that already received aided capital injections to fund subsequent financing rounds even beyond the general safe-harbour thresholds and the companies' early-growth financing***

The Commission recognises the importance of follow-on investments into target companies that already received aided capital injections in their early stages to finance financing rounds even beyond the maximum safe-harbour investment tranches and the companies' early-growth financing up to the exit of the initial investment. This may be necessary to avoid dilution of the public participation in these financing rounds while ensuring continuity of financing for the target enterprises so that both public and private investors can fully benefit from the risky investments. In these circumstances and taking into account the specificities of the targeted sector and enterprises, the Commission is prepared to consider declaring follow-on investment compatible with the common market provided the amount of this investment is consistent with the initial investment and with the size of the fund.

(d) **Measures providing for a participation by private investors below 50 % in non-assisted areas or below 30 % in assisted areas**

In the Community the level of development of the private risk capital market varies to a significant extent in the various Member States. In some cases, it might be difficult to find private investors, and therefore the Commission is prepared to consider declaring measures with a private participation below the thresholds set out in section 4.3.4 compatible with the common market, if Member States submit the necessary evidence.

This problem may be even greater for risk capital measures targeting SMEs in assisted areas. In these cases there may be an additional shortage of capital available for them given their remote location from venture capital centres, the lower population density, and the increased risk-aversion of private investors. These SMEs may also be affected by demand-side issues such as the difficulty in drawing up a viable, investment-ready business proposition, a more limited equity culture, and particular reluctance to lose management control as a result of venture capital intervention.

(e) **Measures providing seed capital to small enterprises which may foresee (i) less or no private participation by private investors, and/or (ii) predominance of debt investment instruments as opposed to equity and quasi-equity**

The market failures affecting enterprises in their seed stage are more pronounced due to the high degree of risk involved by the potential investment and the need to closely mentor the entrepreneur in this crucial phase. This is also reflected by the reluctance and near absence of private investors to provide seed capital, which implies no or very limited risk of crowding-out. Furthermore, there is reduced potential for distortion of competition due to the significant distance from the market of these small-size enterprises. These reasons may justify a more favourable stance of the Commission towards measures targeting the seed stage, also in light of their potentially crucial importance to generate growth and jobs in the Community.

(f) **Measures specifically involving an investment vehicle**

An investment vehicle may facilitate the matching between investors and target SMEs for which it may therefore improve the access to risk capital. In case of market failures related to the enterprises targeted by the vehicle, the vehicle may not function efficiently without financial incentives. For instance, investors may not find the type of investments targeted by the vehicle attractive compared to investments of higher tranches of investments or investments in more established enterprises or more established market places, despite a clear potential for profitability of the target enterprises. Therefore, the Commission is prepared to consider declaring measures specifically involving an investment vehicle compatible with the common market, provided the necessary evidence for a clearly defined market failure is submitted.

(g) **Costs linked to the first screening of companies in view of the conclusion of the investments, up to the due diligence phase ('scouting costs')**

Risk capital funds or their managers may incur 'scouting costs' in identifying SMEs, prior to the due diligence phase. Grants covering part of these scouting costs must encourage the funds or their managers to carry out more 'scouting' activities than would otherwise be the case. This may also be beneficial for the SMEs concerned, even if the search does not lead to an investment, since it enables those SMEs to acquire more experience with risk capital financing. These reasons may justify a more favourable stance of the Commission towards grants covering part of the scouting costs of risk capital funds or their managers, subject to the following conditions: The eligible costs must be limited to the scouting costs related to SMEs mainly in their seed or start-up stage, where such costs do not lead to investment, and the costs must exclude legal and administrative costs of the funds. In addition, the grant must not exceed 50 % of the eligible costs.

5.2 Positive effects of the aid

5.2.1 Existence and evidence of market failure

For risk capital measures envisaging investment tranches into target enterprises beyond the conditions laid down in section 4, in particular those providing for tranches above EUR 1.5 million per target SME over each period of twelve months, follow-on investments or financing of the expansion stage for medium-sized enterprises in non-assisted areas as well as for measures specifically involving an investment vehicle, the Commission will require additional evidence of the market failure being tackled at each level where aid may be present before declaring the proposed risk capital measure compatible with the common market. Such evidence must be based on a study showing the level of the 'equity gap' with regard to the enterprises and sectors targeted by the risk capital measure. The relevant information concerns the supply of risk capital and the fundraising capital, as well as the significance of the venture capital industry in the local economy. It should ideally be provided for periods of three to five years preceding the implementation of the measure and also for the future, on the basis of reasonable projections, if available. The evidence submitted could also include the following elements:

- (a) development of the fundraising over the past five years, also in comparison with the correspondent national and/or European averages;
- (b) the current overhang of money;
- (c) the share of government aided investment programs in the total venture capital investment over the preceding three to five years;
- (d) the percentage of new start-ups receiving venture capital;
- (e) the distribution of investments by categories of amount of investment;
- (f) a comparison of the number of business plans presented with the number of investments made by segment (amount of investment, sector, round of financing, etc.).

For measures targeting SMEs located in assisted areas, the relevant information must be supplemented by any other relevant evidence proving the regional specificities which justify the features of the measure envisaged. The following elements may be relevant:

- (a) estimation of the additional size of the equity gap caused by the peripherality and other regional specificities, in particular in terms of total amount of risk capital invested, number of funds or investment vehicles present in the territory or at a short distance, availability of skilled managers, number of deals and average and minimum size of deals if available;
- (b) specific local economic data, social and/or historic reasons for an underprovision of risk capital, in comparison with the relevant average data and/or situation at national and/or Community level as appropriate;
- (c) any other relevant indicator showing an increased degree of market failure.

Member States may resubmit the same evidence several times provided that the underlying market conditions have not changed. The Commission reserves the right to question the validity of the submitted evidence.

5.2.2 Appropriateness of the instrument

An important element in the balancing test is whether and to what extent State aid in the field of risk capital can be considered as an appropriate instrument to encourage private risk capital investment. This assessment is closely related to the assessment of the incentive effect and the necessity of aid, as set out in section 5.2.3.

In its detailed assessment, the Commission will take particular account of any impact assessment of the proposed measure which the Member State has made. Where the Member State has considered other policy options and the advantages of using a selective instrument such as State aid have been established and submitted to the Commission, the measures concerned are considered to constitute an appropriate instrument. The Commission will also assess evidence of other measures taken or to be taken to address the 'equity gap' notably *ex post* evaluations and both supply and demand side issues affecting the targeted SMEs, to see how they would interact with the proposed risk capital measure.

5.2.3 *Incentive effect and necessity of aid*

The incentive effect of the risk capital aid measures plays a crucial role in the compatibility assessment. The Commission believes that the incentive effect is present for measures meeting all the conditions in section 4. However, as for the measures covered in this section the presence of the incentive effect becomes less obvious. Therefore, the Commission will also take into account the following additional criteria showing the profit-driven character of investment decisions and the commercial management of the measure, where relevant.

5.2.3.1 Commercial management

In addition to the conditions laid down in section 4.3.6 the Commission will consider it positively that the risk capital measure or fund is managed by professionals from the private sector or by independent professionals chosen according to a transparent, non-discriminatory procedure, preferably an open tender, with proven experience and a track record in capital market investments ideally in the same sector(s) targeted by the fund, as well as an understanding of the relevant legal and accounting background for the investment.

5.2.3.2 Presence of an investment committee

A further positive element would be the existence of an investment committee, independent of the fund management company and composed of independent experts coming from the private sector with significant experience in the targeted sector, and preferably also of representatives of investors, or independent experts chosen according to a transparent, non-discriminatory procedure, preferably an open tender. These experts would provide the managers or management company with analyses of the existing and the expected future market situation and would scrutinise and propose to them potential target enterprises with good investment prospects.

5.2.3.3 Size of the measure/fund

The Commission will consider it positively where a risk capital measure has a budget for investments into target SMEs of a sufficient size to take advantage of economies of scale in administering a fund and the possibility of diversifying risk via a pool of a sufficient number of investments. The size of the fund should be such as to ensure the possibility of absorbing the transaction costs and/or financing the later more profitable financing stages of target companies. Larger funds will be considered positively also taking into account the sector targeted, and provided the risks of crowding-out private investment and distorting competition are minimised.

5.2.3.4 Presence of business angels

For measures targeting seed capital, in view of the more pronounced level of market failure that can be perceived in this phase, the Commission will consider positively the direct or indirect involvement of business angels in investments in the seed stage. In such circumstances, it is therefore prepared to consider declaring measures compatible with the common market even if they foresee a predominance of debt instruments, including a higher degree of subordination of the State funds and a right of first profit for business angels or higher remuneration for their provision of capital and active involvement in the management of the measure/fund and/or of the target enterprises.

5.2.4 Proportionality

Compatibility requires that the aid amount is limited to the minimum necessary. The way to achieve this aspect of proportionality will necessarily depend on the form of the measure in question. However in the absence of any mechanism to check that investors are not overcompensated, or a measure where the risk of losses is borne entirely by the public sector and/or where the benefits flow entirely to the other investors, the measure will not be considered proportionate.

The Commission will consider that the following elements positively influence the assessment of proportionality as they represent a best-practice approach:

- (a) **Open tender for managers.** A transparent, non-discriminatory open tender for the choice of the managers or management company ensuring the best combination of quality and value for money will be considered positively, as it will limit the cost (and possibly aid) level at the minimum necessary and will also minimise distortion of competition.
- (b) **Call for tender or public invitation to investors.** A call for tender for the establishment of any 'preferential terms' given to investors, or the availability of any such terms to other investors. This availability might take the form of a public invitation to investors at the launch of an investment fund or investment vehicle, or might take the form of a scheme (such as a guarantee scheme) which remained open to new entrants over an extended period.

5.3 Negative effects of the aid

The Commission will balance the potential negative effects in terms of distortion of competition and risk of crowding-out private investment against the positive effects when assessing the compatibility of risk capital measures. These potentially negative effects will have to be analysed at each of the three levels where aid may be present. Aid to investors, to investment vehicles and to investment funds may negatively affect competition in the market for the provision of risk capital. Aid to target enterprises may negatively affect the product markets on which these enterprises compete.

5.3.1 Crowding-out

At the level of the market for the provision of risk capital, State aid may result in crowding out private investment. This might reduce the incentives of private investors to provide funding for target SMEs and encourage them to wait until the State provides aid for such investments. This risk becomes more relevant, the higher the amount of an investment tranche invested into an enterprise, the larger the size of an enterprise, and the later the business stage, as private risk capital becomes progressively available in these circumstances.

Therefore, the Commission will require specific evidence regarding the risk of crowding-out for measures providing for larger investment tranches in target SMEs, for follow-on investments or for financing of the expansion stage in medium-sized enterprises in non-assisted areas or for measures with low participation by private investors or measures involving specifically an investment vehicle.

In addition, Member States will have to provide evidence to show that there is no risk of crowding-out, specifically concerning the targeted segment, sector and/or industry structure. The following elements may be relevant:

- (a) the number of venture capital firms/funds/investment vehicles present at national level or in the area in case of a regional fund and the segments in which they are active;

- (b) the targeted enterprises in terms of size of companies, growth stage, and business sector;
- (c) the average deal size and possibly the minimum deal size the funds or investors would scrutinise;
- (d) the total amount of venture capital available for the target enterprises, sector and stage targeted by the relevant measure.

5.3.2 *Other distortions of competition*

As most target SMEs are recently established, at the level of the market where they are present, it is unlikely that these SMEs will have significant market power and thus that there will be a significant distortion of competition in this respect. However, it can not be excluded that risk capital measures might have the effect of keeping inefficient firms or sectors afloat, which would otherwise disappear. Furthermore, an over-supply of risk capital funding to inefficient enterprises may artificially increase their valuation and thus distort the risk capital market at the level of fund providers, which would have to pay higher prices to buy these enterprises. Sector specific aid may also maintain production in non-competitive sectors, whereas region-specific aid may build up an inefficient allocation of production factors between regions.

In its analysis of these risks, the Commission will examine, in particular, the following factors:

- (a) overall profitability of the firms invested in over time and prospects of future profitability
- (b) rate of enterprise failure targeted by the measure;
- (c) maximum size of investment tranche envisaged by the measure as compared to the turnover and costs of the target SMEs;
- (d) over-capacity of the sector benefiting from the aid.

5.4 **Balancing and decision**

In the light of the above positive and negative elements, the Commission will balance the effects of the risk capital measure and determine whether the resulting distortions adversely affect trading conditions to an extent contrary to the common interest. The analysis in each particular case will be based on an overall assessment of the foreseeable positive and negative impact of the State aid. For that purpose the Commission will not use the criteria set out in these guidelines mechanically but will make an overall assessment of their relative importance.

The Commission may raise no objections to the notified aid measure without entering into the formal investigation procedure or, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999, it may close the procedure with a decision pursuant to Article 7 of that Regulation. If it adopts a conditional decision pursuant to Article 7(4) of Regulation (EC) No 659/1999 closing a formal investigation procedure, it may in particular attach the following conditions to limit the potential distortion of competition and ensure proportionality:

- (a) if higher thresholds of investment tranches per target enterprise are foreseen, it may lower the maximum amount proposed per investment tranche or set an overall maximum amount of finance per target enterprise;
- (b) if investments in the expansion stage in medium-sized enterprises in non-assisted areas are foreseen, it may limit investments predominantly to the seed and start-up stage and/or limit the investments to one or two rounds and/or limit the tranches to a maximum threshold per target enterprise;

- (c) if follow-on investment is foreseen, it may set specific limits to the maximum amount to be invested into each target enterprise, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund;
- (d) if a lower participation of private investors is foreseen, it may require a progressive increase of the participation of private investors over the life of the fund, having particular regard to the business stage, the sector, the respective levels of profit-sharing and subordination, and possibly the localisation in assisted areas of the target enterprises;
- (e) for measures providing seed capital only, it may require Member States to ensure that the State receives an adequate return on its investment commensurate with the risks incurred for these investments, in particular where the State finances the investment in the form of quasi-equity or debt instruments, the return on which should, for instance, be linked to potential rights of exploitation (for example, royalties) generated by intellectual property rights created as a result of the investment;
- (f) require a different balancing between respective profit- and loss-sharing arrangements and level of subordination between the State and private investors;
- (g) require more stringent commitments as regards cumulation of risk capital aid with aid granted under other State aid regulations or frameworks, by way of derogation from section 6.

6 CUMULATION

Where capital provided to a target enterprise under a risk capital measure covered by these guidelines is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other State aid documents, the relevant aid ceilings or maximum eligible amounts will be reduced by 50 % in general and by 20 % for target enterprises located in assisted areas during the first three years of the first risk capital investment and up to the total amount received. This reduction does not apply to aid intensities provided for in the Community Framework for State aid for Research and Development ⁽¹⁾ or any successor framework or block exemption regulation in this field.

7 FINAL PROVISIONS

7.1 Monitoring and reporting

Regulation (EC) No 659/1999 and 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 ⁽²⁾ require Member States to submit annual reports to the Commission.

In respect of risk capital measures the reports must contain a summary table with a breakdown of the investments effected by the fund or under the risk capital measure including a list of all the enterprise beneficiaries of risk capital measures. The report must also give a brief description of the activity of investment funds with details of potential deals scrutinised and of the transactions actually undertaken as well as the performance of investment vehicles with aggregate information about the amount of capital raised through the vehicle. The Commission may request additional information regarding the aid granted, to check whether the conditions of the Commission's decision approving the aid measure have been respected.

The annual reports will be published on the internet site of the Commission.

⁽¹⁾ OJ C 45, 17.2.1996, p. 5.

⁽²⁾ OJ L 140, 30.4.2004, p. 1.

In addition, the Commission considers that further measures are necessary to improve the transparency of State aid in the Community. In particular, it appears necessary to ensure that the Member States, economic operators, interested parties and the Commission itself have easy access to the full text of all applicable risk capital aid schemes.

This can easily be achieved through the establishment of linked internet sites. For this reason, when examining risk capital aid schemes, the Commission will systematically require the Member State concerned to publish the full text of all final aid schemes on the internet and to communicate the internet address of the publication to the Commission.

The scheme must not be applied before the information is published on the internet.

Member States must maintain detailed records regarding the granting of aid for all risk capital measures. Such records must contain all information necessary to establish that the conditions laid down in the guidelines have been observed, notably as regards the size of the tranche, the size of the company (small or medium-sized), the development stage of the company (seed, start-up or expansion), its sector of activity (preferably at 4 digit level of the NACE classification) as well as information on the management of the funds and on the other criteria mentioned in these guidelines. This information must be maintained for 10 years from the date on which the aid is granted.

The Commission will ask Member States to provide this information in order to carry out an impact assessment of these guidelines three years after their entry into force.

7.2 Entry into force and validity

The Commission will apply these guidelines from the date of their publication in the *Official Journal of the European Union*. These guidelines will replace the 2001 Communication on State aid and risk capital

These guidelines will cease to be valid on 31 December 2013. After consulting Member States, the Commission may amend it before that date on the basis of important competition policy or risk capital policy considerations or in order to take account of other Community policies or international commitments. Where this would be helpful the Commission may also provide further clarifications of its approach to particular issues. The Commission intends to carry out a review of these guidelines three years after their entry into force.

The Commission will apply these guidelines to all notified risk capital measures in respect of which it must take a decision after the guidelines are published in the *Official Journal of the European Union*, even where the measures were notified prior to the publication of the guidelines.

In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (*'consecutio legis'*)⁽¹⁾, the Commission will apply the following in respect of non-notified aid:

- (a) these guidelines, if the aid was granted after their publication in the *Official Journal of the European Union*;
- (b) the Communication on State aid and risk capital in all other cases.

7.3 Appropriate Measures

The Commission hereby proposes to Member States, on the basis of Article 88(1) of the EC Treaty, the following appropriate measures concerning their respective existing risk capital measures.

Member States should amend, where necessary, their existing risk capital measures in order to bring them into line with these guidelines within twelve months after the publication of the guidelines.

The Member States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of publication of these guidelines. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

(1) OJ C 119, 22.5.2002, p. 22.

▼ **M3**

PART III.11

SUPPLEMENTARY INFORMATION SHEET ON RISK CAPITAL AID

This supplementary information sheet must be used for the notification of any aid scheme covered by the Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises ⁽¹⁷³⁾. Please note that if the scheme is covered by another framework or guidelines, the corresponding standard notification form for the relevant framework or guidelines should be used instead.

1. Possible beneficiaries and scope of the aid measure

1.1. Who is involved in the scheme ⁽¹⁷⁴⁾ (please tick one or more boxes as appropriate):

- investors setting up a fund or providing equity in a company or a set of companies. Please specify the advantage(s) granted:

.....

Please specify possible selection criteria for the beneficiary (e.g. a call for tender or a public invitation):

.....

Are the investments effected *pari passu* between public and private investors?

- yes no

Please provide details:

.....

- investment fund or other investment vehicle and/or its manager. Please specify the advantage(s) granted:

.....

Please specify possible selection criteria for the beneficiary (fund/investment vehicle and the management) and the way it has been selected (e.g. an open and transparent public tender procedure):

.....

Do the fund's managers or the management company receive a remuneration, which fully reflects the current market remuneration in comparable situations?

- yes no

If yes, please provide evidence and attach relevant documents:

.....

⁽¹⁷³⁾ Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2) thereafter 'the RCG'.
⁽¹⁷⁴⁾ For details see Section 3.2 of the RCG.

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Is the fund involved in any other activities?

- yes no

If yes, please specify:

.....

- the target SMEs invested in. Please specify the advantage(s):

.....

Please specify possible selection criteria for the beneficiary:

.....

1.2. *Can you confirm that the risk capital ⁽¹⁷⁵⁾ measure excludes ⁽¹⁷⁶⁾:*

- aid to enterprises in the shipbuilding, coal and steel industry?

yes

- and aid to enterprises in difficulty?

yes

1.3. *Can you confirm that the measure does not apply to aid to export 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 expenditure linked to the export activity, as well as aid contingent upon the use of domestic in preference to imported goods ⁽¹⁷⁷⁾?*

yes

2. Form of aid: the size and time frame of the measure

2.1. *The scheme envisages the following measure(s) and/or instrument(s) (please tick one or more boxes as appropriate) ⁽¹⁷⁸⁾:*

- constitution of an investment fund (i.e. venture capital ⁽¹⁷⁹⁾ fund) in which the State is a partner, investor, or participant. Please specify:

.....

- guarantees where the public coverage for potential losses does not exceed 50 % of the nominal amount of the investment guaranteed to risk capital investors or to venture capital funds, or in respect of loans to investors or funds for investment in risk capital. Please specify:

.....

- other financial instruments in favour of risk capital investors or of venture capital funds to provide extra capital for investment. Please specify:

.....

⁽¹⁷⁵⁾ For definition of 'risk capital' and 'risk capital measures' see Section 2.2(k), (l) of the RCG.

⁽¹⁷⁶⁾ Cf. Section 2.1 of the RCG.

⁽¹⁷⁷⁾ Idem.

⁽¹⁷⁸⁾ Cf. Section 4.2 of the RCG.

⁽¹⁷⁹⁾ For definition see Section 2.2(i) of the RCG.

▼ **M3**

fiscal incentives to investment funds and/or their managers or to investors to undertake risk capital investments. Please specify:

.....

others. Please specify:

.....

2.2. *What is the overall size of budget of the measure and in case of a fund what is the size of the fund? Please specify:*

.....

Is the measure to be co-financed by Community funds (European Social Fund, European Regional Development Fund, other)? Please specify:

.....

2.3 *What is the duration of the measure or in case of a fund in which time period can the fund commit itself to investment and for how long can the fund hold the investments? Please specify:*

.....

3. **General information about the design of the measure**

3.1. *Maximum tranches of investments per target SME ⁽¹⁸⁰⁾*

What is the total maximum size of the tranche of finance (including both, the public and private investments) per target enterprise over a period of 12 months. Please specify:

.....

Are the target enterprises in which the investments can be made, restricted to SMEs ⁽¹⁸¹⁾ and not to large companies?

yes

3.2. *Restrictions to seed, start-up and expansion financing ⁽¹⁸²⁾*

Are the investments restricted to financing (please tick one or more boxes as appropriate):

- up to the seed stage for small enterprises;
- up to the seed stage for medium-sized enterprises;
- up to start-up stage for small enterprises;
- up to start-up stage for medium-sized enterprises;
- up to expansion stage for small enterprises;

⁽¹⁸⁰⁾ For details and restrictions see Section 4.3.1 of the RCG.

⁽¹⁸¹⁾ For definition see Section 2.2(q) of the RCG.

⁽¹⁸²⁾ For details see Section 4.3.2 of the RCG. For definitions of 'seed', 'start-up' and 'expansion capital' see Section 2.2(e), (f) and (h) of the RCG.

▼ **M3**

up to expansion stage for medium-sized enterprises located in assisted regions qualifying under Article 87(3)(a) of the EC Treaty and/or under Article 87(3)(c) of the EC Treaty;

other restrictions. Please specify:

.....

Are the investments restricted to SMEs located in assisted regions qualifying under Article 87(3)(a) of the EC Treaty and/or under Article 87(3)(c) of the EC Treaty?

yes no

3.3. *The composition of financing in the form of equity, quasi-equity and debt* ⁽¹⁸³⁾

Does the measure provide financing to SMEs in the form of equity ⁽¹⁸⁴⁾?

yes no

If yes, please specify the details regarding the conditions on which the financing is invested (type of remuneration, level of subordination, securitisation, etc.):

.....

Does the measure provide financing to SMEs in the form of quasi-equity ⁽¹⁸⁵⁾?

yes no

If yes, please specify the details regarding the conditions on which the financing is invested (type of remuneration, level of subordination, securitisation, etc.):

.....

Does the measure provide that at least 70 % of its total budget to SMEs is in the form of equity and quasi-equity investment instruments?

yes no

Please specify the percentage of equity and quasi-equity, of the total budget:

.....

Does the measure provide financing to SMEs in the form of debt ⁽¹⁸⁶⁾?

yes no

If yes, please specify the details regarding the conditions on which the debt is provided (type of remuneration, level of subordination, securitisation, etc.):

.....

Is the debt provided on market terms or is an aid element in the debt instrument authorised under an existing scheme, please specify:

.....

⁽¹⁸³⁾ For details and conditions see Section 4.3.3 of the RCG.
⁽¹⁸⁴⁾ For definition see Section 2.2(a) of the RCG.
⁽¹⁸⁵⁾ For definition see Section 2.2(c) of the RCG.
⁽¹⁸⁶⁾ For definition of 'debt' see Section 2.2(d) of the RCG.

▼ **M3**3.4. *Participation by private* ⁽¹⁸⁷⁾ *investors* ⁽¹⁸⁸⁾

What percentage of funding of the investments in SMEs is provided directly or indirectly by private investors. Please specify:

.....

3.5. *Profit driven character of investment decisions* ⁽¹⁸⁹⁾

Does the measure ensure that at least 50 % of the funding of the investments is provided by private investors, or for at least 30 % in the case of measures targeting SMEs located in assisted areas ⁽¹⁹⁰⁾?

yes no

Please provide details:

.....

Does the measure ensure that private investors invest on a commercial basis (that is only for profits) directly or indirectly in the equity of the target enterprises?

yes no

Please provide details:

.....

Does the measure ensure that there is a business plan for each investment containing details of the product, sales and profitability development and establishing the ex ante viability of the project?

yes no

Please provide details:

.....

Is there a clear and realistic exit strategy ⁽¹⁹¹⁾ for each investment?

yes no

Please provide details:

.....

3.6. *Commercial management* ⁽¹⁹²⁾

Is there an agreement between a professional manager or a management company and participants in the fund which:

— provides that the manager's remuneration is linked to the performance?

yes no

⁽¹⁸⁷⁾ For details concerning private investments/funding, see Section 2.2(b) and 3.2 (second paragraph) of the RCG.

⁽¹⁸⁸⁾ For details and conditions see Section 4.3.4 of the RCG.

⁽¹⁸⁹⁾ For details and conditions see Section 4.3.5 of the RCG.

⁽¹⁹⁰⁾ For definition see Section 2.2(t) of the RCG.

⁽¹⁹¹⁾ For definition see Section 2.2(p) of the RCG.

⁽¹⁹²⁾ For details and conditions, see Section 4.3.6 of the RCG.

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— sets out the objectives of the fund and proposed timing of investments?

yes no

Please attach a copy of the agreement or an outline of the principles of the agreement.

Are private market investors represented in the decisionmaking, such as through an investors' advisory committee?

yes no

If yes, please specify their role in the decisionmaking:

.....

Is there an application of best practice and regulatory supervision in the management of the fund?

yes no

Please provide details:

.....

3.7. *Sectoral focus* ⁽¹⁹³⁾

Is the measure open to all sectors?

yes no

If no, please specify the technologies or sectors and the underlying reason for the choice of these technologies or sectors:

.....

3.8. *Other information*

Please provide any further information considered relevant to clarify the answers above:

.....

4. **Establishing the need to conduct detailed assessment** ⁽¹⁹⁴⁾

Does the total maximum level of investment tranches (including both the public and private capital) exceed EUR 1,5 million per target SME over each period of 12 months?

yes no

Does the measure provide financing up to the expansion stage for medium-sized enterprises in non-assisted areas?

yes no

Does the measure provide for follow-on investments into target companies that already received aided capital injections to fund subsequent financing rounds even beyond the general safe-harbour thresholds and the companies' early-growth financing?

yes no

⁽¹⁹³⁾ For details and conditions, see Section 4.3.7 of the RCG.
⁽¹⁹⁴⁾ Cf. Section 5.1 of the RCG.

▼ **M3**

Does the risk capital measure provide less than 70 % of its total budget in the form of equity and quasi-equity investment instruments into target SMEs?

yes no

Does the measure provide less than 50 % of the funding of the investments provided by private investors for investments targeting SMEs in non-assisted areas or at least 30 % for SMEs in assisted areas?

yes no

Does the measure provide seed capital to small enterprises which foresee (i) less or no private participation by private investors, and/or (ii) predominance of debt investment instruments as opposed to equity and quasi-equity?

yes no

Does the measure specifically involve an investment vehicle (alternative stock markets specialised in SMEs including high-growth companies)?

yes no

Does the measure cover costs linked to the first screening of companies (scouting costs)?

yes no

Does the scheme envisage a measure(s) and/or instrument which is not covered by Section 4.2 of the RCG, i.e. necessitating that the fifth box others was ticked under Section 2.1 of this form, and is not explicitly referred to above?

yes no

Does the measure involve any other element leading to non-compliance with one or more conditions set out in Section 4 of the RCG?

yes no

If yes, please specify:

.....

If the answer to one or more of the questions in this section 4 is yes, please go to section 5, otherwise go to section 6.

5. Additional information for the detailed assessment ⁽¹⁹⁵⁾

5.1. Positive effects of the aid

5.1.1. Existence and evidence of market failure ⁽¹⁹⁶⁾

Please, attach supporting evidence of the presence of the market failure the measure is designed to tackle. In particular, for measures:

- providing tranches above EUR 1,5 million per target SME (including both, the public and private capital) over each period of twelve months,
- providing follow-on investments,
- financing of the expansion stage of medium-sized enterprises in non-assisted areas,
- specifically involving an investment vehicle.

The evidence must be based on a study showing the level of the equity gap with regard to the enterprises and sectors targeted by the risk capital measure. Please attach the study.

The relevant information concerns the supply of risk capital to SMEs and the capital raised by private investors, as well as the significance of the venture capital industry in the local economy. It should ideally be provided for periods of three to five years preceding the implementation of the measure and also for the future, on the basis of reasonable projections, if available. The evidence submitted could also include the following elements:

- development of the fundraising over the past five years, also in comparison with the correspondent national and/or European averages,

⁽¹⁹⁵⁾ For details on detailed assessment and balancing test see Sections 5(1) to (3) and 1.3 of the RCG.

⁽¹⁹⁶⁾ Cf. Section 5.2.1 of the RCG.

▼ **M3**

- the current overhang of money, i.e. the difference between the amount of funds raised by private investors for investments and the amount actually invested,
- the share of government aided investment programs in the total venture capital investment over the preceding three to five years,
- the percentage of new start-ups receiving venture capital,
- the distribution of investments provided by private market investors by categories of amount of investment,
- a comparison of the number of business plans presented with the number of investments made by segment (amount of investment, sector, round of financing, etc.),
- any other relevant indicator showing the existence of market failure.

For measures targeting SMEs located in assisted areas, the relevant information must be supplemented by any other relevant evidence as regards the regional specificities which justify the features of the measure envisaged. The following elements may be relevant:

- estimation of the additional size of the equity gap caused by the peripherality and other regional specificities, in particular in terms of total amount of risk capital invested, number of funds or investment vehicles present in the territory or at a short distance, availability of skilled managers, number of deals and average and minimum size of deals if available;
- specific local economic data, social and/or historic reasons for an underprovision of risk capital, in comparison with the relevant average data and/or situation at national and/or Community level as appropriate;
- any other relevant indicator showing an increased degree of market failure.

5.1.2. Appropriateness of the instrument ⁽¹⁹⁷⁾

Is there an impact assessment of the measure?

- yes no

If yes, please attach a summary or the full text of the impact assessment.

Have other policy options to tackle the equity gap than State aid instruments been considered?

- yes no

If yes, please specify:

.....

.....

.....

Have other policy initiatives been taken to address the supply and demand side issues leading to the equity gap affecting the targeted SMEs?

- yes no

If yes, please specify:

.....

.....

.....

Are there evaluations of how these other policy initiatives will interact with the notified risk capital measure?

- yes no

If yes, please specify:

.....

.....

.....

⁽¹⁹⁷⁾ Cf. Section 5.2.2 of the RCG.

▼ **M3**

5.1.3. Incentive effect and necessity of aid ⁽¹⁹⁸⁾

Is the risk capital measure or fund managed by professionals from the private sector?

yes no

Is the measure managed by independent professionals chosen according to a transparent, non-discriminatory procedure, preferably an open tender?

yes no

Will the management have a proven experience and a track record in capital market investments ideally in the same sector(s) targeted by the fund, as well as an understanding of the relevant legal and accounting background for the investment?

yes no

If yes, please specify:

.....

Is there an investment committee, independent of the fund management company and composed of independent experts coming from the private sector with significant experience in the targeted sector, and preferably also of representatives of investors, or independent experts chosen according to a transparent, non-discriminatory procedure, preferably an open tender?

yes no

If yes, please specify:

.....

Will the experts provide the managers or management company with analyses of the existing and the expected future market situation and would scrutinise and propose to them potential target enterprises with good investment prospects?

yes no

If yes, please specify:

.....

Please specify the size of budget/size of the fund:

.....

Please specify the estimated transaction costs:

.....

Will there be a direct involvement from business angels ⁽¹⁹⁹⁾ in investments in the seed stage?

yes no

If yes, please specify:

.....

⁽¹⁹⁸⁾ Cf. Section 5.2.3 of the RCG.

⁽¹⁹⁹⁾ For definition see Section 2.2(s) of the RCG.

▼ **M3**

Are there other mechanisms in place to ensure an incentive effect and the necessity of aid?

- yes no

If yes, please specify:

.....

5.1.4. Proportionality ⁽²⁰⁰⁾

Does the measure involve (Please tick one or more boxes as appropriate):

- open tender for managers or management company? Please specify:

.....

- call for tender or public invitation to investors? Please specify:

.....

- other mechanisms to ensure that management or investors are not overcompensated? Please specify:

.....

5.2. *Negative effects of the aid*

5.2.1. Crowding-out ⁽²⁰¹⁾

Please attach evidence as regards the risk of crowding-out of investments at the level of investors, funds and/or investment vehicles.

The following elements may for instance be relevant:

- the number of venture capital firms/funds/investment vehicles present at national level or in the area in case of a regional fund and the segments in which they are active,
- the targeted enterprises in terms of size of companies, growth stage, and business sector,
- the average deal size and possibly the minimum deal size the funds or investors would scrutinise,
- the total amount of venture capital available for the target enterprises, sector and stage targeted by the relevant measure.

If investments are not restricted to assisted regions and if they go beyond the start-up stage for medium-sized enterprises, is there a limit per enterprise on total funding through the measure.

- yes no

If yes, please specify:

.....

⁽²⁰⁰⁾ Cf. Section 5.2.4 of the RCG.
⁽²⁰¹⁾ Cf. Section 5.3.1 of the RCG.

▼ M3

For measures providing for follow-on investment, does the measure foresee specific limits to the maximum amount to be invested into each target SME, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund?

yes no

If yes, please specify:

.....

.....

.....

Does the measure foresee a limitation related to the number of investment rounds per target SME or a maximum amount which can be invested in on target enterprise?

yes no

If yes, please specify:

.....

.....

.....

If follow-on investment is foreseen, is there a maximum amount to be invested into each target SME, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund?

yes no

If yes, please specify:

.....

.....

.....

If a lower participation of private investors is foreseen, is there a progressive increase of the participation of private investors over the life of the fund, having particular regard to the business stage, the sector, the respective levels of profit-sharing and subordination, and possibly the localisation in assisted areas of the target SMEs.

yes no

If yes, please specify:

.....

.....

.....

For measures providing seed capital only, is there any mechanism ensuring that the State receives an adequate return on its investment commensurate with the risks incurred for these investments, in particular where the State finances the investment in the form of quasi-equity or debt instruments, the return on which should, for instance, be linked to potential rights of exploitation (for example, royalties) generated by intellectual property rights created as a result of the investment.

yes no

If yes, please specify:

.....

.....

.....

▼ **M3**5.2.2. Other distortions of competition ⁽²⁰²⁾

What is the expected overall profitability of the firms invested in over time and prospects of future profitability? Please specify:

.....

What is the expected rate of enterprise failure targeted by the measure? Please specify:

.....

What is the total maximum size of investment tranche (including both the public and private investments) envisaged by the measure as compared to the turnover and costs of the target SMEs? Please specify:

.....

In case of sectoral focus of the measure, is there over-capacity of the sector benefiting from the aid? Please give a brief description of the economic situation in the sector(s):

.....

Are there any other mechanisms in place in order to limit the distortions of competition? Please specify:

.....

6. **Cumulation of the aid** ⁽²⁰³⁾

Can be the aid granted under the notified measure combined with other aid ⁽²⁰⁴⁾?

yes no

If yes, please provide the details (e.g. type of aid with which the aid granted under the notified measure is combined):

.....

If yes, please confirm the following:

The Member State undertakes to reduce the relevant aid ceilings or maximum eligible amounts by 50 % in general and by 20 % for target SMEs located in assisted areas during the first three years of the first risk capital investment and up to the total amount received, where the capital provided to a target enterprise under the risk capital measure is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other State aid documents. This reduction does not apply to aid intensities provided for in the Community Framework for State aid for Research and Development ⁽²⁰⁵⁾ or any successor framework or block exemption regulation in this field.

yes

⁽²⁰²⁾ Cf. Section 5.3.2 of the RCG.

⁽²⁰³⁾ Cf. Section 6 of the RCG.

⁽²⁰⁴⁾ For cumulation of *de minimis* aid please see Article 2(5) of *de minimis* block exemption (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 389, 28.12.2006, p. 5).

⁽²⁰⁵⁾ OJ C 45, 17.2.1996, p. 5.

▼ M3**7. Monitoring ⁽²⁰⁶⁾**

The Member State undertakes to submit annual reports to the Commission containing a summary table with a breakdown of the investments effected by a fund or under the risk capital measure including a list of all the enterprise beneficiaries of risk capital measures as well as a brief description of the activity of investments funds with details of potential deals scrutinised and of the transactions actually undertaken as well as the performance of investment vehicles with aggregate information about the amount of capital raised through the vehicle.

yes

The Member State undertakes to publish the full text of the final aid schemes as approved by the Commission on the Internet and to communicate the Internet address of the publication to the Commission

yes

The Member State undertakes to maintain for at least 10 years detailed records regarding the granting of aid for the risk capital measure containing all information necessary to establish that the conditions laid down in the RCG have been observed, notably as regards the size of the tranche, the size of the company (small or medium-sized), the development stage of the company (seed, start-up or expansion), its sector of activity (preferably at 4 digit level of the NACE classification) as well as information on the management of the funds and on the other criteria mentioned in these guidelines.

yes

The Member State undertakes to submit the records referred to above on request of the Commission.

yes

8. Other information

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the *Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises*.

⁽²⁰⁶⁾ Cf. Section 7.1 of the RCG.

COMMUNICATION FROM THE COMMISSION

COMMUNITY GUIDELINES ON STATE AID FOR RESCUING AND RESTRUCTURING FIRMS IN DIFFICULTY

(2004/C 244/02)

(Text with EEA relevance)

1. INTRODUCTION

- cases in the past and is among the most distortive types of State aid. Hence, the general principle of the prohibition of State aid as laid down in the Treaty should remain the rule and derogation from that rule should be limited.
1. The Commission adopted its original Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾ in 1994. In 1997, the Commission added specific rules for agriculture⁽²⁾. A new version of the guidelines was adopted in 1999⁽³⁾ and will expire on 9 October 2004.
 2. The Commission wishes through this version of the Guidelines, the text of which builds on previous versions, to make certain changes and clarifications prompted by a number of factors.
 3. First, in the light of conclusions of the meetings of the European Councils of Stockholm on 23 and 24 March 2001 and of Barcelona on 15 and 16 March 2002, which called on Member States to continue to reduce State aid as a percentage of gross domestic product while redirecting it towards more horizontal objectives of common interest including cohesion objectives, closer scrutiny of the distortion created by allowing aid for rescue and restructuring operations seems warranted. This is also consistent with the conclusions of the European Council held in Lisbon on 23 and 24 March 2000 aimed at increasing the competitiveness of the European economy.
 4. The exit of inefficient firms is a normal part of the operation of the market. It cannot be the norm that a company which gets into difficulties is rescued by the State. Aid for rescue and restructuring operations has given rise to some of the most controversial State aid
 5. The 'one time, last time' principle is further reinforced, to avoid the use of repeated rescue or restructuring aids to keep firms artificially alive.
 6. The 1999 guidelines made a distinction between rescue aid and restructuring aid, whereby rescue aid was defined as temporary assistance to keep an ailing firm afloat for the time needed to work out a restructuring and/or a liquidation plan. In principle, restructuring measures financed through State aid could not be undertaken during this phase. However, such strict distinction between rescue and restructuring has given rise to difficulties. Firms in difficulty may already need to take certain urgent structural measures to halt or reduce a worsening of the financial situation in the rescue phase. These guidelines therefore widen the concept of 'rescue aid' in order to allow the beneficiary to undertake urgent measures, even of a structural nature, such as an immediate closure of a branch or other form of abandonment of loss-making activities. Given the urgent character of such aids, the Member States should be given the opportunity to opt for a simplified procedure to obtain their approval.
 7. As regards restructuring aids, building on the 1994 guidelines, the 1999 guidelines continued to require a substantial contribution from the beneficiary to the restructuring. Within this revision, it is appropriate to reaffirm with greater clarity the principle that this contribution must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition. In this respect the Commission will also request compensatory measures to minimise the effect on competitors.

⁽¹⁾ OJ C 368, 23.12.1994, p. 12.

⁽²⁾ OJ C 283, 19.9.1997, p. 2. See also the footnote relating to the heading of Chapter 5.

⁽³⁾ OJ C 288, 9.10.1999, p. 2.

8. The provision of rescue or restructuring aid to firms in difficulty may only be regarded as legitimate subject to certain conditions. It may be justified, for instance, by social or regional policy considerations, by the need to take into account the beneficial role played by small and medium-sized enterprises (SMEs) in the economy or, exceptionally, by the desirability of maintaining a competitive market structure when the demise of firms could lead to a monopoly or to a tight oligopolistic situation. On the other hand, it would not be justified to keep a firm artificially alive in a sector with long-term structural overcapacity or when it can only survive as a result of repeated State interventions.

2. DEFINITIONS AND SCOPE OF THE GUIDELINES AND LINKS WITH OTHER TEXTS ON STATE AID

2.1. Meaning of 'a firm in difficulty'

9. There is no Community definition of what constitutes 'a firm in difficulty'. However, for the purposes of these Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

10. In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances:

(a) in the case of a limited liability company⁽¹⁾, where more than half of its registered capital has disappeared⁽²⁾ and more than one quarter of that capital has been lost over the preceding 12 months;

(b) in the case of a company where at least some members have unlimited liability for the debt of the company⁽³⁾, 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;

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

⁽¹⁾ This refers in particular to the types of company mentioned in the first subparagraph of Article 1(1) of Council Directive 78/660/EEC (OJ L 222, 14.8.1978, p. 11) as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

⁽²⁾ By analogy with the provisions of Article 17 of Council Directive 77/91/EEC (OJ L 26, 30.1.1977, p. 1) as last amended by the 2003 Act of Accession.

⁽³⁾ This refers in particular to the types of company mentioned in the second subparagraph of Article 1(1) of Council Directive 78/660/EEC.

11. Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm's continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.

12. For the purposes of these Guidelines, a newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. A firm will in principle be considered as newly created for the first three years following the start of operations in the relevant field of activity. Only after that period will it become eligible for rescue or restructuring aid, provided that:

(a) it qualifies as a firm in difficulty within the meaning of these Guidelines, and

(b) it does not form part of a larger business group⁽⁴⁾ except under the conditions laid down in point 13.

13. A firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. Where a firm in difficulty creates a subsidiary, the subsidiary, together with the firm in difficulty controlling it, will be regarded as a group and may receive aid under the conditions laid down in this point.

⁽⁴⁾ To determine whether a company is independent or forms part of a group, the criteria laid down in Annex 1 to Commission Regulation (EC) No 68/2001 (OJ L 10, 13.1.2001, p. 20), as amended by Regulation (EC) No 363/2004 (OJ L 63, 28.2.2004, p. 20) will be taken into account.

2.2. Definition of 'rescue and restructuring aid'

14. Rescue aid and restructuring aid are covered by the same set of guidelines, because in both cases the public authorities are faced with a firm in difficulty and the rescue and restructuring are often two parts of a single operation, even if they involve different processes.

15. Rescue aid is by nature temporary and reversible assistance. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. The general principle is that rescue aid makes it possible temporarily to support a company confronted with an important deterioration of its financial situation reflected by an acute liquidity crisis or technical insolvency. Such temporary support should allow time to analyse the circumstances which gave rise to the difficulties and to develop an appropriate plan to remedy those difficulties. Moreover, the rescue aid must be limited to the minimum necessary. In other words, rescue aid offers a short respite, not exceeding six months, to a firm in difficulty. The aid must consist of reversible liquidity support in the form of loan guarantees or loans, with an interest rate at least comparable to those observed for loans to healthy firms and in particular the reference rates adopted by the Commission. Structural measures which do not require immediate action, such as, the irremediable and automatic participation of the State in the own funds of the firm, cannot be financed through rescue aid.

16. Once a restructuring or liquidation plan for which aid has been requested has been established and is being implemented, all further aid will be considered as restructuring aid. Measures which need to be implemented immediately to stem losses, including structural measures (for example, immediate withdrawal from a loss-making field of activity), can be undertaken with the rescue aid, subject to the conditions mentioned in Section 3.1 for individual aids and section 4.3 for aid schemes. Except where use is made of the simplified procedure set out in section 3.1.2, a Member State will need to demonstrate that such structural measures must be undertaken immediately. Rescue aid cannot normally be granted for financial restructuring.

17. Restructuring, on the other hand, will be based on a feasible, coherent and far-reaching plan to restore a firm's

long-term viability. Restructuring usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring operations within the scope of these Guidelines cannot, however, be limited to financial aid designed to make good past losses without tackling the reasons for those losses.

2.3. Scope

18. These Guidelines apply to firms in all sectors, except to those operating in the coal⁽¹⁾ or steel sector⁽²⁾, without prejudice to any specific rules relating to firms in difficulty in the sector concerned⁽³⁾. With the exception of point 79⁽⁴⁾, they apply to the fisheries and aquaculture sector, subject to compliance with the specific rules laid down in the Guidelines for the examination of State aid to fisheries and aquaculture⁽⁵⁾. Chapter 5 contains some additional rules for agriculture.

2.4. Compatibility with the common market

19. Article 87(2) and (3) of the Treaty provide for the possibility that aid falling within the scope of Article 87(1) will be regarded as compatible with the common market. Apart from cases of aid envisaged by Article 87(2), in particular aid to make good the damage caused by natural disasters or exceptional occurrences, which are not covered here, the only basis on which aid for firms in difficulty can be deemed compatible is Article 87(3)(c). Under that provision the Commission has the power to authorise 'aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest.' In particular, this could be the case where the aid is necessary to correct disparities caused by market failures or to ensure economic and social cohesion.

⁽¹⁾ Article 3 of Council Regulation (EC) No 1407/2002 (OJ L 205, 2.8.2002, p. 1), as amended by the 2003 Act of Accession.

⁽²⁾ Point 19 of the Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ C 152, 26.6.2002, p. 5). Point 1 of the communication from the Commission on rescue and restructuring aid and closure aid for the steel sector (OJ C 70, 19.3.2002, p. 21). Appropriate measures adopted in the context of the Multi-sectoral Framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8).

⁽³⁾ Specific rules of this nature exist for the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽⁴⁾ In other words, awards of aid to SMEs that do not fulfil the conditions set out in this point 0 may nevertheless be exempted from individual notification.

⁽⁵⁾ OJ C 19, 20.1.2001, p. 7.

20. Given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Commission considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if the conditions set out in these Guidelines are met. Where the firms which are to receive rescue or restructuring aid are located in assisted areas, the Commission will take the regional considerations referred to in Article 87(3)(a) and (c) of the Treaty into account as described in points 55 and 56.

21. The Commission will pay particular attention to the need to prevent the use of these Guidelines to circumvent the principles laid down in existing frameworks and Guidelines.

22. The assessment of rescue or restructuring aid should not be affected by changes in the ownership of the business aided.

2.5. Recipients of previous unlawful aid

23. Where unlawful aid has previously been granted to the firm in difficulty, in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place in compliance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, the assessment of any rescue and restructuring aid to be granted to the same undertaking shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid ⁽²⁾.

3. GENERAL CONDITIONS FOR THE AUTHORISATION OF RESCUE AND/OR RESTRUCTURING AID NOTIFIED INDIVIDUALLY TO THE COMMISSION

24. This Chapter deals exclusively with aid measures that are notified individually to the Commission. Under certain conditions, the Commission may authorise rescue or restructuring aid schemes: those conditions are set out in Chapter 4.

3.1. Rescue aid

3.1.1. Conditions

25. In order to be approved by the Commission, rescue aid as defined in point 15 must:

- (a) consist of liquidity support in the form of loan guarantees or loans ⁽³⁾; in both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rates adopted by the Commission; any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after the disbursement of the first instalment to the firm;
- (b) be warranted on the grounds of serious social difficulties and have no undue adverse spillover effects on other Member States;
- (c) be accompanied, on notification, by an undertaking given by the Member State concerned to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated; in the case of non-notified aid the Member State must communicate, no later than six months after the first implementation of a rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and /or that the guarantee has been terminated;
- (d) be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised; such an amount may include aid for urgent structural measures in accordance with point 16; the amount necessary should be based on the liquidity needs of the company stemming from losses; in determining that amount regard will be had to the outcome of the application of the formula set out in the Annex; any rescue aid exceeding the result of that calculation will need to be duly explained;
- (e) respect the condition set out in section 3.3 (one time, last time).

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

⁽²⁾ Case C-355/95 P, *Textilwerke Deggendorf v Commission and others*. [1997] ECR I-2549.

⁽³⁾ An exception may be made in the case of rescue aid in the banking sector, in order to enable the credit institution in question to continue temporarily carrying on its banking business in accordance with the prudential legislation in force (Directive 2000/12/EC of the European Parliament and of the Council, OJ L 126, 26.5.2000, p. 1). At any rate, aid granted in a form other than loan guarantees or loans fulfilling the conditions set out in point (a), should fulfil the general principles of rescue aid and cannot consist in structural financial measures related to the bank's own funds. Any aid granted in a form other than loan guarantees or loans fulfilling the conditions set out in point(a), will be taken into account when any compensatory measures under a restructuring plan are examined in accordance with points 38 to 42.

26. Where the Member State has submitted a restructuring plan within six months of the date of authorisation or, in the case of non-notified aid, of implementation of the measure, the deadline for reimbursing the loan or for putting an end to the guarantee is extended until the Commission reaches its decision on the plan, unless the Commission decides that such an extension is not justified.
27. Without prejudice to Article 23 of Regulation (EC) No 659/1999 and to the possibility of an action before the Court of Justice, in accordance with the second subparagraph of Article 88 (2) of the Treaty, the Commission will initiate proceedings under Article 88(2) of the Treaty if the Member State fails to communicate:
- (a) a credible and substantiated restructuring plan or a liquidation plan, or
 - (b) proof that the loan has been reimbursed in full and/or that the guarantee has been terminated before the six-month deadline has expired,
28. In any event, the Commission may decide to initiate such proceedings, without prejudice to Article 23 of Regulation (EC) No 659/1999 and to the possibility of an action before the Court of Justice in accordance with the second subparagraph of Article 88(2) of the Treaty, if it considers that the loan or the guarantee has been misused, or that, after the six-month deadline has expired, the failure to reimburse the aid is no longer justified.
29. The approval of rescue aid does not necessarily mean that aid under a restructuring plan will subsequently be approved; such aid will have to be assessed on its own merits.

3.1.2. Simplified procedure

30. The Commission will as far as possible endeavour to take a decision within a period of one month in respect of rescue aids fulfilling all conditions set out in section 3.1.1 and the following cumulative requirements:
- (a) the firm concerned satisfies at least one of the three criteria set out in point 10;
 - (b) the rescue aid is limited to the amount resulting from the application of the formula set out in the Annex and does not exceed EUR 10 million.

3.2. Restructuring aid

3.2.1. Basic principle

31. Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of

structural adjustment and the attendant social and economic problems onto other producers who are managing without aid, and to other Member States. The general principle should therefore be to allow the grant of restructuring aid only in circumstances in which it can be demonstrated that it does not run counter to the Community interest. This will only be possible if strict criteria are met, and if it is certain that any distortions of competition will be offset by the benefits flowing from the firm's survival (for instance, where it is clear that the net effect of redundancies resulting from the firm's going out of business, combined with the effects on its suppliers, would exacerbate employment problems or, exceptionally, where the firm's disappearance would result in a monopoly or tight oligopolistic situation) and that, in principle, there are adequate compensatory measures in favour of competitors.

3.2.2. Conditions for the authorisation of aid

32. Subject to the special provisions for assisted areas, SMEs and the agricultural sector (see points 55, 56, 57, 59 and Chapter 5), the Commission will approve aid only under the following conditions:

Eligibility of the firm

33. The firm must qualify as a firm in difficulty within the meaning of these Guidelines (see points 9 to 13).

Restoration of long-term viability

34. The grant of the aid must be conditional on implementation of the restructuring plan which must be endorsed by the Commission in all cases of individual aid, except in the case of SMEs, as laid down in section 3.2.5.
35. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring.

36. The restructuring plan must describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It must take account, *inter alia*, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It must enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.
37. The plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits. Where the firm's difficulties stem from flaws in its corporate governance system, appropriate adaptations will have to be introduced.
41. However, this condition will not normally apply to small enterprises, since it can be assumed that ad hoc aid to small enterprises does not normally distort competition to an extent contrary to the common interest, except where otherwise provided by rules on State aid in a particular sector or when the beneficiary is active in a market suffering from long-term overcapacity.

Avoidance of undue distortions of competition

38. In order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as 'contrary to the common interest' and therefore incompatible with the common market. The Commission will have regard to the objective of restoring the long-term viability in determining the adequacy of the compensatory measures.
39. These measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned. When assessing whether the compensatory measures are appropriate the Commission will take account of the market structure and the conditions of competition to ensure that any such measure does not lead to a deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a tight oligopolistic situation. If a Member State is able to prove that such a situation would arise, the compensatory measures should be construed in such a way to avoid this situation.
40. The measures must be in proportion to the distortive effects of the aid and, in particular, to the size⁽¹⁾ and the relative importance of the firm on its market or markets. They should take place in particular in the market(s) where the firm will have a significant market position
42. When the beneficiary is active in a market suffering from long-term structural overcapacity, as defined in the context of the Multisectoral framework on regional aid for large investments⁽²⁾, the reduction in the company's capacity or market presence may have to be as high as 100 %⁽³⁾.
43. The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.

Aid limited to the minimum: real contribution, free of aid

⁽¹⁾ In this respect the Commission may also take into account whether the company in question is a medium-sized enterprise or a large one.

⁽²⁾ OJ C 70, 19.3.2002, p. 8.

⁽³⁾ In such cases, the Commission will only allow aid to alleviate the social costs of the restructuring, in line with section 3.2.6 and environmental aid to clean up polluted sites which might otherwise be abandoned.

44. The Commission will normally consider the following contributions ⁽¹⁾ to the restructuring to be appropriate: at least 25 % in the case of small enterprises, at least 40 %, for medium-sized enterprises and at least 50 % for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a lower contribution.
45. To limit the distortive effect, the amount of the aid or the form in which it is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The Commission will accordingly examine the level of the firm's liabilities after restructuring, including the situation after any postponement or reduction of its debts, particularly in the context of its continuation in business following collective insolvency proceedings brought against it under national law ⁽²⁾. None of the aid should go to finance new investment that is not essential for restoring the firm's viability.

Specific conditions attached to the authorisation of aid

46. In addition to the compensatory measures described in points 38 to 42, the Commission may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest, in the event that the Member State concerned has not given a commitment that it will adopt such provisions. For example, it may require the Member State:
- (a) to take certain measures itself (for example, to open up certain markets directly or indirectly linked to the company's activities to other Community operators with due respect to Community law);
 - (b) to impose certain obligations on the recipient firm;
 - (c) to refrain from granting other types of aid to the recipient firm during the restructuring period.

Full implementation of restructuring plan and observance of conditions

47. The company must fully implement the restructuring plan and must discharge any other obligations laid down in the Commission decision authorising the aid. The Commission will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid, without prejudice to Article 23 of Regulation (EC)

⁽¹⁾ See point 7. This minimum contribution must not contain any aid. This is not the case, for instance, where a loan carries an interest-rate subsidy or is backed by government guarantees containing elements of aid.

⁽²⁾ See point 10(c).

No 659/1999 and to the possibility of an action before the Court of Justice in accordance with the second subparagraph of Article 88(2) of the Treaty.

48. Where restructuring operations cover several years and involve substantial amounts of aid, the Commission may require payment of the restructuring aid to be split into instalments and may make payment of each instalment subject to:
- (i) confirmation, prior to each payment, of the satisfactory implementation of each stage in the restructuring plan, in accordance with the planned timetable; or
 - (ii) its approval, prior to each payment, after verification that the plan is being satisfactorily implemented.

Monitoring and annual report

49. The Commission must be put in a position to make certain that the restructuring plan is being implemented properly, through regular detailed reports communicated by the Member State concerned.
50. In the case of aid to large firms, the first of these reports will normally have to be submitted to the Commission not later than six months after approval of the aid. Reports will subsequently have to be sent to the Commission at least once a year, at a fixed date, until the objectives of the restructuring plan can be deemed to have been achieved. They must contain all the information the Commission needs in order to be able to monitor the implementation of the restructuring programme, the timetable for payments to the company and its financial position and the observance of any conditions or obligations laid down in the decision approving the aid. They must in particular include all relevant information on any aid for any purpose which the company has received, either on an individual basis or under a general scheme, during the restructuring period (see points 68 to 71). Where the Commission needs prompt confirmation of certain key items of information, for example, on closures or capacity reductions, it may require more frequent reports.
51. In the case of aid to SMEs, transmission each year of a copy of the recipient firm's balance sheet and profit-and-loss account will normally be sufficient, except where stricter conditions have been laid down in the decision approving the aid.

3.2.3. Amendment of the restructuring plan

52. Where restructuring aid has been approved, the Member State concerned may, during the restructuring period, ask the Commission to agree to changes to the restructuring plan and the amount of the aid. The Commission may allow such changes where they meet the following conditions:

- (a) the revised plan must still show a return to viability within a reasonable time scale;
- (b) if the amount of the aid is increased, any requisite compensatory measures must be more extensive than those initially imposed;
- (c) if the proposed compensatory measures are smaller than those initially planned, the amount of the aid must be correspondingly reduced;
- (d) the new timetable for implementation of the compensatory measures may be delayed with respect to the timetable initially adopted only for reasons outside the company's or the Member State's control: if that is not the case, the amount of the aid must be correspondingly reduced.

53. If the conditions imposed by the Commission or the commitments given by the Member State are relaxed, the amount of aid must be correspondingly reduced or other conditions may be imposed.

54. Should the Member State introduce changes to an approved restructuring plan without duly informing the Commission, the Commission will initiate proceedings under Article 88(2) of the Treaty, as provided for by Article 16 of Regulation (EC) No 659/1999 (misuse of aid), without prejudice to Article 23 of Regulation (EC) No 659/1999 and to the possibility of an action before the Court of Justice in accordance with the second subparagraph of Article 88(2) of the Treaty.

3.2.4. Restructuring aid in assisted areas

55. Economic and social cohesion being a priority objective of the Community under Article 158 of the Treaty and other policies being required to contribute to this objective under Article 159⁽¹⁾, the Commission must take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an

⁽¹⁾ Article 159 of the EC Treaty provides, *inter alia*, that 'the formulation and implementation of the Community's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 158 and shall contribute to their achievement'.

ailing firm is located in an assisted area does not, however, justify a permissive approach to aid for restructuring: in the medium to long term it does not help a region to prop up companies artificially. Furthermore, in order to promote regional development it is in the regions own best interest to apply its resources to develop as soon as possible activities that are viable and sustainable. Finally, distortions of competition must be minimised even in the case of aid to firms in assisted areas. In this context, regard must also be had to possible harmful spill-over effects which could take place in the area concerned and other assisted areas.

56. Thus, the criteria listed in points 32 to 54 are equally applicable to assisted areas, even when the needs of regional development are considered. In assisted areas, however, and unless otherwise stipulated in rules on State aid in a particular sector, the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the size of the beneficiary's contribution. If needs of regional development justify it, in cases in which a reduction of capacity or market presence appear to be the most appropriate measure to avoid undue distortions of competition, the required reduction will be smaller in assisted areas than in non-assisted areas. In those cases, which need to be demonstrated by the Member State concerned, a distinction will be drawn between areas eligible for regional aid under Article 87(3)(a) of the Treaty and those eligible under Article 87(3)(c) so as to take account of the greater severity of the regional problems in the former areas.

3.2.5. Aid for restructuring SMEs

57. Aid to small enterprises⁽²⁾ tends to affect trading conditions less than that granted to medium-sized and large firms. This also applies to aid to help restructuring, so that the conditions laid down in points 32 to 54 are applied less strictly in the following respects:

- (a) the grant of restructuring aid to small enterprises will not usually be linked to compensatory measures (see point 41), unless this is otherwise stipulated in rules on State aid in a particular sector.
- (b) the requirements regarding the content of reports will be less stringent for SMEs (see points 49, 50 and 51).

⁽²⁾ As defined in the Commission Recommendation 2003/361/EC (OJ L 124, 20.5.2003, p. 36). Until 31 December 2004, the relevant definition is to be found in the Commission Recommendation 96/280/EC (OJ L 107, 30.4.1996, p. 4).

58. However, the 'one time, last time' principle (section 3.3) applies in full to SMEs.

59. For SMEs the restructuring plan does not need to be endorsed by the Commission. However, the plan must meet the requirements laid down in points 35, 36 and 37 and be approved by the Member State concerned and communicated to the Commission. The grant of aid must be conditional on full implementation of the restructuring plan. The obligation to verify that these conditions are fulfilled lies with the Member State.

3.2.6. Aid to cover the social costs of restructuring

60. Restructuring plans normally entail reductions in or abandonment of the affected activities. Such retrenchments are often necessary in the interests of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid. Whatever the reason for them, such measures will generally lead to reductions in the company's workforce.

61. Member States' labour legislation may comprise general social security schemes under which redundancy benefits and early retirement pensions are paid direct to redundant employees. Such schemes are not to be regarded as State aid falling within the scope of Article 87(1) of the Treaty.

62. Besides direct redundancy benefit and early retirement provision for employees, general social support schemes frequently provide for the government to cover the cost of benefits which the company grants to redundant workers and which go beyond its statutory or contractual obligations. Where such schemes are available generally without sectoral limitations to any worker meeting predefined and automatic eligibility conditions, they are not deemed to involve aid under Article 87(1) for firms undertaking restructuring. On the other hand, if the schemes are used to support restructuring in particular industries, they may well involve aid because of the selective way in which they are used⁽¹⁾.

63. The obligations a company itself bears under employment legislation or collective agreements with trade unions, to provide redundancy benefits and/or early

retirement pensions are part of the normal costs of a business which a firm has to meet from its own resources. That being so, any contribution by the State to these costs must be counted as aid. This is true regardless of whether the payments are made direct to the firm or are administered through a government agency to the employees.

64. The Commission has no a priori objection to such aid when it is granted to firms in difficulty, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship.

65. Besides meeting the cost of redundancy payments and early retirement, aid is commonly provided in connection with a particular restructuring scheme for training, counselling and practical help with finding alternative employment, assistance with relocation, and professional training and assistance for employees wishing to start new businesses. The Commission consistently takes a favourable view of such aid when it is granted to firms in difficulty.

66. The type of aid described in points 62 to 65 must be clearly identified in the restructuring plan, since aid for social measures exclusively for the benefit of redundant employees is disregarded for the purposes of determining the extent of the compensatory measures referred to in points 38 to 42.

67. In the common interest, the Commission will ensure in the context of the restructuring plan that social effects of the restructuring in Member States other than the one granting aid are kept to the minimum.

3.2.7. Need to inform the Commission of any aid granted to the recipient firm during the restructuring period

68. Where restructuring aid received by a large or medium-sized enterprise is examined under these Guidelines, the grant of any other aid during the restructuring period, even in accordance with a scheme that has already been authorised, is liable to influence the Commission's assessment of the extent of the compensatory measures required.

⁽¹⁾ In its judgment in Case C-241/94, (*France v Commission* [1996] ECR I-4551), (*Kimberly Clark Sopalin*), the Court of Justice confirmed that the system of financing on a discretionary basis by the French authorities, through the National Employment Fund, was liable to place certain firms in a more favourable situation than others and thus to qualify as aid within the meaning of Article 87(1) of the Treaty. (The Court's judgment did not call into question the Commission's conclusion that the aid was compatible with the common market).

69. Notifications of aid for restructuring a large or medium-sized enterprise must indicate all other aid of any kind which is planned to be granted to the recipient firm during the restructuring period, unless it is covered by the de minimis rule or by exemption regulations. The Commission shall take such aid into account when assessing the restructuring aid.
70. Any aid actually granted to a large or medium-sized enterprise during the restructuring period, including aid granted in accordance with an approved scheme, must be notified individually to the Commission to the extent that the latter was not informed thereof at the time of its decision on the restructuring aid.
71. The Commission shall ensure that the grant of aid under approved schemes is not liable to circumvent the requirements of these Guidelines.

3.3. 'One time, last time'

72. Rescue aid is a one-off operation primarily designed to keep a company in business for a limited period, during which its future can be assessed. It should not be possible to allow repeated granting of rescue aids that would merely maintain the status quo, postpone the inevitable and in the meantime shift economic and social problems on to other, more efficient producers or other Member States. Hence, rescue aid should be granted only once (one time, last time condition). In accordance with the same principle, in order to prevent firms from being unfairly assisted when they can only survive thanks to repeated State support, restructuring aid should be granted once only. Finally, if rescue aid is granted to a firm that has already received restructuring aid, it can be considered that the beneficiary's difficulties are of a recurrent nature and that repeated State interventions give rise to distortions of competition that are contrary to the common interest. Such repeated State interventions should not be permitted.
73. When planned rescue or restructuring aid is notified to the Commission, the Member State must specify whether the firm concerned has already received rescue or restructuring aid in the past, including any such aid granted before the date of application of these Guidelines and any unnotified aid⁽¹⁾. If so, and where less than 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the

restructuring plan has been halted (whichever is the latest), the Commission will not allow further rescue or restructuring aid. Exceptions to that rule are permitted in the following cases:

- (a) where restructuring aid follows the granting of rescue aid as part of a single restructuring operation;
- (b) where rescue aid has been granted in accordance with the conditions in section 0, and this aid was not followed by a State supported restructuring, if:
 - (i) the firm could reasonably be believed to be viable in the long-term following the granting of rescue aid, and
 - (ii) new rescue or restructuring aid becomes necessary after at least five years due to unforeseeable circumstances⁽²⁾ for which the company is not responsible;
- (c) in exceptional and unforeseeable circumstances for which the company is not responsible.

In the cases set out in points (b) and (c), the simplified procedure mentioned in section 3.1.2 cannot be used.

74. The application of this rule will in no way be affected by any changes in ownership of the recipient firm following the grant of aid or by any judicial or administrative procedure which has the effect of putting its balance sheet on a sounder footing, reducing its liabilities or wiping out its previous debts where it is the same firm that is continuing in business.
75. Where a business group has received rescue or restructuring aid, the Commission will normally not allow further rescue or restructuring aid to the group itself or any of the entities belonging to the group unless 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the restructuring plan has been halted, whichever is the latest. Where an entity belonging to a business group has received rescue or restructuring aid, the group as a whole as well as the other entities of the group remain eligible for rescue or restructuring aid (subject to compliance with the other provisions of these Guidelines), with the exception of the earlier beneficiary of the aid. Member States must ensure that no aid will be passed on from the group or other group entities to the earlier beneficiary of the aid.

⁽¹⁾ With regard to unnotified aid, the Commission will take account in its appraisal of the possibility that the aid could have been declared compatible with the common market other than as rescue or restructuring aid.

⁽²⁾ An unforeseeable circumstance is one which could in no way be anticipated by the company's management when the restructuring plan was drawn up and which is not due to negligence or errors of the company's management or decisions of the group to which it belongs.

76. Where a firm takes over assets of another firm, and in particular one that has been the subject of one of the procedures referred to in point 74 or of collective insolvency proceedings brought under national law and has already received rescue or restructuring aid, the purchaser is not subject to the 'one time, last time' requirement, provided that the following cumulative conditions are met:

- (a) the purchaser is clearly separate from the old firm;
- (b) the purchaser has acquired the old firm's assets at market prices;
- (c) the winding-up or court-supervised administration and purchase of the old company are not merely devices aimed at evading application of the 'one time, last time' principle: the Commission may determine that this was the case if, for example, the difficulties encountered by the purchaser were clearly foreseeable when it took over the assets of the old company.

77. It should, however, be stressed here that, since it constitutes aid for initial investment, aid for the purchase of the assets cannot be authorised under these Guidelines.

4. AID SCHEMES FOR SMES

4.1. General principles

78. The Commission will authorise schemes for providing rescue and/or restructuring aid to small or medium-sized enterprises in difficulty only where the firms concerned correspond to the Community definition of SMEs. Subject to the following specific provisions, the compatibility of such schemes will be assessed in the light of the conditions set out in Chapters 2 and 3, with the exception of Section 3.1.2 which does not apply to aid schemes. Any aid which is granted under a scheme but does not meet any of those conditions must be notified individually and approved in advance by the Commission.

4.2. Eligibility

79. Unless otherwise stipulated in rules on State aid in a particular sector, awards of aid under schemes authorised from the date of application of these Guidelines, to small or medium-sized enterprises will be exempted from individual notification only where the enterprise concerned meets at least one of the three criteria set out in point 10. Aid to enterprises that do not meet any of those three criteria must be notified individually to the Commission

so that it can assess whether they qualify as firms in difficulty. Aid to enterprises active in a market suffering from long-term structural overcapacity, irrespective of the size of the beneficiary, must also be notified individually to the Commission so that it can assess the application of point 42.

4.3. Conditions for the authorisation of rescue aid schemes

80. In order to be approved by the Commission, rescue aid schemes must satisfy the conditions set out in points (a), (b), (d) and (e) of point 25. Furthermore, rescue aid may not be granted for more than six months, during which time an analysis must be made of the firm's position. Before the end of that period the Member State must either approve a restructuring plan or a liquidation plan, or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary.

81. Any rescue aid granted for longer than six months or not reimbursed after six months must be individually notified to the Commission.

4.4. Conditions for the authorisation of restructuring aid schemes

82. The Commission will authorise restructuring aid schemes only if the grant of aid is conditional on full implementation by the recipient of a restructuring plan that has been approved by the Member State concerned and meets the following conditions:

- (a) restoration of viability: the criteria set out in points 34 to 37 apply;
- (b) avoidance of undue distortions of competition: since aid to small enterprises tends to distort competition less, the principle set out in points 38 to 42 does not apply unless it is otherwise stipulated in rules on State aid in a particular sector; schemes should nevertheless provide that recipient firms must not increase their capacity during the restructuring; for medium-sized enterprises points 38 to 42 apply;
- (c) aid limited to the minimum necessary: the principles set out in points 43, 44 and 45 apply;
- (d) amendment of the restructuring plan: any changes to the plan must comply with the rules set out in points 52, 53 and 54.

4.5. Common conditions for the authorisation of rescue and/or restructuring aid schemes

83. Schemes must specify the maximum amount of aid that can be awarded to any one firm as part of an operation to provide rescue and/or restructuring aid, including where the plan is modified. Any aid exceeding that amount must be notified individually to the Commission. The maximum amount of aid granted for the combined rescue and restructuring aid of any one firm may not be more than EUR 10 million, including any aid obtained from other sources or under other schemes.

84. In addition, the 'one time, last time' principle must be respected. The rule laid down in section 3.3 applies.

85. Member States must also notify measures individually to the Commission where one firm takes over assets of another firm which has itself already received rescue or restructuring aid.

4.6. Monitoring and annual reports

86. Points 49, 50 and 51 do not apply to aid schemes. However, it will be a condition of approval that reports are presented on the scheme's operation, normally on an annual basis, containing the information specified in the Commission's instructions on standardised reports ⁽¹⁾. The reports must also include a list of all beneficiary companies, indicating for each of them:

- (a) company name;
- (b) the company's sectoral code, using the NACE ⁽²⁾ three-digit sectoral classification codes;
- (c) number of employees;
- (d) annual turnover and balance sheet value;
- (e) amount of aid granted;
- (f) amount and form of the beneficiary's contribution;

⁽¹⁾ See Annex III. A and B (standardised reporting format for existing State aid) to Commission Regulation (EC) No 794/2004 of 21 April 2004 adopting provisions for the implementation of 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).

⁽²⁾ Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

(g) where appropriate, the form and the degree of the compensatory measures;

(h) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;

(i) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.

5. PROVISIONS APPLICABLE TO AID FOR RESTRUCTURING IN THE AGRICULTURAL SECTOR ⁽³⁾

5.1. Compensatory measures

87. Points 38 to 42, and 57 and 82(b) provide that the requirement for compensatory measures is not normally applied in the case of small enterprises, unless otherwise stipulated in sector-specific State aid rules. In the agricultural sector, the Commission will normally require compensatory measures, in accordance with the principles set out in points 38 to 42, to be carried out by all recipients of restructuring aid, whatever their size.

5.2. Definition of excess capacity

88. For the purposes of these Guidelines, structural excess capacity in the agricultural sector will be defined by the Commission on a case-by-case basis taking account in particular of the extent and trend for the relevant product category over the past three years, of market stabilisation measures, especially export refunds and withdrawals from the market, of development of world market prices, and of the presence of sectoral limits in Community legislation.

5.3. Eligibility for rescue and restructuring aid schemes

89. By way of derogation from point 79, the Commission may also exempt aid to SMEs from individual notification if the SME concerned does not meet at least one of the three criteria set out in point 10.

⁽³⁾ This covers, for the purpose of these Guidelines, all operators involved in the primary production of agricultural products of Annex I to the Treaty (farming). Aid measures in favour of enterprises processing and marketing agricultural products are not covered by this Chapter. Aid to processing and marketing companies is to be assessed in line with the general rules of these Guidelines. Fisheries and aquaculture are not covered by this chapter.

5.4. Capacity reductions

90. Where there is a structural excess of production capacity, the requirement of irreversibly reducing or closing capacity set out in points 38 to 42 applies. Open farmland may be re-used after 15 years following effective capacity closure. Until then, it has to be maintained in good agricultural and environmental condition for land no longer used for production purposes, in accordance with Article 5 of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers⁽¹⁾, and with the relevant implementation rules.

91. Where the aid measure is targeted on particular products or operators, the production capacity reduction must attain at least 10 % of that for which the restructuring aid is effectively granted. For measures not so targeted, the production capacity reduction must attain at least 5 %. For restructuring aid granted in less favoured areas⁽²⁾, the capacity reduction requirement will be reduced by two percentage points. The Commission will waive these capacity reduction requirements where the decisions to grant restructuring aid taken in favour of beneficiaries in a given sector over any consecutive 12-month period do not together involve more than 1 % of the production capacity of that sector in the Member State concerned. This rule may be applied at regional level in the case of an aid regime limited to a given region.

92. The requirement of irreversibly reducing capacity may be achieved at the relevant market level (not necessarily involving reductions by the beneficiaries of the restructuring aid). Subject to compliance with common agricultural policy provisions, Member States may choose whatever capacity reduction system they wish.

93. The Member State must demonstrate that the capacity reduction would be supplementary to any reduction which would be applied in the absence of the restructuring aid.

94. Where the capacity reduction is not sought at the level of the beneficiary of the aid, measures to achieve the reduc-

tion must be implemented no later than one year after the aid has been granted.

95. In order to ensure the effectiveness of the closure of capacity undertaken at the relevant market level, the Member State must give a commitment not to grant State aid for capacity increases in the sector concerned. This commitment shall remain in force for a period of five years from the date where the required capacity reduction actually has been achieved.

96. In determining eligibility for and amounts of restructuring aid, no account shall be taken of the burdens of compliance with Community quota and related provisions at the level of individual operators.

5.5. 'One time, last time' condition

97. The principle that rescue or restructuring aid should be granted once only also applies to the agricultural sector. However, instead of the period of 10 years set out in section 3.3 a five-year period will apply.

5.6. Monitoring and annual report

98. The rules set out in Chapters 3 and 4 apply to monitoring and annual reports in the agricultural sector, except for the obligation to supply a list of all aid beneficiaries and certain items of information on each of them (see point 86) Where recourse has been had to the provisions of points 90 to 96, the report must also include data showing the production capacity which has effectively benefited from restructuring aid and the capacity reduction achieved.

6. APPROPRIATE MEASURES AS REFERRED TO IN ARTICLE 88(1)

99. The Commission will propose, by separate letter, pursuant to Article 88(1) of the Treaty, that the Member States adopt appropriate measures as set out in points 100 and 101, with regard to their existing aid schemes. The Commission will make authorisation of any future scheme conditional on compliance with those provisions.

⁽¹⁾ OJ L 270, 21.10. 2003, p. 1. Regulation as last amended by Regulation (EC) No 864/2004 (OJ L 161, 30.4.2004, p. 48).

⁽²⁾ As defined in Articles 13 and following of Council Regulation (EC) No 1257/1999 (OJ L 160, 26.6.1999, p. 80), as last amended by Regulation (EC) No 583/2004 (OJ L 91, 30.3.2004, p. 1).

100. Member States which have accepted the Commission's proposal must adapt their existing aid schemes which are to remain in operation after 9 October 2004 within six months in order to bring them into line with these Guidelines.
101. Member States must indicate their acceptance of these appropriate measures within one month following receipt of said letter proposing appropriate measures.

7. DATE OF APPLICATION AND DURATION

102. The Commission will apply these Guidelines with effect from 10 October 2004 until 9 October 2009.

103. Notifications registered by the Commission prior to 10 October 2004 will be examined in the light of the criteria in force at the time of notification.

104. The Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty on the basis of these Guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union*.

In all other cases it will conduct the examination on the basis of the Guidelines which apply at the time the aid is granted.

ANNEX

Formula ⁽¹⁾ to calculate maximum amount of rescue aid to qualify for the simplified procedure:

$$\frac{\text{EBIT}_t + \text{depreciation}_t + (\text{working capital}_t - \text{working capital}_{t-1})}{2}$$

The formula is based on the operating results of the company (EBIT, earnings before interest and taxes) recorded in the year before granting/notifying the aid (indicated as t). To this amount depreciation has been added. Then changes in working capital must be added to the total. The change in working capital is calculated as the difference between the current assets and current liabilities ⁽²⁾ for the latest closed accounting periods. Similarly, if there would be provisions at the level of the operating result, this will need to be clearly indicated and the result should not include such provisions.

The formula aims at estimating the negative operating cash flow of the company in the year preceding the application for the aid (or before the award of the aid in case of non-notified aids). Half of this amount should keep the company in business for a six-month period. Thus the result of the formula has to be divided by 2.

This formula can only be applied where the result is a negative amount.

In case the formula leads to a positive result, a detailed explanation will need to be submitted demonstrating that the firm is in difficulty as defined in points 10 and 11.

Example:

Earnings before interest and taxes (EUR million)	(12)	
Depreciation (EUR million)	(2)	
Balance sheet (EUR million)	December 31, X	December 31, XO
<i>Current assets</i>		
Cash or equivalents	10	5
Accounts receivable	30	20
Inventories	50	45
Prepaid expenses	20	10
Other current assets	20	20
Total current assets	130	100
<i>Current liabilities</i>		
Accounts payable	20	25
Accrued expenses	15	10
Deferred income	5	5
Total current liabilities	40	40
Working capital	90	60
Change in working capital	(30)	

⁽¹⁾ EBIT (earnings before interest and taxes as set out in the annual accounts of the year before the application, indicated as t) must be increased with depreciation in the same period plus the changes in working capital over a two-year period (year before the application and preceding year), divided by two to determine an amount over six months, i.e. normal period for permitting rescue aid.

⁽²⁾ Current assets: liquid funds, receivables (client and debtor accounts), other current assets and prepaid expenses, inventories. Current liabilities: financial debt, trade accounts payable (supplier and creditor accounts) and other current liabilities, deferred income, other accrued liabilities, tax liabilities.

Maximum amount of rescue aid = $[-12 + 2 + (-30)] / 2 = -\text{EUR } 20$ million.

As the outcome of the formula is higher than EUR 10 million, the simplified procedure described in point 30 cannot be used. If this limit is exceeded, the Member State should provide an explanation of how the future cash-flow needs of the company and the amount of rescue aid have been determined.

Commission Communication concerning the prolongation of the Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty

(2009/C 156/02)

The Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty ⁽¹⁾ will expire on 9 October 2009 ⁽²⁾.

Since their adoption in 2004, the Commission has applied these guidelines in numerous cases and experience has shown that they provide a sound basis for the control of this type of State aid.

The economic crisis has created a difficult and unstable economic situation. Having regard to the need to ensure continuity and legal certainty in the treatment of State aid to enterprises in financial difficulty, the Commission has decided to extend the validity of the existing Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty until 9 October 2012.

⁽¹⁾ OJ C 244, 1.10.2004, p. 2-17.

⁽²⁾ See paragraph 102 of the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (OJ C 244, 1.10.2004, p. 15).

CORRIGENDA**Corrigendum to the Commission communication concerning the prolongation of the Community guidelines on State aid for rescuing and restructuring firms in difficulty**

(Official Journal of the European Union C 157 of 10 July 2009)

(2009/C 174/09)

The text of the Commission communication published in the *Official Journal of the European Union* C 157 of 10 July 2009, p. 1, should be considered as null and void since an identical text has already been published in the *Official Journal of the European Union* C 156 of 9 July 2009, p. 3.



PART III.7.A

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESCUING FIRMS IN DIFFICULTY:
AID SCHEMES**

This supplementary information sheet must be used for the notification of rescue aid schemes covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾.

1. Eligibility

- 1.1. Is the scheme limited to firms that fulfil at least one of the eligibility criteria below:
- 1.1.1. Is the scheme limited to firms, where more than half their registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?
- yes no
- 1.1.2. Are the firms unlimited companies, where more than half of their 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?
- yes no
- 1.1.3. Do the firms fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?
- yes no
- 1.2. Is the scheme limited to rescuing small or medium-sized enterprises in difficulty which correspond to the Community definition of SMEs?
- yes no

2. Form of aid

- 2.1. Is the aid granted under the scheme in the form of a loan guarantee or loans?
- yes no
- 2.2. If yes, will the loan be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rate adopted by the Commission?
- yes no
- Please provide detailed information.
- 2.3. Will the aid under the scheme be linked to loans that are to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to the firm?
- yes no

3. Other elements

- 3.1. Will aid under the scheme be warranted on the grounds of serious social difficulties? Please justify.
- 3.2. Will aid under the scheme have no unduly adverse spillover effects on other Member States? Please justify.
- 3.3. Please explain why you think that the aid scheme is limited to the minimum necessary (i.e. is restricted to the amount needed to keep the firm in business for the period during which the aid is authorised. This should not go beyond a period of 6 months).
- 3.4. Do you undertake, within six months after granting the aid, to either approve a restructuring plan or a liquidation plan, or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary?
- yes no

Please specify the maximum amount of the aid that can be awarded to any one firm as part of the rescue operation:
.....

- 3.5. Provide all relevant information on aid of any kind which may be granted to the firms eligible for receiving rescue aid during the same period of time.

4. Annual report

- 4.1. Do you undertake to provide reports, at least on an annual basis, on the scheme's operation, containing the information specified in the Commission's instructions on standardised reports?
- yes no

⁽¹⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

▼ B

- 4.2. Do you undertake in such a report to include a list of beneficiary firms with at least the following information:
- (a) the company name;
 - (b) its sectoral code, using the NACE ⁽¹⁾ two-digit sectoral classification codes;
 - (c) the number of employees;
 - (d) annual turnover and balance sheet value;
 - (e) the amount of aid granted;
 - (f) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
 - (g) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.
- yes no

5. **Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

PART III.7.B

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESCUING FIRMS IN DIFFICULTY:
INDIVIDUAL AID**

This supplementary information sheet must be used for the notification of individual rescue aid covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁾.

1. **Eligibility**

- 1.1. Is the firm a limited 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?
- yes no
- 1.2. Is the firm an unlimited 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 months?
- yes no
- 1.3. Does the firm fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?
- yes no

If you have answered yes to any of the above questions, please attach the relevant documents (latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law)

If you have answered no to all of the above questions, please submit evidence supporting that the firm is in difficulties, for it to be eligible for rescue aid.

- 1.4. When has the firm been created?
- 1.5. Since when is the firm operating?

⁽¹⁾ Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

⁽²⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

▼ B

- 1.6. Does the company belong to a larger business group?

yes no

If you have answered yes, please submit full details about the group (organisation chart, showing the links between the group's members with details on capital and voting rights) and attach proof that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be dealt with by the group itself.

- 1.7. Has the firm (or the group to which it belongs) in the past received any rescue aid?

yes no

If yes, please provide full details (date, amount, reference to previous Commission decision if applicable, etc.)

2. Form of aid

- 2.1. Is the aid in the form of a loan guarantee or loans? Copies of the relevant documents should be provided.

yes no

- 2.2. If yes, is the loan granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rate adopted by the Commission?

yes no

Please provide detailed information.

- 2.3. Is the aid linked to loans that are to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to the firm?

yes no

3. Other elements

- 3.1. Is the aid warranted on the grounds of serious social difficulties? Please justify.

- 3.2. Does the aid have no unduly adverse spillover effects on other Member States? Please justify.

- 3.3. Please explain why you think that the aid is limited to the minimum necessary (i.e. is restricted to the amount needed to keep the firm in business for the period during which the aid is authorised). This should be done on the basis of a liquidity plan for the 6 months ahead and on the basis of a comparison with operating costs and financial charges over the previous 12 months.

- 3.4. Do you undertake, not later than six months after the rescue aid measure has been authorised, to communicate to the Commission a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated?

yes no

4. Other Information

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.



PART III.8.A

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESTRUCTURING FIRMS IN DIFFICULTY:
AID SCHEMES**

This supplementary information sheet must be used for the notification of restructuring aid schemes covered by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁾.

1. Eligibility

- 1.1. Is the scheme limited to firms that fulfil at least one of the eligibility criteria below:
- 1.1.1. Is the scheme limited to firms, where more than half their registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?
- yes no
- 1.1.2. Are the firms unlimited companies, where more than half of their capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding months?
- yes no
- 1.1.3. Do the firms fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?
- yes no
- 1.2. Is the scheme limited to restructuring small or medium-sized enterprises in difficulty which correspond to the Community definition of SMEs?
- yes no

2. Return to viability

A restructuring plan must be implemented which must assure restoration of viability. At least the following information should be included:

- 2.1. Presentation of the different market assumptions arising from the market survey.
- 2.2. Analysis of the reason(s) why the firm has run into difficulty.
- 2.3. Presentation of the proposed future strategy for the firm and how this will lead to viability.
- 2.4. Complete description and overview of the different restructuring measures planned and their cost.
- 2.5. Timetable for implementing the different measures and the final deadline for implementing the restructuring plan in its entirety.
- 2.6. Information on the production capacity of the company, and in particular on utilisation of this capacity, capacity reductions.
- 2.7. Full description of the financial arrangements for the restructuring, including:
- Use of capital still available;
 - Sale of assets or subsidiaries to help finance the restructuring;
 - Financial commitment by the different shareholders and third parties (like creditors, banks);
 - Amount of public assistance and demonstration of the need for that amount;

⁽¹⁾ Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

▼ B

2.8. Projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios;

2.9. Name(s) of the author(s) of the restructuring plan and date on which it was drawn up.

3. **Avoidance of undue distortion of competition**

Does the scheme provide that recipient firms must not increase their capacity during the restructuring plan?

yes no

4. **Aid limited to the minimum necessary**

Describe how it will be assured that the aid granted under the scheme is limited to the minimum necessary.

5. **One time, Last time**

Is it excluded that recipient firms receive restructuring aid more than once over a period of ten years?

yes no

All cases where this principle is not respected must be notified individually

6. **Amount of aid**

6.1. Please specify the maximum amount of the aid that can be awarded to any one firm as part of the restructuring operation:

6.2. Provide all relevant information on aid of any kind which may be granted to the firms eligible for receiving restructuring aid.

7. **Annual report**

7.1. Do you undertake to provide reports, at least on an annual basis, on the scheme's operation, containing the information specified in the Commission's instructions on standardised reports?

yes no

7.2. Do you undertake in such report to include a list of beneficiary firms with at least the following information:

- (a) the company name;
- (b) its sectoral code, using the NACE ⁽¹⁾ two-digit sectoral classification codes;
- (c) the number of employees;
- (d) annual turnover and balance sheet value;
- (e) the amount of aid granted;
- (f) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
- (g) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.

yes no

⁽¹⁾ Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

▼ B**8. Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

PART III.8.B

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESTRUCTURING FIRMS IN DIFFICULTY:
INDIVIDUAL AID**

This supplementary information sheet must be used for the notification of individual restructuring aid covered by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁾.

1. Eligibility

- 1.1. Is the firm a limited 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?

yes no

- 1.2. Is the firm an unlimited 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?

yes no

- 1.3. Does the firm fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?

yes no

If you have answered yes on any of the above questions, please attach the relevant documents (latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law)

If you have answered no to all of the above questions, please submit evidence supporting that the firm is in difficulties, for it to be eligible for restructuring aid.

- 1.4. When has the firm been created?

- 1.5. Since when is the firm operating?

- 1.6. Does the company belong to a larger business group?

yes no

If you have answered yes, please submit full details about the group (organisation chart, showing the links between the group's members with details on capital and voting rights) and attach proof that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be dealt with by the group itself.

- 1.7. Has the firm (or the group to which it belongs) in the past received any restructuring aid?

yes no

If yes, please provide full details (date, amount, reference to previous Commission decision if applicable, etc.)

⁽¹⁾ Community Guidelines on State aid for rescuing and restructuring firms in difficulty, JO C 288, 9.10.1999, p. 2. Please note that a specific form shall be used in case of aid for restructuring firms in the aviation sector (Part III.13.a) as well as in the agricultural sector (Part III. 12.p).

▼ B**2. Restructuring plan**

- 2.1. Please supply a copy of the survey of the market(s) served by the firm in difficulty, with the name of the organisation which carried it out. The market survey must give in particular:
- 2.1.1. A precise definition of the product and geographical market(s).
- 2.1.2. The names of the company's main competitors with their shares of the world, Community or domestic market, as appropriate.
- 2.1.3. The evolution of the company's market share in recent years.
- 2.1.4. An assessment of total production capacity and demand at Community level, concluding whether or not there is excess capacity on the market.
- 2.1.5. Community-wide forecasts for trends in demand, aggregate capacity and prices on the market over the five years ahead.
- 2.2. Please attach the restructuring plan. At least the following information should be included:
- 2.2.1. Presentation of the different market assumptions arising from the market survey.
- 2.2.2. Analysis of the reason(s) why the firm has run into difficulty.
- 2.2.3. Presentation of the proposed future strategy for the firm and how this will lead to viability.
- 2.2.4. Complete description and overview of the different restructuring measures planned and their cost.
- 2.2.5. Timetable for implementing the different measures and the final deadline for implementing the restructuring plan in its entirety.
- 2.2.6. Information on the production capacity of the company, and in particular on utilisation of this capacity, capacity reductions.
- 2.2.7. Full description of the financial arrangements for the restructuring, including:
- Use of capital still available;
 - Sale of assets or subsidiaries to help finance the restructuring;
 - Financial commitment by the different shareholders and third parties (like creditors, banks);
 - Amount of public assistance and demonstration of the need for that amount;
- 2.2.8. Projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios;
- 2.2.9. Name(s) of the author(s) of the restructuring plan and date on which it was drawn up.
- 2.3. Describe the compensatory measures proposed with a view to mitigating the distortive effects on competition at Community level.
- 2.4. Provide all relevant information on aid of any kind granted to the firm receiving restructuring aid, whether under a scheme or not, until the restructuring period comes to an end.

3. Other Information

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

F. SECTOR - SPECIFIC RULES

Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works

(2002/C 43/04)

(COM(2001) 534 final)

1. INTRODUCTION

Audiovisual works, and cinema in particular, play an important role in shaping European identities, both in common aspects shared across Europe and in the cultural diversity that characterises our different traditions and histories. They are an essential element for the good functioning of our democracies because of their widespread influence on society. They are also at the heart of the transformations resulting from the development of the information society: new technological developments offer new opportunities for promoting culture and heritage conservation, and to increase mutual understanding across Europe. But the multiplication of distribution channels available for distribution of audiovisual goods does not automatically lead to an increase in the creation of quality content.

The principles of the Community audiovisual policy have been expressed in the Commission's communication of December 1999 ⁽¹⁾ and remain fully valid today. The primary purpose of regulation in the audiovisual sector is to safeguard certain public interest objectives such as pluralism, cultural and linguistic diversity and the protection of minors. At a European level, the necessary balance must be kept to guarantee subsidiarity in an area where major competences are at the national or regional level, while ensuring that European companies can fully benefit from the European dimension. The key European instruments specifically developed in this area, the Television without frontiers Directive, for regulatory aspects, and the MEDIA Plus programme for support mechanisms, have as their main objective to allow European companies in this sector to benefit fully from the European single market.

Audiovisual works have unique characteristics because of their double nature: they are economic goods, offering important opportunities for the creation of wealth and employment. In 1999, the European audiovisual market ⁽²⁾ was estimated at EUR 58,3 billion (+ 8,7 % v 1998). They are also cultural goods which at the same time mirror and shape our societies. This is the reason why the development of this sector has never been left solely to market forces.

⁽¹⁾ Principles and guidelines for the Community's audiovisual policy in the digital age, COM(1999) 657 final of 14 December 1999.

⁽²⁾ European Audiovisual Observatory. Includes television, cinema, video (cassettes and DVD), but not games.

The advent of new technologies has not affected the renaissance of the cinema in Europe; such new technologies have been shown to offer additional income for media operators rather than substituting existing media. Total cinema admissions in Europe rose from 662 million in 1995 to 844 million in 2000 (+ 27 %) ⁽³⁾. This increase would appear to be due at least in part to the growth in the number of cinema screens in Europe, in particular multiplexes (+ 22 % in 1999 v 1995) ⁽³⁾ as well as improved facilities at cinemas. Recent figures ⁽⁴⁾ show that TV viewing in Europe has increased in most Member States in the past year.

Amongst audiovisual works, cinematographic works have a particular prominence, because of their cost of production and cultural importance: budgets for the productions of cinema films are substantially higher than for other audiovisual content, they are more frequently the subject of international co productions, and the duration of their exploitation life is longer, with the potential to use all distribution channels, cinemas, DVDs and videocassettes (both selling and rental), Internet downloading, and television (pay per view, pay per channel, free to air). Cinematographic works face strong competition from outside Europe ⁽⁵⁾. There is little circulation of European works outside their country of origin, although there appears to be an upward trend: according to certain estimations, European non national films reached over 10 % ⁽⁶⁾ of total attendance in 1999 from less than 8 % in 1996.

Because of the particularity of cinema, the Commission had indicated in its communication on audiovisual policy in 1999, that there was a need to examine in more detail a number of issues to clarify the legal framework of the cinema sector, including the application of State aid policy in that area. The objective of this review was to determine which measures could be taken in order to improve the circulation of these works in Europe.

⁽³⁾ European Audiovisual Observatory.

⁽⁴⁾ European Audiovisual Observatory: the average for television viewing in Europe varies between 144 minutes per day in Austria and 239 minutes per day in Italy. The trend is positive in almost all Member States.

⁽⁵⁾ European Audiovisual Observatory: the market share of American cinema films in Europe in 2000 was above 73 %.

⁽⁶⁾ European Audiovisual Observatory; Lumière database; data are inclusive of international EU/extra EU co productions.

In accordance with the principles of the White Paper on Governance⁽⁷⁾, the Commission services organised a public consultation on the basis of a staff working document⁽⁸⁾ in order to give all interested parties the opportunity to make their views known before the adoption of this communication by the Commission. A hearing attended by around 250 interested parties was held on 15 June. This not only provided an opportunity for the Commission to identify the central issues in respect of the issues raised in the staff working document, but also allowed the interested parties to hear and respond to each other's views.

49 written comments⁽⁹⁾ were received from Member States, national regulatory and self regulatory authorities, authors, artists, film and television producers and directors, cinema operators, video and DVD publishers/distributors, television broadcasters, industry associations, consumer representatives and trade unions.

This communication sets out the Commission's policy orientations and proposals building upon the consultation exercise. It sets out the principles to be applied for the application of State aid rules to the cinema sector, and identifies the next steps to be taken and the areas where further reflection is needed in order to create a favourable environment for the production and distribution of audiovisual works.

2. THE GENERAL ORIENTATION OF THE COMMISSION WITH REGARD TO STATE AID TO THE CINEMA SECTOR

Cinema and TV programmes are two of the most universal media of entertainment, with a powerful impact on a great number of people internationally. The current stage of development and the special characteristics of audiovisual production within the EC, mean that it is difficult for producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. In these circumstances, the fostering of audiovisual production by the Member States plays a key role to ensure that their indigenous culture and creative capacity can be expressed, thereby reflecting the diversity and richness of European culture.

The Maastricht Treaty gave Community level recognition to the utmost importance of promoting culture for the European Union and its Member States by incorporating culture amongst the Community's policies specifically referred to in the EC Treaty (see Article 151 EC). At the same time, it

⁽⁷⁾ COM(2001) 428 of 25 July 2001.

⁽⁸⁾ SEC(2001) 619 of 11 April 2001.

⁽⁹⁾ Representing more than 95 % of the production industry, film directors, cinema exhibitors, rights holders, broadcasters, unions representing workers in the audiovisual sectors, video and DVD associations, film institutes and Member States. See list of comments and full text of those sent electronically without a request for confidentiality at: http://europa.eu.int/comm/avpolicy/regul/cine1_en.htm

included in Article 87(3)(d) EC a new specific possibility of exception to the general incompatibility principle of Article 87(1) EC for aid granted by the Member States to promote culture.

Member States implement a wide range of support measures for the audiovisual production of films and TV programmes. This support focuses on the creation and production phases of film making and generally takes the form of subsidies or repayable advances. The rationale behind these measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly based production undertakings and the development of a permanent pool of human skills and experience.

This communication does not cover the application of Articles 81 and 82 of the EC Treaty (anti competitive practices by companies) to the audiovisual sector⁽¹⁰⁾.

2.1. Compatibility with the EC Treaty of schemes of aid to cinema and TV production

The basic rules on State aid under the EC Treaty are as follows: Article 88(3) of the EC Treaty provides that Member States are obliged to inform the Commission of any plans to grant or alter aid before putting it into effect. Article 87(1) EC prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between Member States. However, the Commission may exempt certain State aid from this prohibition. In particular, Article 87(3) EC lists certain aid types that, in view of their effects, the Commission may authorise. One of these exemptions is Article 87(3)(d) EC for aid to promote culture, where such aid does not affect competition and trading conditions to an extent contrary to the common interest.

2.2. Enforcement of the EC Treaty rules on State aid to cinema and TV production

In 1997, the Commission received a complaint about exclusionary effects created by the French cinema production aid scheme. This was confirmed by the Commission's assessment. The anti competitive effects were the result of provisions making the aid conditional on the realisation of certain film making activities in the Member State (so called 'territorialisation').

⁽¹⁰⁾ For example, practices such as block bookings or the bundling of rights, which could be incompatible with the EC Treaty.

The French authorities, at the Commission's request, modified a series of incompatible provisions of their cinema production aid scheme and on 3 June 1998 the Commission authorised their scheme. In its decision (N 3/98), the Commission set out four specific compatibility criteria (see 2(3)(b) below) to authorise aid to cinema and TV production in accordance with the 'culture derogation' contained in Article 87(3)(d) of the EC Treaty. The Commission also undertook to review the schemes in other Member States under the criteria adopted in the French decision.

The Commission launched an inquiry requesting information from all Member States about their aid schemes for the audio visual sector. The inquiry showed that the majority of the schemes had not been notified to the Commission for prior authorisation.

2.3. Assessment of aid schemes to cinema and TV production

When it assesses aid schemes to cinema and TV production, the Commission must verify:

- first, whether the aid scheme respects the 'general legality' principle, i.e. the Commission must verify that the scheme does not contain clauses that would be contrary to provisions of the EC Treaty in fields other than State aid (including its fiscal provisions),'
- secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out by the Commission in its 1998 decision on the French automatic aid scheme ⁽¹¹⁾.

The second condition is specific to cinema and TV production aid schemes, whereas the other is a routine test applied to all aid schemes irrespective of the sector.

(a) *Respect of the general legality criterion*

The Commission must verify that the eligibility conditions of the State aid schemes do not contain clauses contrary to the EC Treaty provisions in fields other than State aid. The Commission must ensure, inter alia, that the EC Treaty principles prohibiting discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 12, 28, 30, 39, 43, 48 and 49 EC). The Commission enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are not detachable from the operation of the scheme.

⁽¹¹⁾ The question whether fiscal relief to producers can be qualified as aid is assessed under the principles contained in the 1998 Commission communication on the application of State aid rules to measures relating to direct business taxation (OJ C 384, 12.12.1998).

In compliance with the above principles, aid schemes must not: e.g. reserve the aid for nationals exclusively; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one Member State and operating in another by means of a permanent branch or agency must be eligible for aid; furthermore, the agency requirement should only be enforceable upon payment of the aid); require workers of foreign companies providing film making services to comply with national labour standards.

Certain schemes of aid to cinema and TV production are financed by para-fiscal charges. According to the Commission's decision making policy and the Court of Justice's jurisprudence, when such schemes benefit solely national producers or do so to a higher extent than to competitors in other Member States, in order to be compatible with the Treaty, imported products may not be levied and national production may not enjoy a lower rate of taxation when exported.

When the Commission applies the State aid rules to assess the compatibility of aid schemes under the review, it addresses at the same time the problems identified by the Code of conduct group on direct business taxation (the so called Primarolo Group) set up by the Council ⁽¹²⁾.

(b) *The specific compatibility criteria for State aid to cinema and TV programme production*

The specific criteria on which basis the Commission currently assesses State aid to cinema and TV programme production under the culture derogation of Article 87(3)(d) EC were established in its decision of June 1998 on the French automatic aid scheme to film production. These specific criteria are as follows:

1. The aid is directed to a cultural product. Each Member State must ensure that the content of the aided production is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle).
2. The producer must be free to spend at least 20 % of the film budget in other Member States without suffering any reduction in the aid provided for under the scheme. In other words, the Commission accepted as an eligibility criteria territorialisation in terms of expenditure of up to 80 % of the production budget of an aided film or TV work.

⁽¹²⁾ This group compiled an inventory of harmful measures that includes a certain number of State aid schemes for cinema and TV production.

3. Aid intensity must in principle be limited to 50 % of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between Member States. Difficult and low budget films are excluded from this limit. The Commission considers that, under the subsidiarity principle, it is up to each Member State to establish a definition of difficult and low budget film according to national parameters.
4. Aid supplements for specific film making activities (e.g. post production) are not allowed in order to ensure that the aid has a neutral incentive effect and consequently that the protection/attraction of those specific activities in/to the Member State granting the aid is avoided.

Several considerations arise in respect of the abovementioned criteria:

The Commission considers that aid should be towards the overall budget of a specific film making project and the producer should be free to choose the items of the budget that will be spent in other Member States. Aid schemes shaped on this basis are deemed to support the creation of an audiovisual product and not to assist the development of an industrial activity. Consequently, this aid is to be assessed under the culture derogation of Article 87(3)(d) EC rather than the industrial derogation of Article 87(3)(c). Undertakings in the film and TV programme production sector may also benefit from other aid types granted under national horizontal aid schemes authorised by the Commission under the Article 87(3)(a) and (c) EC exemptions (e.g. regional aid, aid for SMEs, R & D aid, training aid, employment aid).

The Commission accepted that Member States may require a certain part of the film production budget to be spent on their territory as an eligibility criterion for aid. This is based on the reasoning that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation⁽¹³⁾. This should be limited to the minimum degree required to promote cultural objectives.

Furthermore, given the particular characteristics of film production, the Commission considers that the overall budget of an audiovisual production is the disbursement at risk necessary for its creation and, consequently, admits that the reference for aid calculation is that overall budget, regardless of the nature of the individual expenditure items of which it is formed. The earmarking of aid to specific individual items of a film budget could turn such aid into a national preference to the sectors providing the specific aided items, which might be incompatible.

⁽¹³⁾ See reply to Written Question 3173 00 of Mr Veltroni (OJ C 163 E, 6.6.2001, p. 50).

Funds provided directly from EC programmes like MEDIA Plus are not State resources. Therefore, their assistance does not count for the purposes of respecting the 50 % aid ceiling. Furthermore, this assistance promotes the distribution of national films abroad and, consequently, its effects do not add up to those of national schemes focusing on national production and distribution.

Legal obligations imposed by Member States upon TV broadcasters to invest in audiovisual production do not constitute State aid, where these investments provide a reasonable compensation to broadcasters. The extent to which these legal obligations may be considered State aid as such has to be considered in view of the development of the EC Court of Justice jurisprudence after its judgement of 13.3.2001 in Case C 379/98 (PreussenElektra).

In the Commission's view, the above criteria strike a balance between the aims of cultural creation, the development of the EC audiovisual production and the respect of the EC rules on State aid.

2.4. Review of schemes

Following its 1998 decision on the French scheme of automatic aid to film production, the Commission has reviewed the schemes in place in other Member States under the abovementioned assessment criteria. The Commission has already reviewed and approved the schemes of a series of Member States⁽¹⁴⁾. The Commission, is at present, completing discussions with the remaining Member States to bring their schemes in line with EC law. The Commission intends to complete the review by the end of 2001. The completion of the review will provide legal certainty to the sector.

The review has revealed the following key features of national State aid schemes:

- there is a great diversity of aid schemes within EC both in terms of aid type and scope,
- many of the schemes contained provisions contrary to the general legality principle,
- very few Member States impose territoriality requirements in order to qualify for aid,
- only exceptionally, Member States grant State aid levels higher than 50 % of the film costs,
- the exceptions to this latter finding normally fall under the 'difficult and low budget film' category.

⁽¹⁴⁾ France, the Netherlands, Germany (and certain German *Länder*, Ireland, and Sweden: see http://europa.eu.int/comm/competition/state_aid/decisions/)

2.5. Future developments

The specific compatibility criteria for aid to cinema and TV programme production, set out above, will remain valid until June 2004, the time limit set in the decisions adopted so far. Under the review, the other Member States' schemes will be authorised until the same deadline.

The Commission does not intend to alter these criteria unless they prove unable to prevent undue distortion of competition within the EC. The Commission will examine further in the light of the review the maximum level of admissible territorialisation. Territoriality requirements fragment the internal market for the provision of goods and services for audiovisual production and hinder their development. Possible distortion of competition created by aid to cinema and TV programme production would originate more from territorialisation requirements rather than from the level of aid itself. Territoriality requirements exceeding what may be judged acceptable under the necessity and proportionality criteria go beyond the strict limits of cultural promotion and aim basically at industrial objectives. Therefore, the Commission, in its decision on the French aid scheme considered that the Member States should be encouraged to reduce national preferences for an important part of the costs as to the place of expenditure.

In view of the comparatively limited geographic extension of certain languages and cultures, and given the limited circulation of those cultural products within the EC and world markets, the Commission could accept aid intensities higher than 50 % where proven to be necessary in cases other than for difficult and low budget films for these Member States.

The Commission intends to continue the multilateral dialogue with the Member States to discuss relevant issues connected with State support to cinema and TV production. This dialogue started in the conference organised by the French National Cinema Centre in Paris in October 2000 that brought together expert officials of the Commission and representatives from the relevant Ministries and film institutes in the EU. The dialogue was pursued in a second conference organised by the Swedish Film Institute in Stockholm in June 2001.

3. PROTECTION OF HERITAGE AND EXPLOITATION OF AUDIOVISUAL WORKS

A number of issues relating to protection of heritage, transparency, and effective exploitation of rights have been raised⁽¹⁵⁾: the legal deposit of audiovisual works, the creation of a European register (or the linking of national registers) and

⁽¹⁵⁾ In particular in the Commission staff working document, SEC(2001) 428 of 11.4.2001.

other possible forms and use of databases with a commercial aim. These issues could have important consequences for the circulation of audiovisual works within Europe, and for the preservation of Europe's audiovisual heritage.

3.1. The legal deposit of audiovisual works

Different work has been done in various fora on this issue. The Council adopted a resolution on conservation and enhancement of European cinema heritage in May 2000⁽¹⁶⁾, in which it called on the Commission to take account of the specific needs of this particular form of cultural legacy, and to support and encourage a transnational study to be carried out by the Member States on the situation facing European cinema archives.

From the contributions both at the public hearing and in writing, it is clear that there is consensus on the need to preserve and to safeguard Europe's audiovisual heritage. Opinions diverged as to the best way of achieving this aim, and as to whether regulatory intervention at a European level was required or in fact desirable.

At pan European level initiatives have been taken by professional organisations⁽¹⁷⁾, and by the Council of Europe, whose draft European Convention for the protection of the audiovisual heritage should be adopted shortly. This convention will provide for a compulsory legal deposit of 'moving image material forming part of its audiovisual heritage and having been produced or co produced in the territory of the party concerned'.

Opinions were divided as to whether the European Union should adhere to this instrument and/or encourage the Member States to do so. A number of commentators considered that the convention offered a reasonable compromise for action in this area, making Community action unnecessary, or alternatively felt that it constituted a good starting point for a Community initiative. Others favoured a Community initiative, stating that this was still necessary despite the convention and could provide an added value in terms of the protection of heritage and the promotion of cultural diversity. It was suggested that any Community approach should focus on best practice, although certain commentators felt that self regulation or co regulation did not function adequately and could lead to disparities as regards the preservation of audiovisual works.

⁽¹⁶⁾ 2261 Council meeting (16 May 2000) Press 154 — No 8394/2000.

⁽¹⁷⁾ There are proposals from the European Federation of Film Directors (FERA) and the International Federation of Cinema Producers Associations (FIAPF) (which has proposed a 'voluntary' deposit for cinematographic works based on a model contract that they have drawn up 'General regulations concerning trust deposit of motion picture prints with film archives' (1971)).

There were conflicting views as to whether such a system should be compulsory or voluntary. A number of commentators supported obligatory legal deposit as a minimum measure. Others considered that such a requirement should not entail any additional costs for the producer and should therefore be publicly financed. The requirement should only apply to new works (older works should be the subject of voluntary deposit). Many commentators favoured a voluntary scheme with details established at Member State level and limited to national works, which could be linked to incentives.

Commentators drew a distinction between cinematographic and other works. Broadcasters considered that it would be inappropriate to make television productions part of any mandatory deposit scheme. They added that if regulatory intervention for the preservation of television productions was to be regarded as necessary, it should be on a voluntary basis, and linked to significant financial support mechanisms. Others favoured the inclusion of all audiovisual works, whilst a third group favoured focusing initially on cinematographic works, which could later be extended to other categories.

In terms of conservation, the cinemathèques stressed the need for the works deposited to be of high quality (either the original copy or one of similar quality), as well as the need to create a database of the different material supports for audiovisual works.

The Commission notes that there is widespread support of the need to preserve audiovisual works in view of the objectives of protection of heritage and the promotion of cultural diversity. The results of the consultation show that there is a need for action to preserve our audiovisual heritage. This appears to be particularly important in respect of cinematographic works. However, there was a lack of consensus as to the type of measures that would be appropriate.

Thus, before putting forward a possible proposal the Commission intends to carry out a stocktaking exercise in respect of the current situation within the Member States. This will be carried out by means of an inquiry addressed to the national authorities later on this year. This exercise will evaluate the role played by legislative and other measures and to further analyse the conditions that should apply. Furthermore, the Commission intends to encourage cooperation between the interested parties in this area together with the spread of 'best practice'. It notes the consensus between the parties concerned that there should not be a single European archive. Deposit should rather be organised at the national or regional level, with appropriate transparency as to the location of works. It also intends to examine further the issue of creating a database of the different material supports for audiovisual works as suggested during the consultation.

3.2. The creation of a registration scheme

Differing opinions exist as to the value of a registration scheme for films and other audiovisual works. At the moment, only a minority of Member States has put in place such a register. An initiative to create an international register in the context of the World Intellectual Property Organisation (WIPO) only met with limited success.

A European initiative in this domain might encourage transparency and thereby help protect right holders and facilitate the circulation of European productions. This could be particularly important in view of the complexity of the industry. Such a scheme should not impact on questions relating to different rules on authorship or on the use of rights in line with copyright rules, but could aim to provide certain information relating to the audiovisual works registered.

Although a number of the commentators considered the scheme unnecessary and costly, the majority supported it. There was support for creation of a national public register of films in every Member State, if certain criteria were established. This was seen by some as being an essential element of any policy to promote circulation of audiovisual works. Some went further and saw the absence of such a register (or registers) as a hindrance to exploitation of works.

There were differing opinions on the most appropriate type of action. Some were in favour of the creation of a system of mutual recognition based on individual registers in each Member State. Others felt there was a need to assess market needs before deciding on appropriate action. A number of commentators were in favour of networking national registers at a European level. This was seen as having the advantage of transparency facilitating identification, although others considered that this could be quite cumbersome as a mechanism and that it would be difficult to set up such a scheme.

There was widespread agreement as to the advantages of clear identification and the importance of metadata⁽¹⁸⁾. Public service broadcasters stated that Europe would benefit if there were well known and well designed systems for metadata with respect to production, delivery, classification, protection and archiving of media works. In respect of the standards they considered it important to encourage the development of a more widely distributed media registration number network, in order to ensure interoperability between media registration numbers and to reduce registration fees for the European programme maker. Certain operators supported the use of the ISAN⁽¹⁹⁾ standard or another standard established by industry, whereas others were against the use of this particular standard, whilst nonetheless in favour of standardised metadata systems.

⁽¹⁸⁾ Digital information about an audiovisual work intended to help the production and distribution process (also referred to as digital asset management (DAM)).

⁽¹⁹⁾ Developed by the International Standards Organisation (ISO). The current version is known as IVID (international version identifier) or V ISAN.

Some commentators suggested that it should hold details of all the contracts relating to the production and exploitation of films produced in the country, in particular the identity of the various parties, ownership and exercise of copyright, the exploitation terms in the contract, the duration of the licence and its exclusive or non exclusive character. Commentators considered that financing should be provided at a European level or alternatively by a combination of private and public funding. Other commentators expressed concern either about the costs of such a scheme, or the possible disadvantages if the information was not accurate or up to date.

The Commission notes that there is considerable support for the creation of public registers of films in Member States based on the argument that such a registration scheme would improve the circulation of films by assuring that the information needed is readily available, although a number of issues remain to be clarified. The Commission therefore intends to carry out a stocktaking exercise in respect of the current situation within the Member States. This will be carried out by means of an inquiry addressed to the national authorities later on this year. It will aim to evaluate the role played by legislative and other measures and to further analyse the conditions that should apply.

3.3. Right-holders database

The possibility of creating a new database enabling the identification of 'rights' or 'licensing' agreements across the European Union was put forward. There was disagreement as to whether information on rights and licensing agreements was difficult to obtain. The availability of this information could have a positive effect on the circulation of films. It should be noted that the Commission is analysing the issue of management of rights, as a follow up to its 1995 Green Paper on copyright and related rights in the information society ⁽²⁰⁾.

Opinions were divided as to whether there was a lack of transparency regarding this information. The majority stated that sufficient transparency is ensured by producers and collecting societies. It was suggested that there was work to be done in the standardised codification of rights in order that rights may be consistently represented and relevant information exchanged in a legally reliable way. A potential benefit of such a database could be to help producers and distributors to find partners in other European countries.

A large number of commentators asserted that such a database would not seem necessary to improve the circulation of audiovisual works: the view was expressed that such a database might be very slow, costly, cumbersome and unable to keep pace with constant, very rapid changes in property. This would not correspond to the flexibility needed for the efficient exploi-

tation of audiovisual works. Consequences of any mistaken or obsolete information could be considerable. The formalities might be unmanageable and the delays in registering valid rights and the related contracts could be a hindrance to freedom of movement in a very brisk market. There might even be a danger that defrauders could obtain validation for misappropriated rights to the detriment of the entitled parties. Concern was also expressed that the creation of such a database could interfere with the internationally well established rule (see Article 5(2) Berne Convention) that the enjoyment and the exercise of copyright and neighbouring rights must not be subject to any formalities. Others maintained that major differences in the relevant contract law for copyright seriously affect the competitiveness of audiovisual producers of one country as compared to such producers in another country and that such a database could play an important role in the circulation of audiovisual works by ensuring that it was possible to obtain information about audiovisual works in other countries. The database could facilitate identification of right holders but negotiations should still take place on a contractual basis.

The Commission has taken note of the views expressed in the consultation and in particular the lack of support for the creation of a right-holders database. It will continue to examine the issue of management of rights, which it is analysing as a follow-up to its 1995 Green Paper on copyright and related rights in the information society, with a view to evaluating the possible impact of the existing differences in national law on the internal market.

3.4. The exploitation of rights

Copyright and neighbouring legislation vest rights in authors, performers, phonogram producers, broadcasters and other rightsholders to authorise or prohibit certain acts of exploitation of their works or other subject matter. In general, users acquire rights by direct individual contracts with the rightsholders concerned or their representatives.

The issue of the exploitation of rights has been raised by broadcasters who assert they have problems in exploiting some of their productions stored in their archives, which they would like to show again especially in the new online environment. They claim it to be virtually impossible to identify and to trace and negotiate with all individual programme contributors or their heirs, particularly in the case of old productions. They assert that these difficulties prevent them from exploiting their archives today. Public service broadcasters therefore asked for legislative action to facilitate their situation. The cinémathèques also stated that they were unable to use a number of works and that the public therefore lost access to its own audiovisual heritage.

⁽²⁰⁾ COM(95) 382 final.

Producers and certain private broadcasters on the other hand, felt that the matter had been settled in the context of the new Copyright Directive ⁽²¹⁾ and should not be reopened in this context.

A number of commentators considered that the creation of the databases and registers referred to above could facilitate identification. It was also suggested that the matter should be considered in the review of the Television Without Frontiers (TVWF) Directive. However, it should be noted that this directive does not cover copyright and related rights issues.

The Commission supports cooperation between all parties in order to solve specific difficulties, which may exist in certain situations. This cooperation should in the first place aim to set up an inventory of works for which problems relating to the identification of rightsholders could exist.

4. E CINEMA

The issue of e cinema has been raised because of the new pan European distribution possibilities that are being created by digital technologies. These technologies can also enable the development of local multipurpose centres in less densely populated areas ⁽²²⁾. The term e cinema is used to signify electronic delivery to a cinema screen. The term d cinema has also been used by the industry, signifying that the final image is either the result of an end to end digital chain or the digital projection of material originated on film and transferred to digital medium. The impact on the cost/benefit analysis for film distributors and cinema owners was also raised.

There was widespread support from commentators for an industry led approach to the standardisation of e cinema. Intervention by national authorities or the European Union was not felt to be necessary. A number of contributions referred to the European Digital Film Forum, recently established in Stockholm, at the initiative of the Swedish Presidency, as the appropriate body to take forward actions, and called for support of its objectives and projects.

There were calls for the Commission to support the development of e cinema through the MEDIA Plus programme and to open its 'multiannual framework programme 2002 2006 for research, technological development and demonstration activities aimed at contributing towards the

⁽²¹⁾ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001).

⁽²²⁾ For example, the Swedish Folket Hus.

creation of the European research area' (the sixth framework programme) to the European industries committed to developing a high standard for electronic cinema distribution.'

The pilot projects under the MEDIA programme are the way in which Council Decisions 2000/821/EC and 2001/163/EC ensure that the MEDIA Plus ⁽²³⁾ and the MEDIA Training ⁽²⁴⁾ programmes respond to rapid technological change. This reflects an expectation that the use of digital technologies will make European audiovisual works more readily accessible as a result of new ways of transporting audiovisual content and thus more widely available outside their country of origin. Competitiveness in a globalisation context will increasingly depend on the use of new technologies in the development, production and distribution stages.

However, the MEDIA programmes address themselves to the audiovisual industry and not to the research community. The Commission will ensure suitable and effective coordination with the measures undertaken in the field of new technologies and in particular, *inter alia*, with the sixth framework programme, focusing on the needs and potential of SMEs operating on the audiovisual market.

The Commission's overall objective is to strengthen, through the development and use of new technologies, the European content industry, by improving the chances of such content entering into production, by encouraging its transnational distribution and by improving the potential of professionals through appropriate continuous vocational training. The target should be to develop globally recognised, open standardised e cinema systems, through an industry led process. This could include the following elements: to develop suitable algorithms for the compression of film quality digital content to be exhibited; to develop technologies capable of projecting such content; to develop methods of protecting the use of content through encryption; to develop methods which will allow the billing of content consumed over a network; to develop methods for the digitisation, enhancement, restoration and conservation of content.

The Commission considers that e-cinema offers important new opportunities for increasing the circulation of European audiovisual works. It considers that the priority in this respect is the delivery to cinema, i.e. business to business, although there may possibly be a consumer phase at a later date. The Commission welcomes the establishment of the European Digital Cinema Forum. It supports the objectives of this forum to establish European user requirements for all parts of the digital/electronic chain, and to facilitate the development of worldwide standards for e-cinema in a timely manner.

⁽²³⁾ OJ L 13, 17.1.2001.

⁽²⁴⁾ OJ L 26, 27.1.2001.

5. TAX ISSUES

Certain questions arise concerning the differences that exist between various types of cultural 'goods' within the Member States and the effect of fiscal measures in force in the Member States on the production and circulation of audiovisual works. It was considered that national fiscal incentives could be an important factor in the development of co productions, as well as the harmonisation of tax practices to avoid double liability. Producers and directors felt that the Commission should ask all Member States to facilitate the creation of specialised, national or European, banks or venture capital funds with private finances, and to encourage Member States that don't have them to introduce fiscal measures to encourage audiovisual investment. A number of commentators referred to fiscal measures (in particular 'tax shelters') that were being used to finance non European production. Cinema exhibitors considered that the Commission should encourage Member States to lower indirect taxes on cinema seats to the same level as those imposed for other cultural products.

There was widespread agreement from the different players concerned that reduced rates of VAT or a zero rate should apply to audiovisual cultural products and services. Accordingly, a number of commentators suggested that Annex H of the Sixth VAT Directive ⁽²⁵⁾ should be expanded to cover either certain parts of the sector (video and online services) or the entire sector. Certain national authorities, however, questioned the need for European action although others considered that this subject should be discussed at European level.

The procedure laid down by the Directive is for the review to be carried out on the basis of a report from the Commission. On the basis of this report, the Council shall review the scope of the reduced rates every two years. The Council, acting unanimously on a proposal from the Commission, may decide to alter the list of goods and services in Annex H. The Commission laid down its policy for VAT in the communication of 7 June 2000 ⁽²⁶⁾. In this communication, the Commission stated that it would look at the harmonisation of rates and assess the impact of their structure on the functioning of the single market. Guidelines will be established on the basis of this analysis once the evaluation of the current pilot project for labour intensive services ⁽²⁷⁾ (for which a reduced rate may be applied until December 2002) has been completed. Particular attention will be paid to the use of reduced VAT rates in the context of the Community's priorities in this sector.

⁽²⁵⁾ Sixth Council Directive 77/388/EEC of 17 May 1977, as last amended by Directive 2001/41/EC of 19 January 2001. Annex H includes a number of items of cultural interest such as books and newspapers (including their loan), and entrance fees for cultural and other events (cinema, theatre, fairs, museums etc.) and the reception of broadcasting services.

⁽²⁶⁾ A strategy to improve the operation of the VAT system within the context of the internal market, COM(2000) 348 final.

⁽²⁷⁾ Introduced by Directive 1999/85/EC of 22 October 1999.

The Commission notes the views expressed about taxation for cultural goods and services, and in particular the request to enable those Member States who wish to do so to apply a reduced rate of VAT to all cultural goods and services without discriminating between different forms of distribution. The Commission will consider whether to respond to this request in the context of the review of Annex H of the Sixth VAT Directive, which will take place after 2002. The Commission would draw attention to the existing possibility for Member States to apply a reduced rate to cinema admissions.

6. RATING

There are two interlinked issues concerning the differences in ratings given to audiovisual works within Member States for different means of distribution and between Member States for the same means of distribution. Audiovisual works are generally subject to rating of their content, indicating for which age ranges they are considered suitable.

On the issue of differences between the Member States, a certain number of commentators (notably national authorities) considered that differences were the result of cultural differences and did not affect circulation significantly and therefore should be dealt with at a national level. Others were in favour of action to address this issue, even though they acknowledged that harmonising rating systems for audiovisual works across Europe could be difficult because of varying cultural traditions and sensitivities. There was support for increased cooperation between the competent authorities and the rating bodies to reduce the disparities from one Member State to another and from one medium to another, and to develop mutual recognition. Certain commentators considered that the role of national and European public authorities could be to support cooperation between relevant authorities possibly with the development at the European level of common descriptive criteria.

In respect of the differences between different means of distributions many commentators thought that content should be treated in the same way through the different distribution outlets. There were requests for harmonised standards, as this would facilitate the circulation of European works. It was argued that judgements about the suitability of material should be made on a more consistent and coherent basis across the media, according to a set of statutory objectives and principles for content regulation. The solution could be to set up a uniform European rating standard across audiovisual media, which would benefit consumers and suppliers and therefore positively affect production and circulation of European audiovisual works.

In its report on the recommendation on the protection of minors and human dignity⁽²⁸⁾, the Commission has stressed the need to have a coherent approach across all media. The Commission intends to continue this work and to evaluate which systems could be put in place, which would address this problem, whilst taking account of the cultural differences existing between the Member States. The Commission recognises the important cultural aspects of ratings, to be decided in accordance with the principles of subsidiarity and governance as set out in its recent White Paper⁽²⁹⁾, but considers that further analysis should be carried out of the role played by self regulatory schemes such as NICAM in the Netherlands.

The Commission will encourage exchanges of experience in respect of ratings (to include self-regulation) with a view to increasing cooperation on this issue. In this respect, the Commission intends to launch a Study on the rating of films, for cinema, television, DVD and videocassette in the EEA. The study will evaluate the reasons for, and the impact of differences between the different national laws or self-regulatory measures for rating of films on their subsequent marketing. It also will analyse whether such differences in rating create potential confusion amongst the persons responsible for minors.

7. OTHER MEASURES TO IMPROVE THE CIRCULATION OF FILMS

A number of different ideas to increase the production and circulation of European audiovisual works were put forward, notably a number of commentators considered that the Commission should encourage the funding of the production sector and/or encourage Member States or other institutions to do so. It should be noted that the Commission, together with the European Investment Bank (EIB) and the European Investment Fund (EIF) launched the 'i2i audiovisual initiative', which supplements the MEDIA Plus programme for 2001-2005 and focuses on both industrial goals of competitiveness together with the promotion of cultural diversity inherent in the promotion of the development of European audiovisual content. The Commission will continue to examine all appropriate financial measures to improve the production and circulation of European audiovisual works.

In this respect, the Commission highlights the positive approach taken in the recent communication adopted on State aid and risk capital⁽³⁰⁾, which it will apply for the next five years. This text is in line with the commitment to risk capital set out as a wider Community objective at the Lisbon European Council, and with the Commission's general policy of promoting risk capital in the Community⁽³¹⁾. The Commission

⁽²⁸⁾ Evaluation report from the Commission to the European Parliament and the Council on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2001) 106 of 27 February 2001, http://europa.eu.int/comm/avpolicy/regul/new_srv/pmhd_en.htm

⁽²⁹⁾ See note 7.

⁽³⁰⁾ OJ C 235, 21.8.2001.

⁽³¹⁾ Risk capital, a key to job creation in the European Union, SEC(1998) 552 final of 31 March 1998.

has approved a number of schemes launched by the Member States to create such funds. Encouraging exchanges of information and 'best practice' between the Member States and the Commission to identify the best means by which the various Member States could help the cinema sector, and to consider opportunities to develop them in every Member State. In this regard it could be useful to create transnational networks of European professionals in the film industry. Others identified a need for the Commission to define broad principles for the Member States and to address key issues such as the need for national approaches to avoid inhibiting trans frontier production or circulation.

It was suggested that the European Commission should use its e-Learning initiative that seeks to mobilise the educational and cultural communities, in order to speed up changes in the education systems to introduce the knowledge of classic European films to Europe's young citizens.

Finally, there was support for the creation of a European Union TV channel to broadcast 'European films'.

The Commission considers that the exchange of information and best practice is extremely important in the sector. The audiovisual production industry is extremely complex, and faces a number of both technological and market challenges. The Commission intends to create a group of experts to discuss these issues and provide an input for the Commission for the elaboration of policy in this area. This group should gather together multidisciplinary expertise. Its objective should be to provide information and ideas on the technological and market developments in the audiovisual production sector. It should not represent Member States as such but gather the experience and knowledge in all Member States.

The Commission will examine which action could be taken in the context of its e-Learning initiative to develop image education and the knowledge of European films to Europe's young citizens.

The Commission also intends to launch a study on the identification and evaluation of financial flows within the European cinema industry, based on the analysis of the financial records of a selected number of films marketed between 1996 and 2000. This study will identify and evaluate the key factors determining the economic characteristics of the cinema industry. In particular, it will analyse the different project phases of pre-production, development, production, post-production, promotion, distribution and import and export. A description of the impact that possible relations between specific investors and amount of revenues may have had on the film performances will also be carried out.

8. QUESTIONS TO BE CONSIDERED IN THE 2002 REVIEW ⁽³²⁾ OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

8.1. Definitions

The definition of a European work: Different definitions of a European work exist at international, Community and national levels. The main issues identified were whether there is a need for an agreed definition at European level, what the level of detail of that definition should be, and whether it should be binding for the various uses envisaged. At Member State level a number of different definitions exist for 'European works'. It has been argued that the differences could create barriers to the circulation of European productions. These definitions have been adopted at Member State level both to implement the provisions of the TVWF Directive and for the application of national support schemes for audiovisual works.

There was widespread recognition that the issue of 'definitions' was important for all types of production. Many commentators stressed the need for such definitions to take account of the relevant context, notably support schemes, co productions etc. and highlighted the links with the review of the TVWF Directive in 2002. Some felt that certain political objectives would benefit from a harmonised definition or, as an alternative, from coordination or mutual recognition of Member State definitions; this could simplify the creation of European co productions and the combination of different (national or European) support schemes.

A number of commentators (including broadcasters and national authorities) felt that the differences in definition identified did not create difficulties for transfrontier production. Others (notably, film and television producers) considered that the existence of different definitions, as well as the different national interpretation of these definitions, hampers any attempt to clearly assess the economic development of the European production industry as a whole. Opinions were also divided as to whether a more detailed definition should be provided in Community law, with some asserting that this was not necessary whilst others called for harmonisation.

In respect of the criteria that should be adopted a number of different views were expressed. Views were divided between the merits of the widest possible definition or a stricter approach, and of cultural or economic criteria. Certain criteria such as the control of rights were the subject of disagreement. Other commentators put forward criteria such as the use of a labour based definition, or 'cultural' elements.

The definition of an independent producer: A number of different definitions of an 'independent producer' and 'independent production' exist across Europe. Many Member States use the notion of independent producer to delimit the

beneficiaries of national State aid schemes. The issues of the meaning of 'independence' and the criteria to establish whether a producer is independent were raised.

There was broad agreement that it was necessary to clarify the underlying policy objectives, in particular in the light of new industry structures. Certain commentators noted a potential tension between the objectives of increasing European competitiveness and that of promoting cultural diversity within Europe. The latter goal would appear to be in line with the original aims of the TVWF Directive to stimulate the creation of new sources of TV production, notably by favouring the creation of SMEs, which will compete with the existing established producers. It would imply focusing the protection offered by the current system on SMEs, rather than extending it to larger groups linked to broadcasters. In this respect, it was also noted that the distinction between producers and broadcasters is not as clear as it used to be, as they frequently form part of vertically integrated groups and the relationship is therefore increasingly complex. Any definition should therefore include links with interests in different parts of the audiovisual value chain. There was a certain amount of support for a European definition, which could ensure that Member States used the same interpretation. The general opinion was that the issue should be considered in the review of the TVWF Directive.

The distinction between the notions of independent producer and independent production was highlighted by producers and directors. The important contribution of independent producers was stressed by a large number of commentators, in particular in view of the need to promote cultural diversity. In respect of possible criteria that could be used a number of commentators considered that the starting point should be the relevant recital in the TVWF Directive (Recital 31).

There was disagreement notably between broadcasters and producers as to whether the criteria should include a limitation on the duration of the transfer of rights from producers to broadcasters. Broadcasters considered that any intervention at the European level to introduce a time or other limit on rights ownership by broadcasters would be unjustified and contrary to the objectives of European audiovisual policy, as well as having an adverse effect on competition. Producers considered that the re transfer of traditional rights back to the producer and the fair negotiation of new media rights can only benefit the circulation of audiovisual works, and increase the quantity and quality of European content available to new delivery platforms.

Key criteria put forward included the free choice of facilities, free choice of international distribution, majority participation link, company ownership and shareholdings. Others suggested that any definition should focus on the notion of 'independence' to retain the distinction between broadcasters and producers. A number of broadcasters (public service and commercial) considered that the current definition of 'independence from a broadcaster' should be altered to reflect developments in the sector, notably the increasing concentration and creation of media conglomerates and the presence of other platforms linked back to broadcasters.

⁽³²⁾ Review provided by Article 26 of the directive; see http://europa.eu.int/comm/avpolicy/regul/regul_en.htm

In respect of the use of this definition for the application of Community competition rules it was suggested that consideration should be given to the question of independent production when looking at mergers and joint ventures to ensure that the sector (composed mainly of SMEs) would not be adversely affected. This should include, in particular, control of production, access to distribution channels, and the retention of rights for independents in respect of catalogues.

The Commission considers that the debate launched in this context will provide useful input to the studies that have been launched in preparation of the review of the TVWF Directive in 2002, and intends to take this issue forward in that context. It notes that the review should pay particular attention to the objectives to be achieved, notably in respect of the need to promote cultural diversity and the role played by the definition in that respect as well as to the wide range of possible criteria to be evaluated.

8.2. Questions on media chronology and online rights

This issue concerns the chronology of windows for the economic exploitation of films in Member States of the European Union, which is based on agreements between the relevant economic actors⁽³³⁾. An obligation exists in Community law for Member States to ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the right holders⁽³⁴⁾.

There was widespread agreement from commentators that this was sufficient and that provided that the principle of media chronology was guaranteed at the European level, deadlines for film exploitation should be left to contractual arrangements between the parties involved. Certain commentators felt that to harmonise practices would be counterproductive. Others spoke up in favour of self regulation.

The new issues in terms of defining on line and new media rights created by the distribution of European production on line were highlighted and comments on the implications for different actors in the value chain (bundling of rights etc) were requested. Broadcasters and producers disagreed as to the need to categorise rights, with producers considering that there was a need to categorise and to define the different groups of rights.

In general, producers considered that broadcasters already acquired new media rights at no additional cost, since these rights were not clearly defined in the contract and negotiated separately. Broadcasters agreed that negotiations for rights must recognise the range of platforms over which there is potential for exploitation, and make clear arrangements either to include or exclude those additional rights in any agreement, subject to fair payment (current practice). In addition, they considered

that intervention would curtail commercial freedom for both parties.

The Commission considers that the consultation has confirmed that the current position under Community law remains the best solution, permitting a flexible approach to the use of rights for different media windows. It notes the concerns expressed by producers in terms of bundling of rights and intends to consider this question insofar as it is linked to the definition of an independent producer in the context of the review of the TVWF Directive in 2002.

9. NEXT STEPS

The fundamental principles, which are at the heart of the Community's audiovisual policy, remain fully valid. The Community will develop this policy on the basis of existing regulatory instruments and support mechanisms, but also explore the possibility of using new instruments or initiatives to achieve these objectives. Technological and market developments must be seen in the light of the need to reinforce Europe's cultural and linguistic diversity and preserve our audiovisual heritage. In this respect, the Commission has identified a certain number of initiatives that could be taken to promote the circulation of works and will therefore launch the following actions:

Timetable for action

Subject	Action	Completion date
Ratings	Independent study on the evaluation of rating practices	2002
Other issues	Creation of a cinema experts group	2002
Other issues	Independent study on financial flows within the European cinema industry	2002
Protection of heritage and exploitation of audiovisual works	Stocktaking, before launch of initiative	Mid 2002
Definitions of a European work and an independent producer	Review of the Television Without Frontiers Directive	End of 2002
Tax issues	Review of Sixth VAT Directive	After 2002
e Cinema	Inclusion in MEDIA Plus and sixth framework programme	2002 2006

⁽³³⁾ Supplemented by legislation in Germany, France and Portugal.

⁽³⁴⁾ Article 7 of the amended TVWF Directive.

I

(Information)

COMMISSION

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema communication) of 26 September 2001 (published in OJ C 43 on 16.2.2002)

(2004/C 123/01)

(Text with EEA relevance)

(COM(2004) 171 final)

1. INTRODUCTION

1. The Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works ⁽¹⁾ (hereinafter referred to as 'the Communication') tackled, among others, two issues that are of vital importance for the cinematographic industry: State aid to cinema and protection of heritage.

2. The present Communication is the follow-up to that Communication. In the field of State aid, the Commission intends to provide legal security to the sector, by clearly stating the rules to be applied until 30 June 2007. In relation to film heritage, the Commission proposes adopting a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities.

2. THE GENERAL APPROACH OF THE COMMISSION WITH REGARD TO STATE AIDS TO CINEMA SECTOR

1. The criteria used by the European Commission to assess the compatibility with the EC Treaty of aid schemes for cinema and TV production were clarified in chapter 2 of the Communication. This Communication contains the general approach of the Commission with regard to State aid to the cinema and TV production sector.

2. These criteria are two-fold:

(a) Respect of the general legality criterion;

(b) Specific compatibility criteria for State aid to cinema and TV programme production.

⁽¹⁾ COM(2001)534 final of 26.9.2001, OJ C 43, 16.2.2002

3. The Communication stated that the specific compatibility criteria would remain valid until June 2004. Member States' aid schemes for cinema and TV production are currently authorised by the Commission until the same deadline.
4. The Commission organised a broad consultation exercise on the possible adjustment of the specific compatibility criteria with Member States, accession countries and professionals, within the framework of the Cinema Expert Groups, which met on 9 and 19 January 2004 in Brussels. Member States and professionals unanimously expressed their satisfaction with the criteria set out in the Communication and did not raise any concern regarding their impact on competition.
5. In their view, the cinema sector in Europe is under pressure and therefore aid is needed to support it. They fear that a modification of the existing rules could threaten the stability of the sector and therefore they pleaded to maintain the set of rules as it now stands.
6. The Commission's main concerns are not related to the volume of the aid, which, being aimed at supporting culture is compatible with the Treaty. However, the Commission recalled its worries over certain territoriality requirements, i.e. the 'territorialization' clauses of certain aid schemes. Such territorialization clauses impose on producers an obligation to spend a certain amount of the film budget in a particular Member State as an eligibility condition for receiving the full aid amount. Territorialization clauses may constitute a barrier to the free circulation of workers, goods and services across the EC. They may, therefore, fragment the internal market and hinder its development. However, the Commission considers that these clauses may be justified under certain circumstances and within the limits set in the Communication in order to ensure the continued presence of human skills and technical expertise required for cultural creation. Of course, this Communication is without prejudice to the Commission's obligations under the Treaty to deal with complaints relating to possible breaches of other Treaty rules than the State aid provisions.
7. The Commission has therefore carefully considered the arguments put forward by the national authorities and the professionals of the cinematographic sector. It accepts that the sector of film production is under pressure. It is therefore willing to consider, at the latest at the time of the next review of the Communication, higher aid amounts being made available provided that the aid schemes comply with the conditions of general legality under the Treaty and, in particular, that barriers to the free circulation of workers, goods and services across the EC in this sector are reduced.
8. In advance of the next review of the Communication, the Commission intends, in addition to further analysing the arguments of the sector, to carry out an extensive study on the effects of the existing State aid systems. The study should examine in particular the economic and cultural impact of the territorialization requirements imposed by Member States, in particular taking into account their impact on co-productions.
9. In the light of the above, the Commission extends the validity of the specific compatibility criteria for aid to cinema and TV programme production, as set out in the Communication, until 30 June 2007.

3. PROTECTION OF FILM HERITAGE

1. The Cinema Communication examined the legal deposit of audiovisual works at national or regional level as one of the possible ways of conserving and safeguarding the European audiovisual heritage and launched a stocktaking exercise of the situation regarding the deposit of cinematographic works in the Member States, accession countries and EFTA countries. All Member States already have systems in place for collecting and preserving cinematographic works forming part of their audiovisual heritage. Four-fifths of these systems are based on a legal or contractual obligation to deposit all films, or at least those films that have received public support.

2. Cinematography is an art form contained on a fragile medium, which therefore requires positive action from the public authorities to ensure its preservation. Cinematographic works are an essential component of our cultural heritage and therefore merit full protection. In addition to their cultural value, cinematographic works are a source of historical information about European society. They are a comprehensive witness to history of the richness of Europe's cultural identities and the diversity of its people. Cinematographic images are a crucial element for learning about the past and for civic reflection upon our civilisation. In order to ensure that the European film heritage is passed down to future generations, it has to be systematically collected, catalogued, preserved and restored. In addition, European film heritage should be made accessible for educational, academic, research and cultural purposes, without prejudice to copyright and related rights.

3. There have been a number of EU and international actions aimed at protecting film heritage. At EU level, the following should be mentioned:

— The Council Resolution of 26 June 2000 ⁽²⁾ on the conservation and enhancement of European cinema heritage calls on Member States to cooperate in the restoration and conservation of cinema heritage, including through recourse to digital technologies, to exchange good practice in this sector, to encourage progressive networking of European archival data and to consider the possible use of these collections for educational purposes.

— European Parliament Report on the Commission Communication on cinema of 7 June 2002 ⁽³⁾, in which the European Parliament underlined the importance of safeguarding the cinematographic heritage.

— The Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union ⁽⁴⁾ invited Member States to put in place an efficient system of deposit and preservation of the cinematographic works forming part of their audiovisual heritage in their national archives, film institutes or similar institutions, if such systems do not yet exist.

4. At international level, The European Convention for the protection of the Audiovisual Heritage ⁽⁵⁾ was open for signature on 8 November 2001. It provides that each Party has to introduce the obligation to deposit moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned.

5. The transfer of the possession of cinematographic works to archiving bodies does not imply transferring copyright and related rights to them. Nevertheless, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽⁶⁾ stipulates that Member States may provide for an exception or limitation in respect of specific acts of reproduction made by publicly accessible libraries or by archives which are not for direct or indirect economic or commercial advantage.

6. Finally, the cinematographic industry in Europe has great potential for creating employment and contributing to economic growth. This refers not only to the production and showing of films, but also to the collection, cataloguing, preservation and restoration of cinematographic works. The conditions for the competitiveness of these industrial activities related to film heritage need to be improved, especially as regards better use of technological developments, such as digitisation.

7. In the light of the above, the Commission proposes adopting a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities. Member States, accession countries and professionals have been consulted on the draft proposal, within the framework of the Cinema Expert Groups, which met on 9 and 19 January 2004 in Brussels.

⁽²⁾ OJ C 193, 11.7.2000.

⁽³⁾ PE 312.517, not yet published in the Official Journal.

⁽⁴⁾ Council Press Release 1457/03, OJ C 295/5, 5.12.2003.

⁽⁵⁾ <http://conventions.coe.int>, Council of Europe, ETS No 183.

⁽⁶⁾ OJ L 167, 22.6.2001.

Commission communication concerning the prolongation of the application of the Communication on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (cinema communication) of 26 September 2001

(Text with EEA relevance)

(2007/C 134/03)

Point 2.5 of the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works ⁽¹⁾ states that 'The specific compatibility criteria for aid to cinema and TV programme production, set out above, will remain valid until June 2004, the time limit set in the decisions adopted so far'. In 2004 the Commission extended the validity of the specific compatibility criteria for aid to cinema and TV programme production until 30 June 2007 ⁽²⁾.

The Commission announced that 'In advance of the next review of the Communication, the Commission intends, in addition to further analysing the arguments of the sector, to carry out an extensive study on the effects of the existing State aid systems. The study should examine in particular the economic and cultural impact of the territorialisation requirements imposed by Member States, in particular taking into account their impact on co productions'.

The study was launched on 24 August 2006 ⁽³⁾. The results of the study will be an essential input for taking a decision about the future compatibility criteria.

In order to allow time for completion of the study and the subsequent review of the Communication, the Commission has decided to continue to apply the current criteria until such time as new rules on State aid to cinematographic and other audiovisual works come into effect, or, at the latest, until 31 December 2009.

⁽¹⁾ OJ C 43, 16.2.2002, p. 6.

⁽²⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the follow up of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works of 26 September 2001 OJ C 123, 30.4.2004, p. 1.

⁽³⁾ OJ S 173, 12.9.2006, reference 2006/S 173 183834.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001

(Text with EEA relevance)

(2009/C 31/01)

As announced in its 2004 ⁽¹⁾ and 2007 ⁽²⁾ Communications extending the validity of the State aid assessment criteria of the 2001 Cinema Communication ⁽³⁾, the Commission has carried out an extensive study into the economic and cultural impact of territorial spending obligations imposed in film support schemes. The study was launched on 24 August 2006 ⁽⁴⁾ and a stakeholders' workshop was held in Brussels on 6 July 2007. The results of the study were published on 22 May 2008 ⁽⁵⁾.

The final report of the study was not conclusive about the economic or cultural impact of territorial spending obligations in film support schemes, one way or the other. Therefore, the results underline the need for further reflection before proposing a modification of the existing State aid assessment criterion in the 2001 Cinema Communication concerning territorial spending obligations, compatible with the fundamental principles of the Treaty.

In the Commission's view, the current State aid assessment criteria can continue for the time being to promote cultural creation and will ensure that the aid granted to film and audiovisual production does not affect competition and trading conditions to an extent contrary to the common interest. However, a number of different trends have emerged since the 2001 Cinema Communication which will require some refinement of these criteria in due course.

These trends include support for aspects other than film and TV production (such as film distribution and digital projection), more regional film support schemes, as well as competition among some Member States to use State aid to attract inward investment from large scale, mainly US, film production companies. These are complex issues which will require reflection with the Member States and national and regional film support bodies to develop appropriate criteria.

Consequently, the Commission has decided to continue to apply the current criteria until such time as new rules on State aid to cinematographic and other audiovisual works come into effect, or, at the latest, until 31 December 2012.

⁽¹⁾ OJ C 123, 30.4.2004, p. 1.

⁽²⁾ OJ C 134, 16.6.2007, p. 5.

⁽³⁾ OJ C 43, 16.2.2002, p. 6.

⁽⁴⁾ OJ S 173, 12.9.2006, reference 2006/S 173 183834.

⁽⁵⁾ http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#finalised



PART III.9

SUPPLEMENTARY INFORMATION SHEET ON AID FOR AUDIOVISUAL PRODUCTION

This supplementary information sheet must be used for notifications of aid covered by the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works ⁽¹⁾.

1. The aid scheme

- 1.1. Please describe as accurately as possible the purpose of the aid and its scope, where appropriate, for each measure.
- 1.2. Does the aid directly benefit the creation of a cultural work (for cinema or television)?
- 1.3. Please indicate what provisions exist to guarantee the cultural objective of the aid:

- 1.4. Does the aid have the effect of supporting industrial investment?

2. Conditions for eligibility

Please indicate the conditions for eligibility for the planned aid:

- 2.2. Beneficiaries:
- 2.2.1. Does the scheme distinguish between specific categories of beneficiary (e.g. natural/legal person, dependent/independent producer/broadcaster, etc.)?
- 2.2.2. Does the scheme differentiate on grounds of nationality or place of residence?

- 2.2.3. In the case of establishment in the territory of a Member State, are beneficiaries obliged to fulfil any conditions other than that of being represented by a permanent agency? Note that the conditions of establishment must be defined with respect to the territory of the Member State and not to a subdivision of that State.
- 2.2.4. If the aid has a tax component, must the beneficiary fulfil any obligations or conditions other than that of having taxable revenue in the territory of the Member State?

3. Territorial coverage

- 3.1. Please indicate if there is provision for any form of obligation to spend in the territory of the Member State or in one of its subdivisions.
- 3.2. Is it necessary to comply with a minimum degree of territorial coverage in order to be eligible for the aid?
- 3.3. Is the required territorial coverage calculated with regard to the overall budget of the film or to the amount of aid?
- 3.4. Does the condition of territorial coverage apply to certain specific items of the production budget?
- 3.5. Is the absolute amount of aid adjustable in proportion to the expenditure carried out in the territory of the Member State?
- 3.6. Is the aid intensity directly proportional to the effective degree of territorial coverage?
- 3.7. Is the aid adjustable in proportion to the degree of territorial coverage required?

⁽¹⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43, 16.2.2002, p. 6.

▼ B

4. **Eligible costs**
- 4.1. Please specify the costs which may be taken into account to determine the amount of aid.
- 4.2. Do the eligible costs all relate directly to the creation of a cinematographic or audiovisual work?
5. **Aid intensity**
- 5.1. Please indicate whether the scheme provides for use of the concept of difficult, low-budget film in order to obtain an aid intensity of over 50% of the production budget.
- 5.2. If so, please indicate the categories of film covered by this concept.
- 5.3. Please indicate whether the aid can be combined with other aid schemes ('cumulation of aid') or other provisions for aid and, if so, what arrangements are made to limit such cumulation or to ensure that, in the case of cumulation, the maximum aid intensity for the work is not exceeded.
6. **Compatibility**
- 6.1. Please provide a reasoned justification in support of compatibility of the aid in the light of the principles set out in the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works.
7. **Other Information**
- Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the Communication on certain legal aspects relating to cinematographic and other audiovisual works.

PART III.10

SUPPLEMENTARY INFORMATION SHEET ON ENVIRONMENTAL PROTECTION AID

This supplementary information sheet must be used for the notification of any aid covered by the Community Guidelines on State aid for environmental protection ⁽¹⁾.

1. **Objective of the aid**
- 1.1. Which are the objectives aimed at in terms of environmental protection? Please submit a detailed description for each part of the scheme

- If the measure in question has already been applied in the past, what have been the results in terms of environmental protection?
- 1.2. If the measure is a new one, what environmental results are anticipated, and over what period?

⁽¹⁾ Community Guidelines on State aid for environmental protection, JOC 37, 3.2.2001, p. 3.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission on the application of State aid rules to public service broadcasting**(Text with EEA relevance)**

(2009/C 257/01)

1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

Articles 86 and 87 of the EC Treaty in relation to public funding of public service broadcasters.

1. Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.
2. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Member States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent. This was confirmed in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty (hereinafter referred to as the Amsterdam Protocol).
3. At the same time, the increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission's attention by private operators. The complaints allege infringements of
4. The 2001 Communication from the Commission on the application of State aid rules to public service broadcasting ⁽¹⁾ has first set out the framework governing State funding of public service broadcasting. The 2001 Communication has served as a good basis for the Commission to develop significant decision-making practice in the field. Since 2001, more than 20 decisions have been adopted concerning the financing of public service broadcasters.
5. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and Internet companies, entering the market. Technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services. The provision of audiovisual services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services.

⁽¹⁾ OJ C 320, 15.11.2001, p. 5.

Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 *Altmark* judgment⁽²⁾, the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new decision⁽³⁾ and framework⁽⁴⁾ on State aid in the form of public service compensation. In 2007, the Commission adopted a Communication accompanying the Communication on 'A single market for 21st century Europe' — Services of general interest, including social services of general interest: a new European Commitment⁽⁵⁾. Furthermore, in December 2007, the Audiovisual Media Services Directive⁽⁶⁾ entered into force, extending the scope of the EU audiovisual regulation to emerging media services.

7. These changes in the market and in the legal environment have called for an update to the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan⁽⁷⁾ announced that the Commission would 'revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities'.

8. In the course of 2008 and 2009, the Commission held several public consultations on the review of the 2001 Broadcasting Communication. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual

services in the broadcasting sector⁽⁸⁾, taking into account recent market and legal developments. The present Communication is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

2. THE ROLE OF PUBLIC SERVICE BROADCASTING

9. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

10. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union⁽⁹⁾ and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts⁽¹⁰⁾.

11. The role of the public service⁽¹¹⁾ in general is recognised by the Treaty, in particular Articles 16 and 86(2). The interpretation of these provisions in the light of the particular nature of the broadcasting sector is outlined in the Amsterdam Protocol, which, after considering 'that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism', states that 'the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit

⁽²⁾ Judgment in Case C-280/2000 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* (2003) ECR I-7747.

⁽³⁾ Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽⁴⁾ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

⁽⁵⁾ COM(2007) 725 final.

⁽⁶⁾ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27).

⁽⁷⁾ COM(2005) 107 final.

⁽⁸⁾ For the purpose of the present communication, the notion 'audiovisual service(s)' refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of 'audiovisual service(s)' must be distinguished from the narrower concept of 'audiovisual media service(s)', as defined in Article 1(a) of the Audiovisual Media Services Directive.

⁽⁹⁾ OJ C 364, 18.12.2000, p. 1.

⁽¹⁰⁾ Judgment in Case C-260/89 *ERT*, (1991) ECR I-2925.

⁽¹¹⁾ For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term 'public service' as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term 'service of general economic interest' used in Article 86(2).

as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account’.

12. The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution ‘broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting’. Moreover, public service broadcasting needs to ‘benefit from technological progress’, bring ‘the public the benefits of the new audiovisual and information services and the new technologies’ and to undertake ‘the development and diversification of activities in the digital age’. Finally, ‘public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences’ (12).
13. The role of public service broadcasting in promoting cultural diversity was also recognised by the 2005 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was approved by the Council on behalf of the Community and thus forms part of EC law (13). The Convention states that each party may adopt ‘measures aimed at protecting and promoting the diversity of cultural expressions within its territory’. Such measures may include, among others, ‘measures aimed at enhancing diversity of the media, including through public service broadcasting’ (14).
14. These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the recommendations of the Council of Europe concerning media pluralism and diversity of media content (15), and the remit of public service media in the information society (16). The latter recommendation calls upon the members of the Council of Europe to ‘guarantee public service media (...) in a transparent and accountable manner’ and to ‘enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions’.
15. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that ‘regulations governing State aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency’ (17).
16. At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the Internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Audiovisual Media Services Directive (18), ‘the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.’ Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.
- (12) Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 (OJ C 30, 5.2.1999, p. 1).
- (13) Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council Decision 2006/515/EC of 18 May 2006. In accordance with Annex 2 to of the Council Decision, ‘the Community is bound by the Convention and will ensure its implementation.’
- (14) Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 6(1) and (2)(h).
- (15) Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.
- (16) Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.
- (17) European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).
- (18) Cf. footnote 6 above.

3. THE LEGAL CONTEXT

17. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 concerning culture and Article 87(3)(d) on aid to promote culture. The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.
18. The regulatory framework concerning 'audiovisual media services' is coordinated at European level by the Audiovisual Media Services Directive. The financial transparency requirements concerning public undertakings are regulated by the Transparency Directive⁽¹⁹⁾.
19. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules. In particular, in 2005, the Commission adopted the Services of General Economic Interest Framework⁽²⁰⁾ and Decision⁽²¹⁾ clarifying the requirements of Article 86(2) of the EC Treaty. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(a) of the Decision are met⁽²²⁾.

4. APPLICABILITY OF ARTICLE 87(1)

4.1. The State aid character of State financing of public service broadcasters

20. In line with Article 87(1), the concept of State aid includes the following conditions: (a) there must be an intervention by the State or by means of State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage of the beneficiary; (d) it must distort or threaten to distort competition⁽²³⁾. The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Community Courts.

⁽¹⁹⁾ Commission Directive 2006/111/EC of 16 November 2006.

⁽²⁰⁾ Cf. footnote 4 above.

⁽²¹⁾ Cf. footnote 3 above.

⁽²²⁾ According to Article 2(1)(a) of the Decision, it applies to State aid in the form of 'public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million'.

⁽²³⁾ Judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 'TV2' at 156.

21. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources⁽²⁴⁾.
22. State financing of public service broadcasters can also be generally considered to affect trade between Member States. As the Court of Justice has observed, 'when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid'⁽²⁵⁾. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.
23. Regarding the existence of an advantage, the Court of justice clarified in the *Altmark* case⁽²⁶⁾ that public service compensation does not constitute State aid provided that four cumulative conditions are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well

⁽²⁴⁾ Regarding the qualification of licence fee funding as State resources, see judgment in joined Cases T-09/04, T-317/04, T-329/04 and T-336/04 'TV2' at 158-159.

⁽²⁵⁾ Cases C-730/79, *Philip Morris Holland v Commission* (1980) ECR 2671, paragraph 11; C-303/88, *Italy v Commission* (1991) ECR I-1433, paragraph 27; C-156/98, *Germany v Commission* (2000) ECR I-6857, paragraph 33.

⁽²⁶⁾ Case C-280/2000, cf. footnote 2 above.

run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

24. To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

4.2. Nature of the aid: existing aid as opposed to new aid

25. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as 'existing aid' within the meaning of Article 88(1). In line with this provision, '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 common market'.

26. Pursuant to Article 1(b)(i) of the Procedural Regulation⁽²⁷⁾, existing aid includes '... 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'.

27. In the cases of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the 10 Member States which acceded in 2004 (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) and Bulgaria and Romania which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called 'interim procedure' are considered as existing aid.

28. Pursuant to Article 1(b)(v) of the Procedural Regulation, existing aid also includes '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'.

⁽²⁷⁾ 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).

29. In accordance with the case law of the Court⁽²⁸⁾, the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission believes that a case by case approach is the most appropriate⁽²⁹⁾, taking into account all the elements related to the broadcasting system of a given Member State.

30. According to the case law in Gibraltar⁽³⁰⁾, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, 'it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.'

31. In light of the above considerations, in its decision-making practice the Commission has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.

5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87(3)

32. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.

⁽²⁸⁾ Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* (1994) ECR I-3829.

⁽²⁹⁾ See, for example, the decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/2005, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); E 8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public broadcasters (OJ L 49, 22.2.2008, p. 1); C 60/99 Commission Decision of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ L 361, 8.12.2004, p. 21); C 62/99 Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1); NN 88/98, Financing of a 24-hour advertising-free news channel with licence fee by the BBC (OJ C 78, 18.3.2000, p. 6) and NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).

⁽³⁰⁾ Joined Cases T-195/01 and T-207/01, (2002) ECR II-2309.

33. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.
34. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable⁽³¹⁾. Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se⁽³²⁾. Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d)⁽³³⁾.
35. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.
- 6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)**
36. In accordance with Article 86(2), 'undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'
37. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:
- (i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition)⁽³⁴⁾;
 - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment)⁽³⁵⁾;
 - (iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test)⁽³⁶⁾.
38. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the 'public service remit as conferred, defined and organised by each Member State' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting 'insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account' (proportionality).
39. It is for the Commission, as guardian of the Treaty, to assess, on the basis of evidence provided by the Member States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors (see Section 6.1). The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see Section 6.2).

⁽³¹⁾ For example, Commission Decisions NN 88/98 BBC 24-hours (OJ C 78, 18.3.2000), NN 70/98 'Kinderkanal and Phoenix' (OJ C 238, 21.8.1999).

⁽³²⁾ For example, Commission Decision N 458/2004 State aid to Espacio Editorial Andaluza Holding sl., OJ C 131, 29.5.2005.

⁽³³⁾ NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).

⁽³⁴⁾ Judgment in the Case 172/80 Zuechner; (1981) 2021.

⁽³⁵⁾ Judgment in the Case C-242/95 GT-Link; (1997) 4449.

⁽³⁶⁾ Judgment in the Case C-159/94 EDF and GDF; (1997) I-5815.

40. In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see Section 6.3 and following).
41. The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Commission is aware of the differences in the national broadcasting systems and in the other characteristics of the Member States' media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 86(2) is made on a case-by-case basis, according to Commission practice⁽³⁷⁾, in line with the basic principles set out in the following sections.
42. The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher⁽³⁸⁾ while equally considering potential concerns of other media in these Member States.

6.1. Definition of public service remit

43. In order to meet the condition mentioned in point 37(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.
44. Definition of the public service mandate falls within the competence of the Member States, which can decide at

national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the Community concept of 'services of general economic interest'.

45. The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.
46. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.
47. At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2)⁽³⁹⁾. Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the Court of First Instance, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster⁽⁴⁰⁾. The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms.

⁽³⁷⁾ See, for example, the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 3/05, Aid to the German public service broadcasters (OJ C 185, 8.8.2007, p. 1); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/05, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); State aid E8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public service broadcasters (OJ L 49, 22.2.2008, p. 1).

⁽³⁸⁾ Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.

⁽³⁹⁾ Judgment in the Case T-442/03, SIC v Commission, (2008), paragraph 201, Judgement in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Denmark v Commission (2008) at 122 to 124.

⁽⁴⁰⁾ These qualitative criteria are according to the Court of First Instance 'the justification for the existence of broadcasting SGEIs in the national audiovisual sector'. There is 'no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator', T-442/03, SIC v Commission, paragraph 211.

48. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Amsterdam Protocol — the ‘democratic, social and cultural needs of each society’. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games⁽⁴¹⁾, sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

49. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit⁽⁴²⁾.

6.2. Entrustment and supervision

50. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).

51. The entrustment act(s) shall specify the precise nature of the public service obligations in line with Section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

52. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment Act(s) should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to

new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in Part 6.7 below, before the original entrustment Act is formally consolidated.

53. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community’s audiovisual policy in the digital era⁽⁴³⁾, it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit⁽⁴⁴⁾.

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.

55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

6.3. Choice of funding of public service broadcasting

56. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

⁽⁴¹⁾ Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgment of the Court in Case C-195/06 *KommAustria v ORF* of 18 October 2007.

⁽⁴²⁾ See judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2* (2008) at 107-108.

⁽⁴³⁾ COM(1999) 657 final, Section 3(6).

⁽⁴⁴⁾ See judgment in the Case T-442/03 *SIC/Commission* (2008) at 212.

57. Funding schemes can be divided into two broad categories 'single-funding' and 'dual-funding'. The 'single-funding' category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. 'Dual-funding' systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.
58. As stated in the Amsterdam Protocol: 'The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...)'. The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.
59. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the State funding does not affect competition in the common market in a disproportionate manner, as referred to in paragraph 38 above.
- 6.4. Transparency requirements for the State aid assessment**
60. The State aid assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.
61. Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Amsterdam Protocol.
62. Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i.e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established ⁽⁴⁵⁾.
63. These general transparency requirements apply also to broadcasters, insofar as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.
64. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.
65. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.
66. Costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.

⁽⁴⁵⁾ Article 4 of Directive 2006/111/EC.

67. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities ⁽⁴⁶⁾. In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

68. The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.

69. The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

6.5. Net cost principle and overcompensation

70. As a matter of principle, since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid

that must be repaid to the State subject to the clarifications provided in the present chapter with regard to public service broadcasting.

71. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

72. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission ⁽⁴⁷⁾. However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

73. Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as public service reserves) to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

⁽⁴⁶⁾ This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

⁽⁴⁷⁾ Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.

74. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10 % of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission⁽⁴⁸⁾. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.

75. In order to allow the Commission to exercise its duties, Member States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.

76. The overcompensation mentioned above shall be used for the purpose of financing public service activities, only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

6.6. Financial control mechanisms

77. Member States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of 'public service reserves'. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

78. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Member States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous Chapter 6.5 and cross-subsidisation.

⁽⁴⁸⁾ Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.

79. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the Member States, or in the absence thereof, a time period which normally should not exceed four years. Any 'public service reserves' existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of 'public service reserves' exceeding 10 % of the annual public service costs on a recurring basis, Member States shall review whether the level of funding is adjusted to the public service broadcasters' actual financial needs.

6.7. Diversification of public broadcasting services

80. In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.

81. In this respect, the Commission considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

82. In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).

83. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services — while having an impact on access by viewers⁽⁴⁹⁾ — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities⁽⁵⁰⁾. The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public service broadcasters with such a service as part of their public service remit.
84. As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Amsterdam Protocol are met. To this end, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.
85. It is up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall
- qualify as 'significant new service'. The 'new' nature of an activity may depend among others on its content as well as on the modalities of consumption⁽⁵¹⁾. The 'significance' of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.
86. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.
87. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.
88. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in
- ⁽⁴⁹⁾ As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, '(...) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...) When developing new funding systems, Member States should pay due attention to the nature of the content provided in the interest of the public and in the common interest.'
- ⁽⁵⁰⁾ For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.
- ⁽⁵¹⁾ For example, the Commission considers that some forms of linear transmission, such as the simultaneous transmission of the evening TV news on other platforms (e.g. Internet, mobile devices), may be qualified as not being 'new' for the purposes of this Communication. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by Member States, taking into account the specificities and the features of the services in question.

terms of serving the social, democratic and cultural needs of society ⁽⁵²⁾, taking also into account the existing overall public service offer.

89. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.

90. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.

91. The Commission considers that the above assessment at the national level will contribute to ensuring compliance with the EC State aid rules. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.8. Proportionality and market behaviour

92. In accordance with the Amsterdam Protocol, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Commission invites Member States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

93. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.

94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event 'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest' and thus infringe the Amsterdam Protocol.

95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights ⁽⁵³⁾, shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

96. The Commission considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

⁽⁵²⁾ See also at footnote 40 on the justification of a broadcasting SGEL.

⁽⁵³⁾ For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.

7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the *Official Journal of the European Union*. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting.
99. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.
100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁵⁴⁾, the Commission will apply, in the case of non-notified aid,
- (a) this Communication, if the aid was granted after its publication;
 - (b) the 2001 Communication in all other cases.
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⁽⁵⁴⁾ OJ C 119, 22.5.2002, p. 22.

COMMISSION COMMUNICATION

relating to the methodology for analysing State aid linked to stranded costs

1. INTRODUCTION

European Parliament and Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity¹ laid down the principles for opening up the European electricity industry to competition. The Commission attaches utmost importance to deepening the common market in electricity, this being a significant step towards completing the internal market in energy.

The gradual transition from a situation of largely restricted competition to one of genuine competition at European level must take place under acceptable economic conditions that take account of the specific characteristics of the electricity industry. This concern is already reflected to a very large extent in the text of the Directive itself.

In order to enable them to cope with a number of very specific situations, Article 24 allows Member States to defer application of some of the provisions of the Directive for a transitional period. A number of Member States also wish to introduce State aid mechanisms designed to allow their electricity undertakings to adapt to the introduction of competition under favourable conditions; such aid mechanisms do not fall within the scope of the derogations provided for in Article 24.

The purpose of this Notice is to clarify how the Commission intends, in the light of Directive 96/92/EC, to apply the rules of the Treaty to State aid of this kind.

This Notice does not prejudice the rules on State aid that result from the ECSC Treaty, the Euratom Treaty and the relevant Commission frameworks, guidelines or notices. In particular, the Commission will continue to authorise regional aid and environmental aid in accordance with the respective guidelines. Similarly, aid that could not be authorised under Article 87 of the EC Treaty will, where appropriate, be open to examination in the light of Article 86(2).

2. TRANSITIONAL MEASURES AND STATE AID

With the exception of Belgium, Greece and Ireland, the Member States were required to transpose Directive 96/92/EC into national law by 19 February 1999 at the latest. Belgium and Ireland were required to do so by 19 February 2000 at the latest and Greece by 19 February 2001 at the latest.

¹ OJ L 27, 30.1.1997, p. 20.

Article 24 of the Directive stipulates, however, that transitional measures derogating temporarily from the Directive may be authorised by the Commission:

- “1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities.*
- 2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapters IV, VI and VII of this Directive. Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.”*

Most Member States wished to avail themselves of Article 24 and have, therefore, notified the Commission of transitional measures. It transpires that in several Member States the measures notified do not fall within the scope of Article 24².

Given the present state of play, the Commission considers that decisions taken by it pursuant to Article 24 can create a transitional regime only where it has previously found that the measures notified by the Member States pursuant to that Article are incompatible with the Directive's provisions set out in Chapters IV, V, VI and VII. Under Article 24, the Commission alone may authorise derogations from those provisions.

Accordingly, a system of levies introduced by a Member State via a fund to offset the costs of commitments or guarantees that might not be honoured on account of the application of Directive 96/92/EC does not constitute a measure that could benefit from a Commission decision granting a transitional regime under Article 24 of that Directive; such a measure does not require a derogation from the relevant chapters of the Directive. It may, on the other hand, constitute State aid, which is covered by Articles 87 and 88 of the Treaty, without prejudice to the ECSC and Euratom Treaties.

The purpose of this Notice is to show how the Commission intends to apply the Treaty rules on State aid in the case of aid measures designed to compensate for the cost of commitments or guarantees that it might no longer be possible to honour on account of Directive 96/92/EC. In particular, the Notice does not apply to measures that could not be classified as State aid within the meaning of

² See in particular Commission Decisions 1999/791/EC, 1999/792/EC, 1999/795/EC, 1999/796/EC, 1999/797/EC, and 1999/798/EC, concerning respectively the United Kingdom, France, Austria, the Netherlands, Spain and Denmark, pursuant to Article 24 of Directive 96/92/EC (OJ L 319, 11.12.1999).

Article 87(1) of the EC Treaty pursuant to the ruling of the Court of Justice of 13 March 2001 in Case C-379/98, *PreussenElektra AG v Schleswag AG*³.

3. DEFINITION OF ELIGIBLE STRANDED COSTS

Such commitments or guarantees of operation are normally referred to as “stranded costs”. They may, in practice, take a variety of forms: long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, investments undertaken outside the scope of normal activity, etc. In order to rank as eligible stranded costs that could be recognised by the Commission, such commitments or guarantees must satisfy the following criteria:

- 3.1 *The “commitments or guarantees of operation” that could give rise to stranded costs must predate 19 February 1997, the date of entry into force of Directive 96/92/EC.*
- 3.2 *The existence and validity of such commitments or guarantees will be substantiated in the light of the underlying legal and contractual provisions and of the legislative context in which they were made.*
- 3.3 *Such commitments or guarantees of operation must run the risk of not being honoured on account of the provisions of Directive 96/92/EC. In order to qualify as stranded costs, commitments or guarantees must consequently become non-economical on account of the effects of the Directive and must significantly affect the competitiveness of the undertaking concerned. Among other things, this must result in that undertaking’s making accounting entries (e.g. provisions) designed to reflect the foreseeable impact of the commitment or guarantee.*

Especially where, as a result of the commitments or guarantees in question, the viability of the undertakings might be jeopardised in the absence of aid or any transitional measures, the commitments or guarantees are deemed to meet the requirements laid down in the preceding paragraph.

The effect of such commitments or guarantees on the competitiveness or viability of the undertakings concerned will be assessed at the consolidated level. For commitments or guarantees to constitute stranded costs, it must be possible to establish a cause-and-effect relationship between the entry into force of Directive 96/92/EC and the difficulty that the undertakings concerned have in honouring or securing compliance with such commitments or guarantees. In order to establish such cause-and-effect relationship, the Commission will take into account any fall in electricity prices or market share losses suffered by the undertakings concerned. Commitments or guarantees that could not have been honoured irrespective of the entry into force of the Directive do not constitute stranded costs.

- 3.4 *Such commitments or guarantees must be irrevocable. Should an undertaking have the possibility of revoking against payment, or modifying, such commitments or guarantees, account will have to be taken of this fact in calculating the eligible stranded costs.*

³ [2001] ECR I-

- 3.5 *Commitments or guarantees linking enterprises belonging to one and the same group cannot, as a rule, qualify as stranded costs.*
- 3.6 *Stranded costs are economic costs that must correspond to the actual sums invested, paid or payable by virtue of the commitments or guarantees from which they result: flat-rate calculations cannot, therefore, be accepted unless it can be shown that they reflect economic realities.*
- 3.7 *Stranded costs must be net of the income, profits or added value associated with the commitments or guarantees from which they arise.*
- 3.8 *Stranded costs must be valued net of any aid paid or payable in respect of the assets to which they relate. In particular, where a commitment or a guarantee of operation corresponds to an investment which is the subject of State aid, the value of the aid must be deducted from any stranded costs resulting from the commitment or guarantee.*
- 3.9 *Wherever stranded costs arise from commitments or guarantees that are difficult to honour on account of Directive 96/92/EC, calculation of the eligible stranded costs will take account of the actual change over time in the economic and competitive conditions prevailing on the national and Community electricity markets. In particular, where commitments or guarantees could constitute stranded costs because of the foreseeable fall in electricity prices, calculation of the stranded costs must take account of actual movements in electricity prices.*
- 3.10 *Costs depreciated before the transposition of Directive 96/92/EC into national law cannot give rise to stranded costs. However, provisions or depreciation of assets entered in the balance sheet of the undertakings concerned with the explicit aim of taking account of the foreseeable effects of the Directive may correspond to stranded costs.*
- 3.11 *Eligible stranded costs may not exceed the minimum level necessary to allow the undertakings concerned to continue to honour or secure compliance with the commitments or guarantees called into question by Directive 96/92/EC⁴. Consequently, they will have to be calculated by taking into account the most economic solution (in the absence of any aid) from the point of view of the undertakings concerned. This may involve, among other things, the termination of commitments or guarantees giving rise to stranded costs or the disposal of all or some of the assets giving rise to stranded costs (where this does not run counter to the very principles of the commitments or guarantees themselves).*

⁴ In the case of a long-term contract of sale or purchase, the stranded costs will, therefore, be calculated by comparison with the conditions on which, in a liberalised market, the undertaking would normally have been able to sell or purchase the product under consideration, all things being equal.

3.12 *Costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive (18 February 2006) cannot, as a rule, constitute eligible stranded costs within the meaning of this methodology⁵. However, if it appears necessary, the Commission may in due course take into account such commitments or guarantees and, if appropriate, consider them as eligible stranded costs during the next stage of opening up the Community electricity market.*

For Member States which open up their market more quickly than is required by the Directive, the Commission may agree to regard as eligible stranded costs under this methodology costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive if such costs result from commitments or guarantees which meet the criteria under points 3.1. to 3.12. and provided that they are limited to a period not extending beyond 31 December 2010.

4. STRANDED COSTS AND STATE AID

The general principle laid down in Article 87(1) of the EC Treaty is that State aid is prohibited. However, paragraphs 2 and 3 of that Article provide for a number of derogations from this general rule. Furthermore, in accordance with Article 86(2), “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-enhancing monopoly” are subject to the rules contained in the Treaty, in particular the rules on competition, in so far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In any event, trade must not be affected to an extent contrary to the interests of the Community.

The State aid corresponding to the eligible stranded costs defined in this Notice is designed to facilitate the transition for electricity undertakings to a competitive electricity market. The Commission may take a favourable view of such aid to the extent that the distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a Community objective which market forces could not achieve. Indeed, the distortion of competition that results from aid paid to facilitate the transition for electricity undertakings from a largely closed market to one that has been partially liberalised cannot be contrary to the common interest where it is limited in time and in its effects, since liberalisation of the electricity market is in the general interest of the common market in accordance with Articles 2 and 3(1)(t) of the EC Treaty and supplements moves to establish the internal market. The Commission also takes the view that aid granted for stranded costs enables electricity undertakings to reduce the risks relating to their historic commitments or investments and may thus encourage them to maintain their investments in the long term. Finally, if there were no compensation for stranded costs, there would be a greater risk that the undertakings concerned

⁵ It must be understood that investments which cannot be recouped or are not economically viable as a result of the liberalisation of the internal market in electricity may constitute stranded costs within the meaning of this methodology, including in cases where they are, in principle, to extend beyond 2006. Furthermore, commitments or guarantees which must absolutely continue to be honoured after 18 February 2006 because failure to do so might give rise to major risks concerning protection of the environment, public safety, social protection of workers or the security of the electricity network may, if duly justified, constitute eligible stranded costs according to this methodology.

might pass on the entire cost of their non-economical commitments or guarantees to their captive customers.

Aid to compensate for stranded costs in the electricity industry can be further justified in relation to other liberalised sectors by the fact that liberalisation of the electricity market has not been accompanied by either faster technological progress or increased demand and by the fact that it is hardly conceivable, in the interests of environmental protection, security of supply and the smooth operation of the Community's economy, to wait until electricity undertakings encounter difficulties before considering whether to grant them state support.

In this context, the Commission takes the view that aid designed to offset stranded costs normally qualifies for the derogation under Article 87(3)(c) if it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

Without prejudice to the specific provisions resulting from the ECSC and Euratom Treaties and from the Commission notices on State aid, including the Guidelines on State aid for environmental protection⁶, the Commission may, in principle, accept as being compatible with Article 87(3)(c) of the EC Treaty aid designed to offset eligible stranded costs which satisfied the following criteria:

- 4.1 *The aid must serve to offset eligible stranded costs that have been clearly determined and isolated. It may under no circumstances exceed the amount of the eligible stranded costs.*
- 4.2 *The arrangements for paying the aid must allow account to be taken of future developments in competition. Such developments may be gauged in particular by way of quantifiable factors (prices, market shares, other relevant factors indicated by the Member State). Since changes in the conditions of competition have a direct effect on the amount of eligible stranded costs, the amount of the aid paid will necessarily be conditional on the development of genuine competition, and the calculation of aid paid over time will have to take account of changes in the relevant factors in order to gauge the degree of competition achieved.*
- 4.3 *The Member State must undertake to send to the Commission an annual report that, in particular, describes developments in the competitive situation on its electricity market by indicating among other things the changes observed in the relevant quantifiable factors. The annual report will give details of how the stranded costs taken into account for the relevant year have been calculated and will specify the amounts of aid paid.*

⁶ OJ C 72, 10.3.1994, p. 3.

4.4 *The degressive nature of aid intended to offset stranded costs will be viewed favourably by the Commission when making its assessment; it will, in fact, help the undertaking concerned to speed up its preparations for a liberalised electricity market⁷.*

4.5 *The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance. It must take account of productivity gains that may be achieved by the undertaking.*

Similarly, the detailed arrangements for calculating and financing aid designed to offset stranded costs and the maximum period for which such aid can be granted must be clearly spelt out in advance. Notification of the aid will specify in particular how calculation of the stranded costs will take account of changes in the various factors mentioned in point 4.2.

4.6 *In order to avoid any cumulation of aid, the Member State will undertake in advance not to pay any rescue or restructuring aid to undertakings that are to benefit from aid in respect of stranded costs. The Commission takes the view that the payment of compensation for stranded costs linked to investments in assets that offer no prospects of long-term viability does not facilitate the transition of the electricity industry to a liberalised market and cannot therefore qualify for the derogation under Article 87(3)(c) of the EC Treaty.*

However, the Commission entertains the most serious misgivings regarding aid intended to offset stranded costs which do not satisfy the above criteria or which are likely to give rise to distortions of competition contrary to the common interest for the following reasons:

4.7 *The aid is not linked to eligible stranded costs that meet the above definition or to clearly defined and individualised stranded costs or exceeds the amount of eligible stranded costs.*

4.8 *The aid is intended to safeguard all or some of the income pre-dating the entry into force of Directive 96/92/EC, without taking strictly into account the eligible stranded costs that might result from the introduction of competition.*

4.9 *The amount of aid is not likely to be adjusted to take due account of the differences between the economic and market assumptions initially made when estimating stranded costs and real changes in them over time.*

5. METHOD OF FINANCING AID INTENDED TO OFFSET STRANDED COSTS

Member States are free to choose the methods of financing aid intended to offset stranded costs which they consider to be the most appropriate. However, in order to authorise such aid, the Commission will make sure that the financing arrangements do not give rise to effects that conflict with the objectives of Directive 96/92/EC or with the Community interest. The Community interest takes into account, among other things, consumer protection, free movement of goods and services, and competition.

Consequently, the financing arrangements must not have the effect of deterring outside undertakings or new players from entering certain national or regional

markets. In particular, aid intended to offset stranded costs cannot be financed out of levies on electricity in transit between Member States or from levies linked to the distance between the producer and the consumer⁸.

The Commission will also ensure that the arrangements for financing aid intended to offset stranded costs result in fair treatment for eligible and non-eligible consumers. To this end, the annual report referred to in point 4.3 will give the breakdown by eligible and non-eligible consumers of the sources of finance intended to offset the stranded costs. Where non-eligible consumers participate in the financing of stranded costs directly through the tariff for the purchase of electricity, this must be clearly stated. The contribution imposed on either group (eligible or non-eligible) must not exceed the proportion of stranded costs to be offset that corresponds to the market share accounted for by those consumers.

Where funds are raised by private undertakings with a view to financing aid mechanisms designed to offset stranded costs, the management of those funds will have to be clearly separate from that of the normal resources of those undertakings. Such investments must not benefit the undertakings managing them.

6. OTHER ASSESSMENT FACTORS

In examining State aid intended to offset stranded costs, the Commission takes particular account of the size and level of interconnection of the network concerned and of the structure of the electricity industry. Aid for a small network with a low degree of interconnection with the rest of the Community will be less likely to give rise to substantial distortions of competition.

This methodology for stranded costs is without prejudice to the application, in the regions covered by Article 87(3)(a), of the guidelines on national regional aid.⁹ Pursuant to Article 86(2) of the EC Treaty, where application of the rules on State aid to stranded costs obstructs the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, those rules may be derogated from provided that trade is not affected to an extent contrary to the interests of the Community.

The rules laid down in this methodology for State aid intended to offset stranded costs arising from Directive 96/92/EC apply independently of the public or private ownership of the undertakings concerned.

⁹ OJ C 74, 10.3.1998, p. 9.

Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services

(98/C 39/02)

(Text with EEA relevance)

PREFACE

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services⁽¹⁾ and of a communication to the European Parliament and the Council, setting out the results of the consultations on the Green Paper and the measures advocated by the Commission⁽²⁾, a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community. By Resolution of 7 February 1994 on the development of Community postal services⁽³⁾, the Council invited the Commission to propose measures defining a harmonised universal service and the postal services which could be reserved. In July 1995, the Commission proposed a package of measures concerning postal services which consisted of a proposal for a Directive of the European Parliament and the Council on common rules for the development of Community postal services and the improvement of quality of service⁽⁴⁾ and a draft of the present Notice on the application of the competition rules⁽⁵⁾.

This notice, which complements the harmonisation measures proposed by the Commission, builds on the results of those discussions in accordance with the principles established in the Resolution of 7 February 1994. It takes account of the comments received during the public consultation on the draft of this notice published in December 1995, of the European Parliament's resolution⁽⁶⁾ on this draft adopted on 12 December 1996, as well as of the discussions on the proposed Directive in the European Parliament and in Council.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of new employment in the sector. As recognized by the Court of

Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the post sector⁽⁷⁾. The Court stated that 'in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition' and that those rules 'must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.' Questions are therefore frequently put to the Commission on the attitude it intends to take, for purposes of the implementation of the competition rules contained in the Treaty, with regard to the behaviour of postal operators and with regard to State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

This notice sets out the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Furthermore, this Notice sets out the approach the Commission intends to take when applying the competition rules to the behaviour of postal operators and when assessing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules and other rules of the Treaty. In addition, it addresses the issue of non-discriminatory access to the postal network and the safeguards required to ensure fair competition in the sector.

⁽¹⁾ COM(91) 476 final.

⁽²⁾ 'Guidelines for the development of Community postal services' (COM(93) 247 of 2 June 1993).

⁽³⁾ OJ C 48, 16.2.1994, p. 3.

⁽⁴⁾ OJ C 322, 2.12.1995, p. 22.

⁽⁵⁾ OJ C 322, 2.12.1995, p. 3.

⁽⁶⁾ OJ C 20, 20.1.1997, p. 159.

⁽⁷⁾ In particular in Joined Cases C-48/90 and C-66/90, *Netherlands and Koninklijke PTT Nederland and PTT Post BV v. Commission* [1992] ECR I-565 and Case C-320/91 *Procureur du Roi v. Paul Corbeau* [1993] ECR I-2533.

Especially on account of the development of new postal services by private and public operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organisations to what is considered necessary for the realisation of the public-interest objective. At the same time, the Commission is faced with a growing number of complaints and cases under competition law on which it must take position. At this stage, a notice is therefore the appropriate instrument to provide guidance to Member States and postal operators, including those enjoying special or exclusive rights, to ensure correct implementation of the competition rules. This Notice, although it cannot be exhaustive, aims to provide the necessary guidance for the correct interpretation, in particular, of Articles 59, 85, 86, 90, and 92 of the Treaty in individual cases. By issuing the present notice, the Commission is taking steps to bring transparency and to facilitate investment decisions of all postal operators, in the interest of the users of postal services in the European Union.

As the Commission explained in its communication of 11 September 1996 on 'Services of general interest in Europe' (*), solidarity and equal treatment within a market economy are fundamental Community objectives. Those objectives are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices, and many of them even view services of general interest as social rights.

As regards, in particular, the postal sector, consumers are becoming increasingly assertive in exercising their rights and wishes. Worldwide competition is forcing companies using such services to seek out better price deals comparable to those enjoyed by their competitors. New technologies, such as fax or electronic mail, are putting enormous pressures on the traditional postal services. Those developments have given rise to worries about the future of those services accompanied by concerns over employment and economic and social cohesion. The economic importance of those services is considerable. Hence the importance of modernising and developing services of general interest, since they contribute so much to European competitiveness, social solidarity and quality of life.

The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality

and lower prices, while at the same time helping, through its policies, to strengthen economic and social cohesion between the Member States and to reduce certain inequalities. Postal services have a key role to play here. The Community is committed to promoting their functions of general economic interest, as solemnly confirmed in the new Article 7d, introduced by the Amsterdam Treaty, while improving their efficiency. Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, those mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion in the Union may not be attained. The public authority must then ensure that the general interest is taken into account.

The traditional structures of some services of general economic interest, which are organised on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even where they are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The real challenge is to ensure smooth interplay between the requirements of the single market in terms of free movement, economic performance and dynamism, free competition, and the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a difficult balancing act, since the goalposts are constantly moving: the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements.

The basic concept of universal service, which was originated by the Commission (**), is to ensure the provision of high-quality service to all prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. Those criteria are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. Universal service is the expression in Europe of the requirements

(*) COM(96) 443 final.

(**) See footnote 8.

and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

High-quality universal postal services are of great importance for private and business customers alike. In view of the development of electronic commerce their importance will even increase in the very near future. Postal services have a valuable role to play here.

As regards the postal sector, Directive 97/67/EC has been adopted by the European Parliament and the Council (hereinafter referred to as 'the Postal Directive'). It aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets in a controlled way.

The aim of the Postal Directive is to safeguard the postal service as a universal service in the long term. It imposes on Member States a minimum harmonised standard of universal services including a high-quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as catalogues and parcels within certain price and weight limits. It also covers registered and insured (*valeur déclarée*) items and applies to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

To guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service. The scope of the reserved sector has been harmonised in the Postal Directive. According to the Postal Directive, Member States can only grant exclusive rights for the provision of postal services to the extent that this is necessary to guarantee the maintenance of the universal service. Moreover, the Postal Directive establishes the maximum scope that Member States may reserve in order to achieve this objective. Any additional funding which may be required for the universal service may be found by writing certain obligations into commercial operator's franchises; for example, they may be required to make financial contributions to a competition fund administered for this purpose by a body independent of the beneficiary or beneficiaries, as foreseen in Article 9 of the Postal Directive.

The Postal Directive lays down a minimum common standard of universal services and establishes common

rules concerning the reserved area. It therefore increases legal certainty as regards the legality of some exclusive and special rights in the postal sector. There are, however, State measures that are not dealt with in it and that can be in conflict with the Treaty rules addressed to Member States. The autonomous behaviour of the postal operators also remains subject to the competition rules in the Treaty.

Article 90(2) of the Treaty provides that suppliers of services of general interest may be exempted from the rules in the Treaty, to the extent that the application of those rules would obstruct the performance of the general interest tasks for which they are responsible. That exemption from the Treaty rules is however subject to the principle of proportionality. That principle is designed to ensure the best match between the duty to provide general interest services and the way in which the services are actually provided, so that the means used are in proportion to the ends pursued. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the technical and budgetary constraints that may vary from one sector to another. It also makes for the best possible interaction between market efficiency and general interest requirements, by ensuring that the means used to satisfy the requirements do not unduly interfere with the smooth running of the single European market and do not affect trade to an extent that would be contrary to the Community interest⁽¹⁰⁾.

The application of the Treaty rules, including the possible application of the Article 90(2) exemption, as regards both behaviour of undertakings and State measures can only be done on a case-by-case basis. It seems, however, highly desirable, in order to increase legal certainty as regards measures not covered by the Postal Directive, to explain the Commission's interpretation of the Treaty and the approach that it aims to follow in its future application of those rules. In particular, the Commission considers that, subject to the provisions of Article 90(2) in relation to the provision of the universal service, the application of the Treaty rules would promote the competitiveness of the undertakings active in the postal sector, benefit consumers and contribute in a positive way to the objectives of general interest.

The postal sector in the European Union is characterised by areas which Member States have reserved in order to guarantee universal service and which are now being

⁽¹⁰⁾ See judgment of 23 October 1997 in Cases C-157/94 to C-160/94 'Member State Obligations — Electricity' *Commission v. Netherlands* (157/94), *Italy* (158/94), *France* (154/94), *Spain* (160/94).

harmonised by the Postal Directive in order to limit distortive effects between Member States. The Commission must, according to the Treaty, ensure that postal monopolies comply with the rules of the Treaty, and in particular the competition rules, in order to ensure maximum benefit and limit any distortive effects for the consumers. In pursuing this objective by applying the competition rules to the sector on a case-by-case basis, the Commission will ensure that monopoly power is not used for extending a protected dominant position into liberalised activities or for unjustified discrimination in favour of big accounts at the expense of small users. The Commission will also ensure that postal monopolies granted in the area of cross-border services are not used for creating or maintaining illicit price cartels harming the interest of companies and consumers in the European Union.

This notice explains to the players on the market the practical consequences of the applicability of the competition rules to the postal sector, and the possible derogations from the principles. It sets out the position the Commission would adopt, in the context set by the continuing existence of special and exclusive rights as harmonised by the Postal Directive, in assessing individual cases or before the Court of Justice in cases referred to the Court by national courts under Article 177 of the Treaty.

1. DEFINITIONS

In the context of this notice, the following definitions shall apply ⁽¹⁾:

'postal services': services involving the clearance, sorting, transport and delivery of postal items;

'public postal network': the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:

- the clearance of postal items covered by a universal service obligation from access points throughout the territory,
- the routing and handling of those items from the postal network access point to the distribution centre,
- distribution to the addresses shown on items;

'access points': physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers;

'clearance': the operation of collecting postal items deposited at access points;

'distribution': the process from sorting at the distribution centre to delivery of postal items to their addresses;

'postal item': an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;

'item of correspondence': a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;

'direct mail': a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. The National Regulatory Authority should interpret the term 'significant number of addressees' within each Member State and publish an appropriate definition. Bills, invoices, financial statements and other non-identical messages should not be regarded as direct mail. A communication combining direct mail with other items within the same wrapping should not be regarded as direct mail. Direct mail includes cross-border as well as domestic direct mail;

⁽¹⁾ The definitions will be interpreted in the light of the Postal Directive and any changes resulting from review of that Directive.

'document exchange': provision of means, including the supply of *ad hoc* premises as well as transportation by a third party, allowing self-delivery by

mutual exchange of postal items between users subscribing to this service;

'*express mail service*': a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and addressee in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an *à la carte* service, as and when required. Customers are in principle prepared to pay a higher price for this service;

'*universal service provider*': the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission;

'*exclusive rights*': rights granted by a Member State which reserve the provision of postal services to one undertaking through any legislative, regulatory or administrative instrument and reserve to it the right to provide a postal service, or to undertake an activity, within a given geographical area;

'*special rights*': rights granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

- limits, on a discretionary basis, to two or more the number of such undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
- designates, otherwise than according to such criteria, several competing undertakings as undertakings authorised to provide a service or undertake an activity, or
- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or undertake the same activity in the same geographical area under substantially comparable conditions;

'*terminal dues*': the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country;

'*intermediary*': any economical operator who acts between the sender and the universal service provider, by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country;

'*national regulatory authority*': the body or bodies, in each Member State, to which the Member State entrusts, *inter alia*, the regulatory functions falling within the scope of the Postal Directive;

'*essential requirements*': general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services⁽¹²⁾. These reasons are: the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.

2. MARKED DEFINITION AND POSITION ON THE POSTAL MARKET

a) Geographical and product market definition

- 2.1. Articles 85 and 86 of the Treaty prohibit as incompatible with the common market any conduct by one or more undertakings that may negatively affect trade between Member States which involves the prevention, restriction, or distortion of competition and/or an abuse of a dominant position within the common market or a substantial part of it. The territories of the Member States constitute separate geographical markets with regard to the delivery of domestic mail and also with regard to the domestic delivery of inward cross-border mail, owing primarily to the exclusive rights of the operators

⁽¹²⁾ The meaning of this important phrase in the context of Community competition law is explained in paragraph 5.3.

referred to in point 4.2 and to the restrictions imposed on the provision of postal services. Each of the geographical markets constitutes a substantial part of the common market. For the determination of 'relevant market', the country of origin of inward cross-border mail is immaterial.

2.2. As regards the product markets, the differences in practice between Member States demonstrate that recognition of several distinct markets is necessary in some cases. Separation of different product-markets is relevant, among other things, to special or exclusive rights granted. In its assessment of individual cases on the basis of the different market and regulatory situations in the Member States and on the basis of a harmonised framework provided by the Postal Directive, the Commission will in principle consider that a number of distinct product markets exist, like the clearance, sorting, transport and delivery of mail, and for example direct mail, and cross-border mail. The Commission will take into account the fact that these markets are wholly or partly liberalised in a number of Member States. The Commission will consider the following markets when assessing individual cases.

2.3. The general letter service concerns the delivery of items of correspondence to the addresses shown on the items.

It does not include self-provision, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail.

Also excluded, in accordance with practice in many Member States, are such postal items as are not considered items of correspondence, since they consist of identical copies of the same written communication and have not been altered by additions, deletions or indications other than the name of the addressee and his address. Such items are magazines, newspapers, printed periodicals catalogues, as well as goods or documents accompanying and relating to such items.

Direct mail is covered by the definition of items of correspondence. However, direct mail items do not contain personalised messages. Direct mail addresses the needs of specific operators for commercial

communications services, as a complement to advertising in the media. Moreover, the senders of direct mail do not necessarily require the same short delivery times, priced at first-class letter tariffs, asked for by customers requesting services on the market as referred to above. The fact that both services are not always directly interchangeable indicates the possibility of distinct markets.

2.4. Other distinct markets include, for example, the express mail market, the document exchange market, as well as the market for new services (services quite distinct from conventional services). Activities combining the new telecommunications technologies and some elements of the postal services may be, but are not necessarily, new services within the meaning of the Postal Directive. Indeed, they may reflect the adaptability of traditional services.

A document exchange differs from the market referred to in point 2.3 since it does not include the collection and the delivery to the addressee of the postal items transported. It involves only means, including the supply of *ad hoc* premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service. The users of a document exchange are members of a closed user group.

The express mail service also differs from the market referred to in point 2.3 owing to the value added by comparison with the basic postal service⁽¹³⁾. In addition to faster and more reliable collection, transportation and delivery of the postal items, an express mail service is characterised by the provision of some or all of the following supplementary services: guarantee of delivery by a given date; collection from the sender's address; delivery to the addressee in person; possibility of a change of destination and addressee in transit; conformation to the sender of delivery; tracking and tracing; personalised treatment for customers and the offer of a range of services according to requirements. Customers are in principle prepared to pay a higher price for this service. The reservable services as defined in the Postal Directive may include accelerated delivery of items of domestic correspondence falling within the prescribed price and weight limits.

⁽¹³⁾ Commission Decisions 90/16/EEC (OJ L 10, 12.1.1990, p. 47) and 90/456/EEC (OJ L 233, 28.8.1990, p. 19).

2.5. Without prejudice to the definition of reservable services given in the Postal Directive, different activities can be recognised, within the general letter service, which meet distinct needs and should in principle be considered as different markets; the markets for the clearance and for the sorting of mail, the market for the transport of mail and, finally, the delivery of mail (domestic or inward cross-border). Different categories of customers must be distinguished in this respect. Private customers demand the distinct products or services as one integrated service. However, business customers, which represent most of the revenues of the operators referred to in point 4.2, actively pursue the possibilities of substituting for distinct components of the final service alternative solutions (with regard to quality of service levels and/or costs incurred) which are in some cases provided by, or sub-contracted to, different operators. Business customers want to balance the advantages and disadvantages of self-provision versus provision by the postal operator. The existing monopolies limit the external supply of those individual services, but they would otherwise limit the external supply of those individual according to market conditions. That market reality supports the opinion that clearance, sorting, transport and delivery of postal items constitute different markets⁽¹⁴⁾. From a competition-law point of view, the distinction between the four markets may be relevant.

That is the case for cross-border mail where the clearance and transport will be done by a postal operator other than the one providing the distribution. This is also the case as regards domestic mail, since most postal operators permit major customers to undertake sorting of bulk traffic in return for discounts, based on their public tariffs. The deposit and collection of mail and method of payment also vary in these circumstances. Mail rooms of larger companies are now often operated by intermediaries, which prepare and pre-sort mail before handing it over to the postal operator for final distribution. Moreover, all postal operators allow some kind of downstream access to distribution. Moreover, all postal operators allow some kind of downstream access to their postal network, for instance by allowing or even demanding (sorted) mail to be deposited at an expediting or sorting centre. This permits in many cases a higher reliability (quality of service) by bypassing any sources of failure in the postal network upstream.

⁽¹⁴⁾ See Commission Notice on the definition of the relevant market for the purpose of the application of Community competition law (OJ C 372, 9.12.1997, p. 5).

(b) Dominant position

2.6. Since in most Member States the operator referred to in point 4.2 is, by virtue of the exclusive rights granted to him, the only operator controlling a public postal network covering the whole territory of the Member State, such an operator has a dominant position within the meaning of Article 86 of the Treaty on the national market for the distribution of items of correspondence. Distribution is the service to the user which allows for important economies of scale, and the operator providing this service is in most cases also dominant on the markets for the clearance, sorting and transport of mail. In addition, the enterprise which provides distribution, particularly if it also operates post office premises, has the important advantage of being regarded by the users as the principal postal enterprise, because it is the most conspicuous one, and is therefore the natural first choice. Moreover, this dominant position also includes, in most Member States, services such as registered mail or special delivery services, and/or some sectors of the parcels market.

(c) Duties of dominant postal operators

2.7. According to point (b) of the second paragraph of Article 86 of the Treaty, an abuse may consist in limiting the performance of the relevant service to the prejudice of its consumers. Where a Member State grants exclusive rights to an operator referred to in point 4.2 for services which it does not offer, or offers in conditions not satisfying the needs of customers in the same way as the services which competitive economic operators would have offered, the Member State induces those operators, by the simple exercise of the exclusive right which has been conferred on them, to limit the supply of the relevant service, as the effective exercise of those activities by private companies is, in this case, impossible. This is particularly the case where measures adopted to protect the postal service restrict the provision of other distinct services on distinct or neighbouring markets such as the express mail market. The Commission has requested several Member States to abolish restrictions resulting from exclusive rights regarding the provision of express mail services by international couriers⁽¹⁵⁾.

⁽¹⁵⁾ See footnote 13.

Another type of possible abuse involves providing a seriously inefficient service and failing to take advantage of technical developments. This harms customers who are prevented from choosing between alternative suppliers. For instance, a report prepared for the Commission⁽¹⁶⁾ in 1994 showed that, where they have not been subject to competition, the public postal operators in the Member States have not made any significant progress since 1990 in the standardisation of dimensions and weights. The report also showed that some postal operators practised hidden cross-subsidies between reserved and non-reserved services (see points 3.1 and 3.4), which explained, according to that study, most of the price disparities between Member States in 1994, especially penalising residential users who do not qualify for any discounts schemes, since they make use of reserved services that are priced at a higher level than necessary.

The examples given illustrate the possibility that, where they are granted special or exclusive rights, postal operators may let the quality of the service decline⁽¹⁷⁾ and omit to take necessary steps to improve service quality. In such cases, the Commission may be induced to act taking account of the conditions explained in point 8.3.

As regards cross-border postal services, the study referred to above showed that the quality of those services needed to be improved significantly in order to meet the needs of customers, and in particular of residential customers who cannot afford to use the services of courier companies or facsimile transmission instead. Independent measurements carried out in 1995 and 1996 show an improvement of quality of service since 1994. However, those

measurements only concerne first class mail, and the most recent measurements show that the quality has gone down slightly again.

The majority of Community public postal operators have notified an agreement on terminal dues to the Commission for assessment under the competition rules of the Treaty. The parties to the agreement have explained that their aim is to establish fair compensation for the delivery of cross-border mail reflecting more closely the real costs incurred and to improve the quality of cross-border mail services.

2.8. Unjustified refusal to supply is also an abuse prohibited by Article 86 of the Treaty. Such behaviour would lead to a limitation of services within the meaning of Article 86, second paragraph, (b) and, if applied only to some users, result in discrimination contrary to Article 86, second paragraph, (c), which requires that no dissimilar conditions be applied to equivalent transactions. In most of the Member States, the operators referred to in point 4.2 provide access at various access points of their postal networks to intermediaries. Conditions of access, and in particular the tariffs applied, are however, often confidential and may facilitate the application of discriminatory conditions, Member States should ensure that their postal legislation does not encourage postal operators to differentiate unjustifiably as regards the conditions applied or to exclude certain companies.

2.9. While a dominant firm is entitled to defend its position by competing with rivals, it has a special responsibility not to further diminish the degree of competition remaining on the market. Exclusionary practices may be directed against existing competitors on the market or intended to impede market access by new entrants. Examples of such illegal behaviour include: refusal to deal as a means of eliminating a competitor by a firm which is the sole or dominant source of supply of a product or controls access to an essential technology or infrastructure; predatory pricing and selective price cutting (see section 3); exclusionary dealing agreements; discrimination as part of a wider pattern of monopolizing conduct designed to exclude competitors; and exclusionary rebate schemes.

⁽¹⁶⁾ UFC — Que Choisir, Postal services in the European Union, April 1994.

⁽¹⁷⁾ In many Member States users could, some decades ago, still rely on this service to receive in the afternoon, standard letters posted in the morning. Since then, a continuous decline in the quality of the service has been observed, and in particular of the number of daily rounds of the postmen, which were reduced from five to one (or two in some cities of the European Union). The exclusive rights of the postal organisations favoured a fall in quality, since they prevented other companies from entering the market. As a consequence the postal organisations failed to compensate for wage increases and reduction of the working hours by introducing modern technology, as was done by enterprises in industries open to competition.

3. CROSS-SUBSIDISATION

(b) Consequences

(a) Basic principles

- 3.1. Cross-subsidisation means that an undertaking bears or allocates all or part of the costs of its activity in one geographical or product market to its activity in another geographical or product market. Under certain circumstances, cross-subsidisation in the postal sector, where nearly all operators provide reserved and non-reserved services, can distort competition and lead to competitors being beaten by offers which are made possible not by efficiency (including economies of scope) and performance but by cross-subsidies. Avoiding cross-subsidisation leading to unfair competition is crucial for the development of the postal sector.
- 3.2. Cross-subsidisation does not distort competition when the costs of reserved activities are subsidised by the revenue generated by other reserved services since there is no competition possible as to these services. This form of subsidisation may sometimes be necessary, to enable the operators referred to in point 4.2 to perform their obligation to provide a service universally, and on the same conditions to everybody⁽¹⁸⁾. For instance, unprofitable mail delivery in rural areas is subsidised through revenues from profitable mail delivery in urban areas. The same could be said of subsidising the provision of reserved services through revenues generated by activities open to competition. Moreover, cross-subsidisation between non-reserved activities is not in itself abusive.
- 3.3. By contrast, subsidising activities open to competition by allocating their costs to reserved services is likely to distort competition in breach of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities covered by a monopoly would have to bear costs which are unrelated to the provision of those activities. Nonetheless, dominant companies too many compete on price, or improve their cash flow and obtain only partial contribution to their fixed (overhead) costs, unless the prices are predatory or go against relevant national or Community regulations.
- 3.4. A reference to cross-subsidisation was made in point 2.7; duties of dominant postal operators. The operators referred to in point 4.2 should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area. However, in some justified cases, subject to the provisions of Article 90(2), cross-subsidisation can be regarded as lawful, for example for cultural mail⁽¹⁹⁾, as long as it is applied in a non discriminatory manner, or for particular services to the socially, medically and economically disadvantaged. When necessary, the Commission will indicate what other exemptions the Treaty would allow to be made. In all other cases, taking into account the indications given in point 3.3, the price of competitive services offered by the operator referred to in point 4.2 should, because of the difficulty of allocating common costs, in principle be at least equal to the average total costs of provision. This means covering the direct costs plus an appropriate proportion of the common and overhead costs of the operator. Objective criteria, such as volumes, time (labour) usage, or intensity of usage, should be used to determine the appropriate proportion. When using the turnover generated by the services involved as a criterion in a case of cross-subsidisation, allowance should be made for the fact that in such a scenario the turnover of the relevant activity is being kept artificially low. Demand-influenced factors, such as revenues or profits, are themselves influenced by predation. If services were offered systematically and selectively at a price below average total cost, the Commission would, on a case-by-case basis, investigate the matter under Article 86, or under Article 86 and Article 90(1) or under Article 92.

4. PUBLIC UNDERTAKINGS AND SPECIAL OR EXCLUSIVE RIGHTS

- 4.1. The treaty obliges the Member States, in respect of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor maintain in force any measures contrary to the

⁽¹⁸⁾ See these Postal Directive, recitals 16 and 28, and Chapter 5.

⁽¹⁹⁾ Referred to by UPU as 'work of the mind', comprising books, newspapers, periodicals and journals.

Treaty rules (Article 90(1)). The expression 'undertaking' includes every person or legal entity exercising an economic activity, irrespective of the legal status of the entity and the way in which it is financed. The clearance, sorting, transportation and distribution of postal items constitute economic activities, and these services are normally supplied for reward.

The term 'public undertaking' includes every undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ownership of it, their financial participation in it or the rules which govern it⁽²⁰⁾. A dominant influence on the part of the public authorities may in particular be presumed when the public authorities hold, directly or indirectly, the majority of the subscribed capital of the undertaking, control the majority of the voting rights attached to shares issued by the undertaking or can appoint more than half of the members of the administrative, managerial or supervisory body. Bodies which are part of the Member State's administration and which provide in an organised manner postal services for third parties against remuneration are to be regarded as such undertakings. Undertakings to which special or exclusive rights are granted can, according to Article 90(1), be public as well as private.

- 4.2. National regulations concerning postal operators to which the Member States have granted special or exclusive rights to provide certain postal services are 'measures' within the meaning of Article 90(1) of the Treaty and must be assessed under the Treaty provisions to which that Article refers.

In addition to Member States' obligations under Article 90(1), public undertakings and undertakings that have been granted special or exclusive rights are subject to Articles 85 and 86.

- 4.3. In most Member States, special and exclusive rights apply to services such as the clearance, transportation and distribution of certain postal items, as well as the way in which those services are provided, such as the exclusive right to place letter boxes along the public highway or to issue stamps bearing the name of the country in question.

5. FREEDOM TO PROVIDE SERVICES

(a) Basic principles

- 5.1. The granting of special or exclusive rights to one or more operators referred to in point 4.2 to carry out the clearance, including public collection, transport and distribution of certain categories of postal items inevitably restricts the provision of such services, both by companies established in other Member States and by undertakings established in the Member State concerned. This restriction has a transborder character when the addresses or the senders of the postal items handled by those undertakings are established in other Member States. In practice, restrictions on the provision of postal services, within the meaning of Article 59 of the Treaty⁽²¹⁾, comprise prohibiting the conveyance of certain categories of postal items to other Member States including by intermediaries, as well as the prohibition on distributing cross-border mail. The Postal Directive lays down the justified restrictions on the provision of postal services.

- 5.2. Article 66, read in conjunction with Article 55 and 56 of the Treaty, sets out exceptions from Article 59. Since they are exceptions to a fundamental principle, they must be interpreted restrictively. As regards postal services, the exception under Article 55 only applies to the conveyance and distribution of a special kind of mail, that is mail generated in the course of judicial or administrative procedures, connected, even occasionally, with the exercise of official authority, in particular notifications in pursuance of any judicial or administrative procedures. The conveyance and distribution of such items on a Member State's territory may therefore be subjected to a licensing requirement (see point 5.5) in order to protect the public interest. The conditions of the other derogations from the Treaty listed in those provisions will not normally be fulfilled in relation to postal services. Such services cannot, in themselves, threaten public policy and cannot affect public health.

- 5.3. The case-law of the Court of Justice allows, in principle, further derogations on the basis of mandatory requirements, provided that they fulfil non-economic essential requirements in the general interest, are applied without discrimination, and are appropriate and proportionate to the objective to

⁽²⁰⁾ Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 195, 29.7.1980, p. 35.

⁽²¹⁾ For a general explanation of the principles deriving from Article 59, see Commission interpretative communication concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3).

be achieved. As regards postal services, the essential requirements which the Commission would consider as justifying restrictions on the freedom to provide postal services are data protection subject to approximation measures taken in this field, the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, as well as, where justified under the provisions of the Treaty, environmental protection and regional planning. Conversely, the Commission would not consider it justified to impose restrictions on the freedom to provide postal services for reasons of consumer protection since this general interest requirement can be met by the general legislation on fair trade practices and consumer protection. Benefits to consumers are enhanced by the freedom to provide postal services, provided that universal service obligations are well defined on the basis of the Postal Directive and can be fulfilled.

- 5.4. The Commission therefore considers that the maintenance of any special or exclusive right which limits cross-border provision of postal services needs to be justified in the light of Articles 90 and 59 of the Treaty. At present, the special or exclusive rights whose scope does not go beyond the reserved services as defined in the Postal Directive are *prima facie* justified under Article 90(2). Outward cross-border mail is *de jure* or *de facto* liberalised in some Member States, such as Denmark, the Netherlands, Finland, Sweden, and the United Kingdom.

(b) Consequences

- 5.5. The adoption of the measures contained in the Postal Directive requires Member States to regulate postal services. Where Member States restrict postal services to ensure the achievement of universal service and essential requirements, the content of such regulation must correspond to the objective pursued. Obligations should, as a general rule, be enforced within the framework of class licences and declaration procedures by which operators of postal services supply their name, legal form, title and address as well as a short description of the services they offer to the public. Individual licensing should only be applied for specific postal services, where it is demonstrated that less restrictive procedures cannot ensure those objectives. Member States may be invited, on a case-by-case basis, to notify the

measures they adopt to the Commission to enable it to assess their proportionality.

6. MEASURES ADOPTED BY MEMBER STATES

(a) Basic principles

- 6.1. Member States have the freedom to define what are general interest services, to grant the special or exclusive rights that are necessary for providing them, to regulate their management and, where appropriate, to fund them. However, under Article 90(1) of the Treaty, Member States must, in the case of public undertakings and undertakings to which they have granted special or exclusive rights, neither enact nor maintain in force any measure contrary to the Treaty rules, and in particular its competition rules.

(b) Consequences

- 6.2. The operation of a universal clearance and distribution network confers significant advantages on the operator referred to in point 4.2 in offering not only reserved or liberalised services falling within the definition of universal service, but also other (non-universal postal) services. The prohibition under Articles 90(1), read in conjunction with Article 86(b), applies to the use, without objective justification, of a dominant position on one market to obtain market power on related or neighbouring markets which are distinct from the former, at the risk of eliminating competition on those markets. In countries where local delivery of items of correspondence is liberalised, such as Spain, and the monopoly is limited to inter-city transport and delivery, the use of a dominant position to extend the monopoly from the latter market to the former would therefore be incompatible with the Treaty provisions, in the absence of specific justification, if the functioning of services in the general economic interest was not previously endangered. The Commission considers that it would be appropriate for Member States to inform the Commission of any extension of special or exclusive rights and of the justification therefor.
- 6.3. There is a potential effect on the trade between Member States from restrictions on the provision of postal services, since the postal services offered by operators other than the operators referred to in

point 4.2 can cover mailings to or from other Member States, and restrictions may impede cross-border activities of operators in other Member States.

6.4. As explained in point 8(b)(vii), Member States must monitor access conditions and the exercise of special and exclusive rights. They need not necessarily set up new bodies to do this but they should not give to their operator⁽²²⁾ as referred to in point 4.2, or to a body which is related (legally, administratively and structurally) to that operator, the power of supervision of the exclusive rights granted and of the activities of postal operators generally. An enterprise in a dominant position must not be allowed to have such a power over its competitors. The independence, both in theory and in practice, of the supervisory authority from all the enterprise supervised is essential. The system of undistorted competition required by the Treaty can only be ensured if equal opportunities for the different economic operators, including confidentiality of sensitive business information, are guaranteed. To allow an operator to check the declarations of its competitors or to assign to an undertaking the power to supervise the activities of its competitors or to be associated in the granting of licences means that such undertaking is given commercial information about its competitors and thus has the opportunity to influence the activity of those competitors.

7. POSTAL OPERATORS AND STATE AID

(a) Principles

While a few operators referred to in point 4.2 are highly profitable, the majority appear to be operating either in financial deficit or at close to break-even in postal operations, although information on underlying financial performance is limited, as relatively few operators publish relevant information of an auditable standard on a regular basis. However, direct financial support in the form of subsidies or indirect support such as tax exemptions is being given to fund some postal services, even if the actual amounts are often not transparent.

The Treaty makes the Commission responsible for enforcing Article 92, which declares State aid that affects trade between Member States of the Community to be incompatible with the common market except in certain circumstances where an

exemption is, or may be, granted. Without prejudice to Article 90(2), Articles 92 and 93 are applicable to postal services⁽²³⁾.

Pursuant to Article 93(3), Member States are required to notify to the Commission for approval all plans to grant aid or to alter existing aid arrangements. Moreover, the Commission is required to monitor aid which it has previously authorised or which dates from before the entry into force of the Treaty or before the accession of the Member State concerned.

All universal service providers currently fall within the scope of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings⁽²⁴⁾, as last amended by Directive 93/84/EEC⁽²⁵⁾. In addition to the general transparency requirement for the accounts of operators referred to in point 4.2 as discussed in point 8(b)(vi), Member States must therefore ensure that financial relations between them and those operators are transparent as required by the Directive, so that the following are clearly shown:

- (a) public funds made available directly, including tax exemptions or reductions;
- (b) public funds made available through other public undertakings or financial institutions;
- (c) the use to which those public funds are actually put.

The Commission regards, in particular, the following as making available public funds:

- (a) the setting-off of operating losses;
- (b) the provision of capital;

⁽²²⁾ See in particular, Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5981, paragraphs 25 to 28.

⁽²³⁾ Case C-387/92 *Banco de Credito Industrial v. Ayuntamiento Valencia* [1994] ECR I-877.

⁽²⁴⁾ OJ L 195, 29.7.1980, p. 35.

⁽²⁵⁾ OJ L 254, 12.10.1993, p. 16.

- (c) non-refundable grants or loans on privileged terms;
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (e) the forgoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

(b) Application of Articles 90 and 92

The Commission has been called upon to examine a number of tax advantages granted to a postal operator on the basis of Article 92 in connection with Article 90 of the Treaty. The Commission sought to check whether that privileged tax treatment could be used to cross-subsidize that operator's operations in sectors open to competition. At that time, the postal operator did not have an analytical cost-accounting system serving to enable the Commission to distinguish between the reserved activities and the competitive ones. Accordingly, the Commission, on the basis of the findings of studies carried out in that area, assessed the additional costs due to universal-service obligations borne by that postal operator and compared those costs with the tax advantages. The Commission concluded that the costs exceeded those advantages and therefore decided that the tax system under examination could not lead to cross-subsidization of that operator's operations in the competitive areas ⁽²⁶⁾.

It is worth noting that in its decision the Commission invited the Member State concerned to make sure that the postal operator adopted an analytical cost-accounting system and requested an annual report which would allow the monitoring of compliance with Community law.

The Court of First Instance has endorsed the Commission's decision and has stated that the tax advantages to that postal operator are State aid

which benefit from an exemption from the prohibition set out in Article 92(1) on the basis of Article 90(2) ⁽²⁷⁾.

8. SERVICE OF GENERAL ECONOMIC INTEREST

(a) Basic principles

8.1. Article 90(2) of the Treaty allows an exception from the application of the Treaty rules where the application of those rules obstructs, in law or in fact, the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of general economic interest. Without prejudice to the rights of the Member States to define particular requirements of services of general interest, that task consists primarily in the provision and the maintenance of a universal public postal service, guaranteeing at affordable, cost-effective and transparent tariffs nationwide access to the public postal network within a reasonable distance and during adequate opening hours, including the clearance of postal items from accessible postal boxes or collection points throughout the territory and the timely delivery of such items to the address indicated, as well as associated services entrusted by measures of a regulatory nature to those operators for universal delivery at a specified quality. The universal service is to evolve in response to the social, economical and technical environment and to the demands of users.

The general interest involved requires the availability in the Community of a genuinely integrated public postal network, allowing efficient circulation of information and thereby fostering, on the one hand, the competitiveness of European industry and the development of trade and greater cohesion between the regions and Member States, and on the other, the improvement of social contacts between the citizens of the Union. The definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.

8.2. The financial resources for the maintenance and improvement of that public network still derive mainly from the activities referred to in point 2.3.

⁽²⁶⁾ Case NN 135/92, OJ C 262, 7.10.1995, p. 11.

⁽²⁷⁾ Case T-106/95 *FFSA v. Commission* [1997] ECR II-229.

Currently, and in the absence of harmonisation at Community level, most Member States have fixed the limits of the monopoly by reference to the weight of the item. Some Member States apply a combined weight and price limit whereas one Member State applies a price limit only. Information collected by the Commission on the revenues obtained from mail flows in the Member States seems to indicate that the maintenance of special or exclusive rights with regard to this market could, in the absence of exceptional circumstances, be sufficient to guarantee the improvement and maintenance of the public postal network.

The service for which Member States can reserve exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service, is harmonised in the Postal Directive. To the extent to which Member States grant special or exclusive rights for this service, the service is to be considered a separate product-market in the assessment of individual cases in particular with regard to direct mail, the distribution of inward cross-border mail, outward cross-border mail, as well as with regard to the collection, sorting and transport of mail. The Commission will take account of the fact that those markets are wholly or partly liberalised in a number of Member States.

8.3. When applying the competition rules and other relevant Treaty rules to the postal sector, the Commission, acting upon a complaint or upon its own initiative, will take account of the harmonized definition set out in the Postal Directive in assessing whether the scope of the reserved area can be justified under Article 90(2). The point of departure will be a presumption that, to the extent that they fall within the limits of the reserved area as defined in the Postal Directive, the special or exclusive rights will be prima facie justified under Article 90(2). That presumption can, however, be rebutted if the facts in a case show that a restriction does not fulfil the conditions of Article 90(2) ⁽²⁸⁾.

8.4. The direct mail market is still developing at a different pace from one Member State to the other,

⁽²⁸⁾ In relation to the limits on the application of the exception set out in Article 90(2), see the position taken by the Court of Justice in the following cases: Case C-179/90 *Merci convenzionali porto di Genova v. Siderurgica Gabrielli* [1991] ECR I-1979; Case C-41/90 *Klaus Höfner and Fritz Elser v. Macroton* [1991] ECR I-5889.

which makes it difficult for the Commission, at this stage, to specify in a general way the obligations of the Member States regarding that service. The two principal issues in relation to direct mail are potential abuse by customers of its tariffication and of its liberalisation (reserved items being delivered by an alternative operators as if they were non-reserved direct mail items) so as to circumvent the reserved services referred to in point 8.2. Evidence from the Member States which do not restrict direct mail services, such as Spain, Italy, the Netherlands, Austria, Sweden and Finland, is still inconclusive and does not yet allow a definitive general assessment. In view of that uncertainty, it is considered appropriate to proceed temporarily on a case-by-case basis. If particular circumstances make it necessary, and without prejudice to point 8.3, Member States may maintain certain existing restrictions on direct mail services or introduce licensing in order to avoid artificial traffic distortions and substantial destabilization of revenues.

8.5. As regards the distribution of inward cross-border mail, the system of terminal dues received by the postal operator of the Member State of delivery of cross-border mail from the operator of the Member State of origin is currently under revision to adapt terminal dues, which are in many cases too low, to actual costs of delivery.

Without prejudice to point 8.3, Member States may maintain certain existing restrictions on the distribution of inward cross-border mail ⁽²⁹⁾, so as to avoid artificial diversion of traffic, which would inflate the share of cross-border mail in Community traffic. Such restrictions may only concern items falling under the reservable area of services. In assessing the situation in the framework of individual cases, the Commission will take into account the relevant, specific circumstances in the Member States.

8.6. The clearance, sorting and transport of postal items has been or is currently increasingly being opened up to third parties by postal operators in a number

⁽²⁹⁾ This may in particular concern mail from one State which has been conveyed by commercial companies to another State to be introduced in the public postal network via a postal operator of that other State.

of Member States. Given that the revenue effects of such opening up may vary according to the situation in the different Member States, certain Member States may, if particular circumstances make it necessary, and without prejudice to point 8.3, maintain certain existing restrictions on the clearance, sorting and transport of postal items by intermediaries⁽³⁰⁾, so as to allow for the necessary restructuring of the operator referred to in point 4.2. However, such restrictions should in principle be applied only to postal items covered by the existing monopolies, should not limit what is already accepted in the Member State concerned, and should be compatible with the principle of non-discriminatory access to the postal network as set out in point 8(b)(vii).

(b) Conditions for the application of Article 90(2) to the postal sector

The following conditions should apply with regard to the exception under Article 90(2):

(i) Liberalisation of other postal services

Except for those services for which reservation is necessary, and which the Postal Directive allows to be reserved, Member States should withdraw all special or exclusive rights for the supply of postal services to the extent that the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of a general economic interest is not obstructed in law or in fact, with the exception of mail connected to the exercise of official authority, and they should take all necessary measures to guarantee the right of all economic operators to supply postal services.

This does not prevent Member States from making, where necessary, the supply of such services subject to declaration procedures or class licences and, when necessary, to individual licensing procedures aimed at the enforcement of essential requirements and at safeguarding the universal service. Member States

should, in that event, ensure that the conditions set out in those procedures are transparent, objective, and without discriminatory effect, and that there is an efficient procedure of appealing to the courts against any refusal.

(ii) Absence of less restrictive means to ensure the services in the general economic interest

Exclusive rights may be granted or maintained only where they are indispensable for ensuring the functioning of the tasks of general economic interest. In many areas the entry of new companies into the market could, on the basis of their specific skills and expertise, contribute to the realisation of the services of general economic interest.

If the operator referred to in point 4.2 fails to provide satisfactorily all of the elements of the universal service required by the Postal Directive (such as the possibility of every citizen in the Member State concerned, and in particular those living in remote areas, to have access to newspapers, magazines and books), even with the benefit of a universal postal network and of special or exclusive rights, the Member State concerned must take action⁽³¹⁾. Instead of extending the rights already granted, Member States should create the possibility that services are provided by competitors and for this purpose may impose obligations on those competitors in addition to essential requirements. All of those obligations should be objective, non-discriminatory and transparent.

(iii) Proportionality

Member States should moreover ensure that the scope of any special and exclusive rights granted is in proportion to the general economic interest which is pursued through those rights. Prohibiting self-delivery, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail, or collection and transport of such items by a third party acting solely on its behalf, would for

⁽³⁰⁾ Even in a monopoly situation, senders will have the freedom to make use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.

⁽³¹⁾ According to Article 3 of the Postal Directive, Member States are to ensure that users enjoy the right to a universal service.

example not be proportionate to the objective of guaranteeing adequate resources for the public postal network. Member States must also adjust the scope of those special or exclusive rights, according to changes in the needs and the conditions under which postal services are provided and taking account of any State aid granted to the operator referred to in point 4.2.

(iv) *Monitoring by an independent regulatory body*

The monitoring of the performance of the public-service tasks of the operators referred to in point 4.2 and of open access to the public postal network and, where applicable, the grant of licences or the control of declarations as well as the observance by economic operators of the special or exclusive rights of operators referred to in point 4.2 should be ensured by a body or bodies independent of the latter ⁽³²⁾.

That body should in particular ensure: that contracts for the provision of reserved services are made fully transparent, are separately invoiced and distinguished from non-reserved services, such as printing, labelling and enveloping; that terms and conditions for services which are in part reserved and in part liberalised are separate; and that the reserved element is open to all postal users, irrespective of whether or not the non-reserved component is purchased.

(v) *Effective monitoring of reserved services*

The tasks excluded from the scope of competition should be effectively monitored by the Member State according to published service targets and performance levels and there should be regular and public reporting on their fulfilment.

(vi) *Transparency of accounting*

Each operator referred to in point 4.2 uses a single postal network to compete in a variety of markets.

Price and service discrimination between or within classes of customers can easily be practised by operators running a universal postal network, given the significant overheads which cannot be fully and precisely assigned to any one service in particular. It is therefore extremely difficult to determine cross-subsidies within them, both between the different stages of the handling of postal items in the public postal network and between the reserved services and the services provided under conditions of competition. Moreover, a number of operators offer preferential tariffs for cultural items which clearly do not cover the average total costs. Member States are obliged by Article 5 and 90 to ensure that Community law is fully complied with. The Commission considers that the most appropriate way of fulfilling that obligation would be for Member States to require operators referred to in point 4.2 to keep separate financial records, identifying separately, *inter alia*, costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions, and making it possible to assess fully the conditions applied at the various access points of the public postal network. Services made up of elements falling within the reserved and competitive services should also distinguish between the costs of each element. Internal accounting systems should operate on the basis of consistently applied and objectively justified cost-accounting principles. The financial accounts should be drawn up, audited by an independent auditor, which may be appointed by the National Regulatory Authority, and be published in accordance with the relevant Community and national legislation applying to commercial organisations.

(vii) *Non-discriminatory access to the postal network*

Operators should provide the universal postal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.

Preferential tariffs appear to be offered by some operators to particular groups of customers in a non-transparent fashion. Member States should monitor the access conditions to the network with a view to ensuring that there is no discrimination

⁽³²⁾ See in particular Articles 9 and 22 of the Postal Directive.

either in the conditions of use or in the charges payable. It should in particular be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network and obtain access within a reasonable period at price conditions based on costs, that take into account the actual services required.

The obligation to provide non-discriminatory access to the public postal network does not mean that Member States are required to ensure access for items of correspondence from its territory, which were conveyed by commercial companies to another State, in breach of a postal monopoly, to be introduced in the public postal network via a postal operator of that other State, for the sole purpose of taking advantage of lower postal tariffs. Other economic reasons, such as production costs and facilities, added values or the level of service offered in other Member States are not regarded as improper. Fraud can be made subject to penalties by the independent regulatory body.

At present cross-border access to postal networks is occasionally rejected, or only allowed subject to conditions, for postal items whose production process includes cross-border data transmission before those postal items were given physical form. Those cases are usually called non-physical remail. In the present circumstances there may indeed be an economic problem for the postal operator that

delivers the mail, due to the level of terminal dues applied between postal operators. The operators seek to resolve this problem by the introduction of an appropriate terminal dues system.

The Commission may request Member States, in accordance with the first paragraph of Article 5 of the Treaty, to inform the Commission of the conditions of access applied and of the reasons for them. The Commission is not to disclose information acquired as a result of such requests to the extent that it is covered by the obligation of professional secrecy.

9. REVIEW

This notice is adopted at Community level to facilitate the assessment of certain behaviour of undertakings and certain State measures relating to postal services. It is appropriate that after a certain period of development, possibly by the year 2000, the Commission should carry out an evaluation of the postal sector with regard to the Treaty rules, to establish whether modifications of the views set out in this notice are required on the basis of social, economic or technological considerations and on the basis of experience with cases in the postal sector. In due time the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this notice.

FRAMEWORK ON STATE AID TO SHIPBUILDING

(2003/C 317/06)

1. INTRODUCTION

1. Since the early 1970s, State aid to shipbuilding has been subject to a series of specific Community regimes. Compared to industrial sectors that have not been subject to specific rules, the regimes applicable to the shipbuilding sector have contained a mixture of both stricter and more lenient provisions. This Framework provides for new rules for the assessment of State aid to shipbuilding following the expiry of Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding⁽¹⁾ on 31 December 2003.

2. The objectives of this Framework are, to the largest extent possible, to remove the differences between the rules applicable to the shipbuilding industry and to other industrial sectors and, thereby, to simplify and make more transparent the Commission's policy in this area, by extending general horizontal provisions to the shipbuilding sector.

3. Nevertheless, the Commission recognises that certain specific factors affecting the shipbuilding sector should be reflected in the Commission's policy of State aid control. These factors include:

- (a) over-capacity, depressed prices and trade distortions in the world shipbuilding market;
- (b) the nature of ships as very large, capital goods, which raises the potential of State-supported credit facilities to distort competition;
- (c) the fact that World Trade Organisation ('WTO') unfair trade disciplines are difficult to apply in the shipbuilding sector;
- (d) the existence of agreements within the Organisation for Economic Cooperation and Development ('OECD') in the shipbuilding sector, namely the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits with its Sector Understanding on Export Credits for Ships, which applies in the Community pursuant to Council Decision 2001/76/EC of 22 December 2000 replacing the Decision of 4 April 1978 on the application of certain guidelines in the field of officially supported export credits⁽²⁾.

4. The Commission acknowledges that work is being undertaken within the OECD framework to replace the 1994 Agreement on respecting normal competitive conditions in the shipbuilding and repair industry⁽³⁾, which has not entered into

force. This Framework is in no way intended to prejudice the outcome of that work and may be reviewed in the light of an agreement within the OECD.

5. In the light of these special characteristics, the objectives of this Framework, in addition to simplifying the applicable rules, are to:

- (a) encourage greater efficiency and competitiveness of Community yards, in particular through the promotion of innovation;
- (b) facilitate the reduction of economically non-viable capacity where necessary;
- (c) respect applicable international obligations in the field of export credits and development aid.

6. In order to achieve these objectives, this Framework provides for specific measures in relation to aid for innovation, closure aid, export credits and development aid and regional aid.

7. Certain features make shipbuilding unique and distinguish it from other industries such as short production series, the size, value and complexity of the units produced as well as the fact that prototypes are generally used commercially. As a consequence, shipbuilding is the only sector eligible for innovation aid. Investment aid for innovation was introduced by Regulation (EC) No 1540/98 and was intended to be authorised only in duly justified cases, as an incentive to technological risk-taking. However, the implementation of this provision was not satisfactory. It is considered that the unique characteristics of the shipbuilding industry justify maintaining a sector-specific innovation aid. Therefore, this Framework aims at improving support to innovation, by taking into account notably the difficulties of application of the previous provision.

8. The Commission may only consider aid to shipbuilding, ship repair and ship conversion to be compatible with the common market if it complies with the provisions of this Framework.

9. This Framework is without prejudice to the temporary measures established by Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding⁽⁴⁾.

2. DEFINITIONS

10. For the purposes of this Framework, the following definitions shall apply:

- (a) 'shipbuilding' means the building, in the Community, of self-propelled seagoing commercial vessels;

⁽¹⁾ OJ L 202, 18.7.1998, p. 1.

⁽²⁾ OJ L 32, 2.2.2001, p. 1. Decision as amended by Decision 2002/634/EC (OJ L 206, 3.8.2002, p. 16).

⁽³⁾ OJ C 375, 30.12.1994, p. 1.

⁽⁴⁾ OJ L 172, 2.7.2002, p. 1.

- (b) 'ship repair' means the repair or reconditioning in the Community of self-propelled seagoing commercial vessels;
- (c) 'ship conversion' means the conversion, in the Community, of self-propelled seagoing commercial vessels of not less than 1 000 gt, on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger accommodation;
- (d) 'self-propelled seagoing commercial vessels' means:
- (i) vessels of not less than 100 gt used for the transportation of passengers and/or goods,
 - (ii) vessels of not less than 100 gt for the performance of a specialised service (for example, dredgers and ice breakers),
 - (iii) tugs of not less than 365 kW,
 - (iv) fishing vessels of not less than 100 gt, with regards to export credits and development aid if in compliance with the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits and with its Sector Understanding on Export Credits for Ships, or with any agreement amending or replacing either of them, as well as with the Community rules governing State aid in the fishery and aquaculture sector,
 - (v) unfinished shells of the vessels referred to in points (i) to (iv) that are afloat and mobile.

For the purposes of the above, 'self-propelled seagoing vessel' shall mean a vessel that, by means of its permanent propulsion and steering, has all the characteristics of self-navigability on the high seas. Military vessels (i.e. vessels which according to their basic structural characteristics and capability are specifically intended to be used exclusively for military purposes, such as warships and other vessels for offensive or defensive action) and modifications made or features added to other vessels exclusively for military purposes shall be excluded, provided that any measures or practices applied in respect of such vessels, modifications or features are not disguised actions taken in favour of commercial shipbuilding inconsistent with State aid rules;

- (e) 'related entity' means any natural or legal person who:
- (i) owns or controls an undertaking engaged in shipbuilding, ship repair or ship conversion, or
 - (ii) is owned or controlled, directly or indirectly, whether through stock ownership or otherwise, by an undertaking engaged in shipbuilding, ship repair or ship conversion.

Control shall be presumed to arise once a person or undertaking engaged in shipbuilding, ship repair or ship conversion owns or controls an interest of more than 25 % in the other or vice versa.

- (f) 'aid' means aid within the meaning of Article 87(1) of the Treaty establishing the European Community, including measures such as credit facilities, guarantees and tax concessions.

3. APPLICABLE PROVISIONS

3.1. Scope

11. Aid to shipbuilding shall include aid to any shipyard, related entity, shipowner and third party which is granted, whether directly or indirectly, for building, repair or conversion of ships.

3.2. Application of Horizontal Provisions

12. The general principle is that aid to shipbuilding may be granted in accordance with Articles 87 and 88 of the Treaty and all legislation and measures adopted on those bases, including the following provisions:

- (a) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾;
- (b) 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 ⁽²⁾;
- (c) 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 ⁽³⁾;
- (d) 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 ⁽⁴⁾;
- (e) Regulation (EC) No 1177/2002;
- (f) Community guidelines on State aid for rescuing and restructuring firms in difficulties ⁽⁵⁾;
- (g) Community guidelines on State aid for environmental protection ⁽⁶⁾; and
- (h) Community framework for State aid for research and development ⁽⁷⁾.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ L 10, 13.1.2001, p. 20.

⁽³⁾ OJ L 10, 13.1.2001, p. 30.

⁽⁴⁾ OJ L 10, 13.1.2001, p. 33.

⁽⁵⁾ OJ C 288, 9.10.1999, p. 2.

⁽⁶⁾ OJ C 37, 3.2.2001, p. 3.

⁽⁷⁾ OJ C 45, 17.2.1996, p. 5.

3.3. Specific Provisions

13. The general principle outlined in Section 3.2 is subject to the following exceptions, which are justified by the specific factors presented in Section 1.

3.3.1. Aid to research, development and innovation

14. Aid granted to defray expenditure by shipbuilding, ship repair or ship conversion undertakings on research and development projects may be considered compatible with the common market if it is in compliance with the rules laid down in the Community framework for State aid for research and development, or any successor arrangement.

15. Aid granted for innovation in existing shipbuilding, ship repair or ship conversion yards may be deemed compatible with the common market up to a maximum aid intensity of 20 % gross, provided that:

- (a) it relates to the industrial application of innovative products and processes, i.e. technologically new or substantially improved products and processes compared to the state of the art existing in this industry in the Community, which carry a risk of technological or industrial failure;
- (b) the aid is limited to supporting expenditure on investments, design, engineering and testing activities directly and exclusively related to the innovative part of the project. Exceptionally, additional production costs that are strictly necessary to validate the technological innovation can be eligible to the extent they are limited to the minimum necessary amount.

3.3.2. Closure aid

16. Aid to defray the normal costs resulting from the total or partial closure of shipbuilding, ship repair or ship conversion yards may be considered compatible with the common market provided that the resulting capacity reduction is of a genuine and irreversible nature.

17. The costs eligible for the aid referred to in paragraph 16 are:

- (a) payments to workers made redundant or retired before legal retirement age;
- (b) the costs of counselling services to workers made or to be made redundant or retired before legal retirement age, including payments made by shipyards to facilitate the creation of small enterprises which are independent of the shipyards in question and whose activities are not principally shipbuilding;
- (c) payments to workers for vocational retraining;

(d) expenditure incurred for the redevelopment of the yard(s), its buildings, installations and infrastructure for use other than shipbuilding.

18. In addition, in the case of undertakings which totally cease shipbuilding, ship repair and ship conversion, the following measures may also be deemed compatible with the common market:

- (a) aid of an amount not exceeding the higher of the following two values, as determined by an independent consultant's report: the residual book value of the installations, or the discounted operational profits obtainable over a projected three-year period, less any advantages the aided undertaking derives from the closure of the installations;
- (b) aid such as loans or loan guarantees for working capital needed to enable the undertaking to complete unfinished works provided that this is kept to the minimum necessary and a significant proportion of the work has already been done.

19. Undertakings receiving partial closure aid must not have benefited from rescue or restructuring aid in the past 10 years. Where less than 10 years have elapsed since the rescue or restructuring aid was granted, the Commission will allow partial closure aid only in exceptional and unforeseeable circumstances for which the company is not responsible.

20. The amount and intensity of aid must be justified by the extent of the closures involved, account being taken of the structural problems of the region concerned and, in the case of conversion to other industrial activities, of the Community legislation and rules applicable to those new activities.

21. In order to establish the irreversible nature of aided closures, the Member State concerned shall ensure that the closed shipbuilding facilities remain closed for a period of not less than 10 years.

3.3.3. Employment aid

22. Aid granted for the creation of employment as well as for the recruitment of disadvantaged and disabled workers or to cover the additional costs of employing disadvantaged and disabled workers in shipbuilding, ship repair or ship conversion undertakings may be considered compatible with the common market if it is in compliance with the substantive rules laid down in 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 ⁽¹⁾.

⁽¹⁾ OJ L 337, 13.12.2002, p. 3.

3.3.4. *Export credits*

23. Aid to shipbuilding in the form of State-supported credit facilities granted to national and non-national shipowners or third parties for the building or conversion of vessels may be deemed compatible with the common market if it complies with the terms of the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits and with its Sector Understanding on Export Credits for Ships or any successive terms laid down in such an arrangement or replacing the Arrangement.

3.3.5. *Development aid*

24. Aid related to shipbuilding and ship conversion granted as development assistance to a developing country may be deemed compatible with the common market if it complies with the terms laid down for that purpose by the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits and its Sector Understanding on Export Credits or any successive terms laid down in such an arrangement or replacing the Arrangement.

25. The Commission will verify the particular development content of the proposed aid, that the aid is necessary and that it falls within the scope of the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits and its Sector Understanding on Export Credits for Ships or any successive terms laid down in such an arrangement or replacing the Arrangement. The offer of development assistance must be open to bids from different yards. To the extent that Community public procurement rules are applicable, bidding procedures have to comply with them.

3.3.6. *Regional aid*

26. Regional aid to shipbuilding, ship repair or ship conversion may be deemed compatible with the common market only if it fulfils the following conditions:

- (a) the aid must be granted for investment in upgrading or modernising existing yards, not linked to a financial restructuring of the yard(s) concerned, with the objective of improving the productivity of existing installations;
- (b) in regions referred to in Article 87(3)(a) of the Treaty and complying with the map approved by the Commission for each Member State for the grant of regional aid, the intensity of the aid must not exceed 22,5 %;

(c) in regions referred to in Article 87(3)(c) of the Treaty and complying with the map approved by the Commission for each Member State for the grant of regional aid, the intensity of the aid must not exceed 12,5 % or the applicable regional aid ceiling, whichever is the lower;

(d) the aid must be limited to support eligible expenditure as defined in the applicable Community guidelines on regional aid.

4. NOTIFICATION OBLIGATION

27. All plans to grant new aid to shipbuilding, ship repair or ship conversion, either in the form of a scheme or as individual aid not covered by a scheme, shall be notified to the Commission except if they fulfil the conditions set forth in one of the Regulations exempting certain categories of State aid from the requirement of prior notification.

5. MONITORING

28. Member States shall submit to the Commission annual reports on all existing aid schemes pursuant to the rules set forth in Regulation (EC) No 659/1999 and in its implementing provisions.

6. OVERLAPPING AID FROM DIFFERENT SOURCES

29. The aid ceilings stipulated in this Framework are applicable irrespective of whether the aid in question is financed wholly or in part from State resources or from Community resources. Aid authorised under this Framework may not be combined with other forms of State aid within the meaning of Article 87(1) of the Treaty or with other forms of Community financing, the cumulation of which produces an aid intensity higher than that laid down in these guidelines.

30. In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

7. APPLICATION OF THIS FRAMEWORK

31. This Framework will be applicable from 1 January 2004 until 31 December 2006 at the latest. It may be reviewed by the Commission during this period, in particular in the light of the Community's international obligations.

Communication Commission on the submission to individual notification of the application of all regional investment aid schemes to the shipbuilding sector and proposal of appropriate measures pursuant to Article 88 paragraph 1 of the EC Treaty

(2003/C 263/02)

(Text with EEA relevance)

The Commission has decided that the application of all regional investment aid schemes to the shipbuilding sector as defined in the Annex shall be notified as from 1 January 2004 to 31 December 2006, in order to allow the Commission to assess the compatibility of such aid on the basis of the rules applicable to the shipbuilding sector as from 1 January 2004.

The Commission has proposed, as an appropriate measure under Article 88(1) of the Treaty, the same notification requirement for the application of all existing regional investment aid schemes to the shipbuilding sector.

ANNEX

DEFINITION OF SHIPBUILDING SECTOR

The shipbuilding sector shall encompass all undertakings engaged in 'shipbuilding', 'ship repair' or 'ship conversion', as well as all 'related entities'.

- (a) 'shipbuilding' shall mean the building, in the Community, of 'self-propelled seagoing commercial vessels';
- (b) 'ship repair' shall mean the repair or reconditioning in the Community of 'self-propelled seagoing commercial vessels';
- (c) 'ship conversion' shall mean the conversion, in the Community, of 'self-propelled seagoing commercial vessels' of not less than 1 000 gt, on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger accommodation;
- (d) 'self-propelled seagoing commercial vessels' shall mean:
 - vessels of not less than 100 gt used for the transportation of passengers and/or goods,
 - vessels of not less than 100 gt for the performance of a specialised service (for example, dredgers and ice breakers),
 - tugs of not less than 365 kW,
 - fishing vessels of not less than 100 gt for export outside the Community,
 - unfinished shells of the abovementioned vessels that are afloat and mobile.

For the purposes of the above, 'self-propelled seagoing vessel' shall mean a vessel that, by means of its permanent propulsion and steering, has all the characteristics of self-navigability on the high seas. Military vessels (i.e. vessels which according to their basic structural characteristics and capability are specifically intended to be used exclusively for military purposes, such as warships and other vessels for offensive or defensive action) and modifications made or features added to other vessels exclusively for military purposes shall be excluded, provided that any measures or practices applied in respect of such vessels, modifications or features are not disguised actions taken in favour of commercial shipbuilding inconsistent with State aid control;

- (e) 'related entity' shall mean any natural or legal person who:
 - (i) owns or controls an undertaking engaged in shipbuilding, ship repair or ship conversion; or
 - (ii) is owned or controlled, directly or indirectly, whether through stock ownership or otherwise, by an undertaking engaged in shipbuilding, ship repair or ship conversion.

Control shall be presumed to arise once a person or undertaking engaged in shipbuilding, ship repair or ship conversion owns or controls an interest of more than 25 % in the other or vice versa.

Commission communication concerning the prolongation of the Framework on State aid to shipbuilding

(2006/C 260/03)

(Text with EEA relevance)

The Framework on State aid to shipbuilding ⁽¹⁾ ('the Framework') will expire on 31 December 2006.

The Framework has been applicable since 1 January 2004, which is a relatively short period of time. Only a few cases have been assessed under the Framework. In particular, the Framework contains provisions on innovation aid, which are unique for this industry and with which the Commission has limited experience.

Accordingly, the Commission has decided to continue to apply the Framework until 31 December 2008. During this period, the Commission expects to be able to assess whether it is appropriate to maintain sector-specific State aid rules for shipbuilding, in the light of the further experience it has acquired.

Since Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding ⁽²⁾ expired on 31 March 2005, the references in the Framework to that Regulation are no longer relevant. Accordingly, point 9 and point 12(e) of the Framework will no longer be applied by the Commission with effect from 1 January 2007.

⁽¹⁾ OJ C 317, 30.12.2003, p. 11.

⁽²⁾ OJ L 172, 2.7.2002, p. 1. Regulation as amended by Regulation (EC) No 502/2004 (OJ L 81, 19.3.2004, p. 6).

Communication from the Commission concerning the prolongation of the Framework on State aid to shipbuilding

(Text with EEA relevance)

(2008/C 173/03)

The Framework on State aid to shipbuilding ⁽¹⁾ ('the Framework') applies until 31 December 2008.

The Commission has conducted an assessment of the results of the application of the Framework. Experience gained to date has shown that there have not been many cases of application of the Framework. Two of its provisions, namely closure aid and employment aid, have not been applied. Other provisions, such as export credits, development aid and regional aid, do not seem to have raised particular problems of application. In addition, as regards regional aid, a number of recent Commission Decisions have clarified how the relevant provisions are interpreted by the Commission ⁽²⁾. The Framework contains a provision on innovation aid for the shipbuilding industry which is unique.

The Commission considers it appropriate to continue to apply these sector specific State aid rules for shipbuilding in order to gain more experience with regard to their application.

The Commission has conducted a public consultation on a proposal to prolong the application of the Framework by three years, until 31 December 2011. There was general support for that proposal.

Accordingly, the Commission has decided to continue to apply the Framework until 31 December 2011.

⁽¹⁾ OJ C 317, 30.12.2003, p. 11. Communication as amended by Communication 2006/C 260/03 (OJ C 260, 28.10.2006, p. 7).

⁽²⁾ See Commission Decision 2007/402/EC (OJ L 151, 13.6.2007, p. 33); Commission Decision 2007/255/EC (OJ L 112, 30.4.2007, p. 32); Commission Decision 2007/529/EC (OJ L 195, 27.7.2007, p. 36); Commission Decision 2007/C 188/01 (OJ C 188, 11.8.2007, p. 1).

COMMUNICATION FROM THE COMMISSION

Rescue and restructuring aid and closure aid for the steel sector

(notified under document No C(2002) 315)

(2002/C 70/05)

(Text with EEA relevance)

1. RESCUE AND RESTRUCTURING AID FOR FIRMS IN DIFFICULTY

In its Communication to the Council, the European Parliament, and the ECSC Consultative Committee on 'The state of the competitiveness of the steel industry in the EU' ⁽¹⁾ adopted on 5 October 1999, the Commission stated that it is important that strict rules are maintained for the steel sector after the expiry of the ECSC Treaty on 23 July 2002. The European Parliament, Member States, the ECSC Consultative Committee and steel companies and their associations have also requested strict rules for State aid to the steel industry.

The Commission considers that this objective may be attained by focusing on the types of State aid that, from the experience of the past and taking into account the features of the steel industry, have most distortive effects on competition in this sector. This is the case of investment aid and rescue and restructuring aid.

As for investment aid, the revised multisectoral framework on regional aid for large investment projects ⁽²⁾ ('the multisectoral framework') provides for a prohibition of this type of aid to the steel sector.

As for rescue and restructuring aid, the Commission bears in mind the fact that, in the last decisions adopted in 1993 on the basis of Article 95 of the ECSC Treaty, the Commission and the Council agreed that no further decisions of this nature would be taken to rescue Community steel firms. Following this, steel companies have been acting on the market on the assumption that no further restructuring aid was available to them. If this state of affairs were to change in future, there is no guarantee that steel firms would not relax their efforts towards costs reduction and increased competitiveness, thereby endangering the enormous efforts already made.

In these circumstances, the Commission considers that rescue aid and restructuring aid for firms in difficulty in the steel sector as defined in Annex B of the multisectoral framework, are not compatible with the common market.

2. CLOSURE AID

By virtue of Article 87(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities may be

considered to be compatible with the common market. The Commission considers that, taking into account the existing overcapacities at European and world level and the consequent inefficiencies as well as the prohibition of rescue and restructuring aid to the steel industry, aid to facilitate structural adjustment can contribute to the development of a healthier steel industry. Therefore, the following aid for firms in the steel industry as defined in Annex B of the multisectoral framework may be regarded as compatible with the common market:

2.1. Aid to cover payments payable by steel firms to workers made redundant or accepting early retirement provided that:

- the payments actually arise from the partial or total closure of steel plants which have not already been taken into account for approval of aid,
- the payments do not exceed those customarily granted under the rules in force in the Member States, and
- the aid does not exceed 50 % of those payments.

2.2. Aid to steel firms which permanently cease production of steel products, provided that:

- the firms became legal entities before 1 January 2002,
- they regularly produced steel products up to the date of notification of the aid concerned,
- they have not reorganised their production or plant structure since 1 January 2002,
- they close and scrap the installations used to manufacture steel products within six months of the cessation of production or approval of the aid by the Commission, whichever is the later,
- the closure of their plants has not already been taken into account for approval of aid, and
- the amount of the aid does not exceed the residual book value of the plants to be closed, ignoring that portion of any revaluation since 1 January 2002 which exceeds the national inflation rate.

⁽¹⁾ COM(1999) 453 final.

⁽²⁾ OJ C 70, 19.3.2002.

2.3. Aid to steel firms which satisfy the conditions set out in point 2.2 but which are directly or indirectly controlled by, or which themselves directly or indirectly control, a firm that is itself a steel firm may be deemed compatible with the common market provided that:

- the firm to be closed has been effectively and legally separated from the corporate structure for at least six months before payment of the aid,
- the accounts of the firm to be closed have been independently certified, by an auditor accepted by the Commission, to be a true and accurate account of the assets and liabilities of that firm, and
- there is a genuine and verifiable reduction in production capacity such as to yield an appreciable benefit over time for the industry as a whole in terms of a reduction in the production capacity for steel products over a period of five years following the date of the aided closure or the date of the last payment of aid approved under this point, if later.

3. NOTIFICATION OBLIGATION

All plans to grant aid for rescuing and restructuring firms in difficulty belonging to the steel industry and for closure aid to that sector shall be notified individually.

4. APPROPRIATE MEASURES

- 4.1. The Commission proposes as an appropriate measure pursuant to Article 88(1) of the EC Treaty, to exclude from the scope of their existing schemes for rescuing and restructuring firms in difficulties, as defined by the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾, aid to firms belonging to the steel sector, as defined by Annex B to the multisectoral framework, as from 24 July 2002.
- 4.2. Member States are invited to give their explicit agreement to the proposed appropriate measures within 20 working days from the date on which the letter is notified to them. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

5. APPLICATION OF THIS COMMUNICATION

This Communication will be applicable from 24 July 2002 for a period ending on 31 December 2009.

6. NON NOTIFIED AID GRANTED TO THE STEEL INDUSTRY

The Commission will examine the compatibility with the common market of aid granted to the steel industry without its authorisation on the basis of the criteria in force at the time the aid was granted.

⁽¹⁾ OJ C 288, 9.10.1999, p. 2.

COMMUNICATION FROM THE COMMISSION

Multisectoral framework on regional aid for large investment projects

(notified under document No C(2002) 315)

(2002/C 70/04)

(Text with EEA relevance)

1. INTRODUCTION: SCOPE OF THE MEASURE

1. On 16 December 1997, the Commission adopted the 'Multisectoral framework on regional aid for large investment projects' ⁽¹⁾. The multisectoral framework became applicable from 1 September 1998 for an initial trial period of three years. Its validity was extended in 2001 until 31 December 2002.
2. In accordance with point 4.1 of the multisectoral framework, the Commission conducted a review in 2001 and concluded that it had to be revised. It also considered that the specific sectoral frameworks should be integrated into the new multisectoral framework.
3. This framework only applies to regional aid, as defined by the 'Guidelines on national regional aid' ⁽²⁾, that aims to promote initial investment, including job creation linked to initial investment, on the basis of Article 87(3)(a) and (c) of the Treaty. This framework is without prejudice to the assessment of aid proposals under other provisions of the Treaty such as Article 87(3)(b) or (d). For the steel and synthetic fibres sectors, it also applies to large individual aid grants for small and medium sized undertakings that are not exempted by Commission Regulation (EC) No 70/2001 ⁽³⁾. This framework does not apply to restructuring aid cases, which will continue to be covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽⁴⁾. Similarly, this framework will not affect the operation of the existing horizontal frameworks, such as the Community framework for State aid for research and development ⁽⁵⁾ and the Community guidelines on State aid for environmental protection ⁽⁶⁾.
4. This framework does not affect the operation of the specific State aid rules that apply to the agriculture, fisheries and transport sectors and to the coal industry.
5. The aid intensity of regional investment aid that is not exempted from the notification obligation laid down in Article 88(3) of the EC Treaty by an exemption regulation adopted by the Commission on the basis of Council Regu-

lation (EC) No 994/98 ⁽⁷⁾ will be limited on the basis of the criteria laid down in this framework.

6. Under this framework no advance notification of aid below certain thresholds for large investment projects is required, provided that aid is granted in accordance with an aid scheme approved by the Commission. However, this framework does not affect the Member States' obligation to notify new individual (ad hoc) aid that is not exempted from the notification obligation laid down in Article 88(3) of the EC Treaty by an exemption regulation adopted by the Commission on the basis of Regulation (EC) No 994/98. The rules laid down in this framework apply also to the assessment of such individual (ad hoc) State aid measures.

2. THE NEED FOR THE MEASURE

2.1. The reasons to have a simple and transparent instrument

7. Compared to the previous multisectoral framework, this framework is a simpler instrument. The Commission considers that regional investment aid to large projects should be controlled in a simple and transparent way. On the basis of experience with the previous multisectoral framework, the Commission has introduced several simplifications, changes and clarifications.
8. Firstly, the previous multisectoral framework did not have a significant impact on State aid levels for large investment projects in the Community. The Commission considers it necessary to have a restrictive approach with regard to regional aid granted to large scale projects, whilst preserving the attraction of the less favoured regions. The need for a more restrictive approach on regional aid to large scale mobile investment projects has been widely acknowledged in recent years. The completion of the single market makes it more important than ever to maintain tight controls on State aid for such projects, since the distortive effect of aid is magnified as other government induced distortions of competition are eliminated and markets become more open and integrated. An appropriate balance between the three core objectives of Community policy, namely undistorted competition in the internal market, economic and social cohesion, and industrial competitiveness, must therefore entail stricter rules for regional aid granted to large scale projects.

⁽¹⁾ OJ C 107, 7.4.1998, p. 7.

⁽²⁾ OJ C 74, 10.3.1998, p. 9.

⁽³⁾ OJ L 10, 13.1.2001, p. 33.

⁽⁴⁾ OJ C 288, 9.10.1999, p. 2.

⁽⁵⁾ OJ C 45, 17.2.1996, p. 5.

⁽⁶⁾ OJ C 37, 3.2.2001, p. 3.

⁽⁷⁾ OJ L 142, 14.5.1998, p. 1.

9. Secondly, the incorporation of several frameworks into a unified instrument will have the effect of simplifying the existing legislation and increasing the accountability and transparency of State aid control.
 10. Third, the utilisation of a much simpler instrument will reduce the administrative burden within the administrations and will enhance the predictability of decisions of allowable aid amounts for investors and administrations alike.
 11. And fourth, in order to prevent serious distortions of competition, the framework provides for stricter rules for sectors suffering from structural problems.
- 2.2. The need for a more systematic control on regional aid to large-scale mobile investment projects**
12. The maximum aid ceilings fixed by the Commission for all areas eligible for regional aid are in general designed to provide an appropriate level of incentive necessary for the development of the assisted regions. However, as they provide a single ceiling, they are usually in excess of the regional handicaps when applied to large scale projects. The purpose of this framework is to limit the level of incentive available for large projects to a level that avoids as much as possible unnecessary distortions of competition.
 13. Large investments can effectively contribute to regional development, amongst other things by attracting other companies to the region and introducing advanced technologies as well as by contributing to the training of workers. However, these investments are less affected by important region specific problems in disadvantaged areas. First of all, large investments can produce economies of scale that reduce location specific initial costs. Secondly, they are in many respects not tied to the region in which the physical investment takes place. Large investments can easily obtain capital and credit on global markets and are not constrained by the more limited offer of financial services in a particular disadvantaged region. Moreover, companies making large investments can access a geographically wider pool of labour, and can more easily transfer a skilled workforce to the chosen location.
 14. At the same time, if large investments receive large amounts of State aid by benefiting from the full regional ceilings, there is an increased risk that trade will be affected and thus of a stronger distortion effect vis à vis competitors in other Member States. This is because the beneficiary of the aid is more likely to be a significant player on the market concerned and, consequently, the investment for which the aid is awarded may modify the conditions of competition in that market.
 15. Additionally, companies making large investments usually possess a considerable bargaining power vis à vis the authorities granting aid. Indeed, investors in large projects often consider alternative sites in different Member States, which may lead to a spiral of increasingly generous promises of aid, possibly to a level much higher than what is necessary to compensate for the regional handicaps.
 16. The outcome of such subsidy auctions is likely to be that large investments receive aid intensities that exceed the additional costs resulting from the choice of locating the investment in a disadvantaged area.
 17. The amount of aid exceeding the minimum necessary to compensate for the regional disadvantages is a very likely cause of perverse effects (inefficient location choices), higher distortion of competition and, since aid is a costly transfer from taxpayers in favour of aid recipients, net welfare losses.
 18. Recent experience has shown that large investment projects benefiting from regional investment aid are more capital intensive than smaller investment projects. As a consequence, a more favourable treatment of smaller investment projects translates into a more favourable treatment in assisted areas of projects that are more labour intensive, thus contributing to job creation and unemployment reduction.
 19. Certain types of investment are likely to cause serious distortion of competition, and their beneficial effect on the region concerned is doubtful. This is true in particular for investments in sectors where a single company has a high market share, or where the existing sectoral production capacity increases significantly, without a corresponding increase in demand for the products concerned. More generally, distortion of competition is likely in sectors suffering from structural problems, where the existing production capacity already exceeds the market demand for the product, or where the demand for the products concerned is persistently declining.
 20. In line with Article 159 of the EC Treaty, due account must be taken of the coherence between the State aid decisions taken pursuant to this framework and the actions of the structural funds leading to a strengthening of the economic and social cohesion of the Community, in particular those aimed at reducing disparities between the levels of development of the various regions, and the backwardness of the least favoured regions. Projects co-financed from the structural funds effectively contribute to economic and social cohesion within the Community and should therefore be duly taken into consideration.

3. REDUCTION OF AID LEVELS FOR LARGE INVESTMENT PROJECTS

21. Without prejudice to the compatibility criteria laid down in the guidelines on national regional aid and in Regulation (EC) No 70/2001, and without prejudice to the notification obligation laid down in point 24 or to the transitional rules laid down in section 8, regional investment aid concerning investments involving eligible expenditure⁽⁸⁾ for the thresholds set out below shall be subject to an adjusted lower regional aid ceiling, on the basis of the following scale:

Eligible expenditure	Adjusted aid ceiling
Up to EUR 50 million	100 % of regional ceiling
For the part between EUR 50 million and EUR 100 million	50 % of regional ceiling
For the part exceeding EUR 100 million	34 % of regional ceiling

22. Thus, the allowable aid amount for a project above EUR 50 million will be calculated according to the formula: maximum aid amount = $R \times (50 + 0,50 B + 0,34 C)$; where R is the unadjusted regional ceiling; B is the eligible expenditure between EUR 50 million and EUR 100 million; and C is the eligible expenditure above EUR 100 million, if any⁽⁹⁾.

⁽⁸⁾ Under the guidelines on national regional aid, the eligible expenditure for regional investment aid is defined either by the rules laid down in its points 4.5 and 4.6 (option 1) or by the rules laid down in its point 4.13 (option 2). In line with point 4.19 of the guidelines on national regional aid, aid calculated on the basis of option 1 ('investment aid') can be combined with aid calculated on the basis of option 2 ('job creation aid') provided the combined amount of aid does not exceed the regional aid ceiling multiplied by the higher of the two possible eligible expenditures. In line with this rule, and for the purposes of the present framework, the eligible expenditure of a specific investment project is defined on the basis of the option that leads to the higher amount. The eligible expenditure amount will be determined in such a way as not to exceed the higher investment amount resulting from the higher of the job creation method and the initial investment method, subject to the intensity ceiling laid down for the region.

⁽⁹⁾ The table below further illustrates, for specific sizes of eligible expenditure and for specific regional ceilings, the aid intensities that could be allowed under the reduction scale.

Eligible expenditure	Regional aid ceiling					
	15 %	20 %	25 %	30 %	35 %	40 %
EUR 50 million	15,00 %	20,00 %	25,00 %	30,00 %	35,00 %	40,00 %
EUR 100 million	11,25 %	15,00 %	18,75 %	22,50 %	26,25 %	30,00 %
EUR 200 million	8,18 %	10,90 %	13,63 %	16,35 %	19,08 %	21,80 %
EUR 500 million	6,33 %	8,44 %	10,55 %	12,66 %	14,77 %	16,88 %

23. By way of example, for a large company investing EUR 80 million in an assisted area where the unadjusted regional aid ceiling is 25 % net grant equivalent (nge), the maximum allowable aid amount would be EUR 16,25 million nge, which corresponds to an aid intensity of 20,3 % nge. For a large company investing EUR 160 million in the same area, the maximum allowable aid amount would be EUR 23,85 million nge, which corresponds to an aid intensity of 14,9 % nge.

24. However, Member States are required to notify every case of regional investment aid if the aid proposed is more than the maximum allowable aid that an investment of EUR 100 million can obtain under the scale and the rules laid down in paragraph 21⁽¹⁰⁾. Individually notifiable projects will not be eligible for investment aid in either of the following two situations:

(a) the aid beneficiary accounts for more than 25 % of the sales of the product concerned before the investment or will, after the investment, account for more than 25 %; or

(b) the capacity created by the project is more than 5 % of the size of the market measured using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Areas's GDP.

The burden of proving that the situations to which points (a) and (b) refer do not obtain lies with the Member State⁽¹¹⁾. For the purpose of applying points (a) and (b) apparent consumption will be defined at the appropriate level of the Prodcom classification⁽¹²⁾ in the EEA, or, if such information is not available, on the basis of any other market segmentation generally accepted for the products concerned and for which statistical data are readily available.

⁽¹⁰⁾ Proposals to award ad hoc aid must in any event be notified and will be assessed on the basis of the rules laid down in section 3 of the Framework, and in line with the general assessment criteria laid down in the guidelines on national regional aid.

⁽¹¹⁾ If the Member State demonstrates that the aid beneficiary creates, through genuine innovation, a new product market, the tests laid down in letters (a) and (b) do not need to be carried out, and the aid will be authorised under the scale in paragraph 21.

⁽¹²⁾ Council Regulation (EEC) No 3924/91 of 19 December 1991 on the establishment of a Community survey of industrial production (OJ L 374, 31.12.1991, p. 1).

25. The maximum allowable aid intensity that a notifiable project can receive under point 24 may be increased by multiplying it by the factor 1,15 if the project is co financed from structural funds resources as a major project within the meaning of Article 25 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the structural funds ⁽¹³⁾, in line with the provisions laid down in Article 26 of the same Regulation. The rate of co financing must be at least 10 % of the total public expenditure, if the project is located in an area eligible for aid under Article 87(3)(c) of the Treaty and at least 25 % of the total public expenditure if the project is located in an area eligible for aid under Article 87(3)(a) thereof.

26. However, the aid increase resulting from point 25 must not lead to an aid intensity higher than the maximum aid intensity allowed for an investment of EUR 100 million, i.e. 75 % of the unadjusted regional aid ceiling.

4. AN AID PROHIBITION FOR INVESTMENT PROJECTS IN THE STEEL INDUSTRY

27. As regards the steel industry as defined in Annex B to this framework ⁽¹⁴⁾, the Commission notes that for a fairly long period of time, ECSC steel companies functioned without recourse to investment aid such as had been available to the rest of the industrial sectors. Steel companies have integrated this factor in their strategies and are used to it. Given the specific features of the steel sector (in particular its structure, the existing over capacity at European and world level, its highly capital intensive nature, the location of the majority of steel plants in regions eligible for regional aid, the substantial amounts of public funds devoted to the restructuring of the steel sector, and the conversion of the steel areas) and the experience gained when less strict rules on State aid applied in the past, it appears justified to continue to prohibit investment aid to this sector, irrespective of the size of the investment. Accordingly, the Commission considers that regional aid to the steel industry is not compatible with the common market. This incompatibility also applies to large individual aid grants made to small and medium sized enterprises within the meaning of Article 6 of Regulation (EC) No 70/2001, which are not exempted by the same Regulation.

5. INVESTMENT PROJECTS IN SECTORS WITH STRUCTURAL PROBLEMS OTHER THAN STEEL

28. The Commission has consistently considered in the past that investment in sectors that do, or might, suffer from

⁽¹³⁾ OJ L 161, 26.6.1999, p. 1.

⁽¹⁴⁾ It includes the steel sectors currently covered by the ECSC Treaty as well as the sub sectors of seamless tubes and large welded tubes, currently not covered by the ECSC Treaty, but which form part of an integrated production process and which have similar features to the steel sector covered by the ECSC Treaty.

serious overcapacity or persistent decline in demand increase the risk of distortion of competition, without bringing the necessary counterbalancing benefits to the region concerned. The proper way to recognise that these investments are less beneficial from a regional point of view is to reduce investment aid to projects in sectors where structural problems prevail, to a level below that permitted for other sectors.

29. Until now, several sensitive industrial sectors have been subject to specific, stricter rules on State aid ⁽¹⁵⁾. In accordance with point 1.3 of the previous multisectoral framework, these specific sectoral rules continued to apply.

30. One of the objectives of the previous multisectoral framework was to provide for the possibility of replacing the existing sectoral rules with a single instrument. Subject to the transitional rules laid down in section 8 below, the Commission wishes through the present revision to include these sensitive industrial sectors within this framework.

31. By 31 December 2003, sectors where serious structural problems prevail will be specified in a list of sectors annexed to the framework. No regional investment aid will be authorised in these sectors, subject to the provisions laid down in this section.

32. For the purpose of drawing up the list of sectors, serious structural problems will in principle be measured on the basis of apparent consumption data, at the appropriate level of the CPA classification ⁽¹⁶⁾ in the EEA, or, if such information is not available, on the basis of any other market segmentation generally accepted for the products concerned and for which statistical data are readily available. Serious structural problems will be deemed to exist when the sector concerned is declining ⁽¹⁷⁾. The list of sectors shall be updated periodically, with a frequency to be determined at the time at which the list of sectors is decided.

⁽¹⁵⁾ Code on aid to the synthetic fibres industry (OJ C 94, 30.3.1996, p. 11) and Community framework on State aid to the motor vehicle industry (OJ C 279, 15.9.1997, p. 1); aid to shipbuilding is covered by Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1).

⁽¹⁶⁾ Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (OJ L 342, 31.12.1993, p. 1), as last amended by Commission Regulation (EC) No 204/2002 (OJ L 36, 6.2.2002, p. 1).

⁽¹⁷⁾ A strong presumption of sectoral decline can arise from a negative average annual growth rate of apparent consumption in the EEA over the last five years.

33. As from 1 January 2004, and for sectors included in the list of sectors with serious structural problems, all regional investment aid concerning an investment project involving eligible expenditure above an amount to be determined by the Commission at the time of drawing up the list of sectors⁽¹⁸⁾ must be individually notified to the Commission, without prejudice to the provisions laid down in Regulation (EC) No 70/2001. The Commission will examine such notifications in accordance with the following rules: firstly, the aid project must comply with the general assessment criteria laid down in the guidelines on national regional aid; secondly, the eligible expenditure as defined under point 50 exceeding an amount to be determined by the Commission at the time of drawing up the list of sectors will not be eligible for investment aid, except for the cases referred to in point 34.

34. By way of derogation from point 33, the Commission may authorise investment aid for sectors included in the list of sectors on the basis of the aid intensities laid down in section 3 of this framework, provided that the Member State demonstrates that, although the sector is deemed to be in decline, the market for the product concerned is fast growing⁽¹⁹⁾.

6. EX POST MONITORING

35. In drawing up this framework, the Commission has attempted to ensure that, as far as possible, it is clear, unambiguous, predictable and efficient and that the additional administrative burden it entails is kept to a minimum.

36. In order to ensure transparency and effective monitoring, it is appropriate to establish a standard format in which Member States should provide the Commission with summary information in the form laid down in Annex A, whenever aid for investments above EUR 50 million is granted in pursuance of this framework. On implementation of aid falling under this framework, Member States must, within 20 working days starting from the granting of the aid by the competent authority, forward to the Commission such summary information. The Commission will make this information available to the public through its website (<http://europa.eu.int/comm/competition/>).

⁽¹⁸⁾ This amount can in principle be set at EUR 25 million but may vary from sector to sector.

⁽¹⁹⁾ The market for the product concerned will be deemed to be fast growing if apparent consumption over the last five years at the appropriate level of the Prodcom classification in the EEA, or, if such information is not available, on the basis of another market segmentation generally accepted for the products concerned and for which statistical data are readily available, is growing in value terms by an average rate equal to or above the average growth of the EEA's GDP.

37. Member States must maintain detailed records regarding the granting of individual aid falling under this framework. Such records must contain all information necessary to establish that the maximum aid intensity determined under this framework is observed. Member States must keep a record regarding an individual aid for 10 years from the date on which it was granted. On written request, the Member State concerned must 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 to assess whether the provisions of this framework have been complied with.

7. VALIDITY OF THE FRAMEWORK

38. This framework will be applicable for a period ending on 31 December 2009. Before 31 December 2009, the Commission will evaluate the framework. The Commission may amend this framework before 31 December 2009 on the basis of important competition policy considerations or in order to take into account other Community policies or international commitments. Such review will not, however, affect the prohibition of investment aid to the steel industry.

39. As regards the steel sector as defined in Annex B, the provisions of the framework will be applied as from 24 July 2002. The existing specific sectoral rules for certain steel sectors not covered by the ECSC Treaty⁽²⁰⁾ will cease to be applicable from that date. As regards the motor vehicle sector as defined in Annex C, and the synthetic fibres sector as defined in Annex D, the provisions of the framework will be applied as from 1 January 2003. However, notifications registered by the Commission before 1 January 2003 for the motor vehicle sector and the synthetic fibres sector will be examined in the light of the criteria in force at the time of notification.

40. As regards sectors other than those mentioned in point 39, the provisions of this framework will be applied as from 1 January 2004. The previous multisectoral framework will remain applicable until 31 December 2003. However, notifications registered by the Commission before 1 January 2004 will be examined in the light of the criteria in force at the time of notification.

41. The Commission will examine the compatibility with the common market of investment aid granted without its authorisation:

- (a) on the basis of the criteria set out in this framework if the aid was granted:

⁽²⁰⁾ OJ C 320, 13.12.1988, p. 3.

- on or after 24 July 2002, as regards investment aid to the steel sector,
- on or after 1 January 2003, as regards investment aid to the motor vehicle sector, and the synthetic fibres sector,
- on or after 1 January 2004, as regards investment aid to all other sectors subject to this framework;

(b) on the basis of the criteria in force at the time the aid was granted, in all other cases.

8. TRANSITIONAL PROVISIONS

42. Until the date of applicability of the list of sectors to which point 31 refers, and without prejudice to Regulation (EC) No 70/2001:

- (a) the maximum aid intensity for regional investment aid in the motor vehicle sector as defined in Annex C granted under an approved scheme in favour of projects that involve either eligible expenditure above EUR 50 million or an aid amount above EUR 5 million expressed in gross grant equivalent, will be equal to 30 % of the corresponding regional aid ceiling ⁽²¹⁾;
- (b) no expenditure incurred in the context of investment projects in the synthetic fibres sector as defined in Annex D will be eligible for investment aid.

43. Before the date of applicability of the list of sectors to which point 31 refers, the Commission will decide whether and to what extent the motor vehicle sector as defined in Annex C and the synthetic fibres sector as defined in Annex D must be included in the list of sectors.

44. As regards the shipbuilding sector, the existing rules under Regulation (EC) No 1540/98 will be in force until 31 December 2003. Before this date, the Commission will have examined whether aid to the shipbuilding sector is to be covered by this framework and included in the list of sectors.

9. APPROPRIATE MEASURES

45. In order to ensure the implementation of the rules laid down in this framework, the Commission will propose

⁽²¹⁾ Proposals to award ad hoc aid must in any event be notified and will be assessed on the basis of this rule, and in line with the general assessment criteria laid down in the guidelines on national regional aid.

appropriate measures within the meaning of Article 88(1) of the Treaty. These appropriate measures will include the following:

(a) modifying existing regional aid maps by adapting:

- as from 24 July 2002 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 4 of this framework,

- as from 1 January 2003 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 8,

- as from 1 January 2004 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 3;

(b) adjusting all existing regional aid schemes, as defined by the guidelines on national regional aid, including those exempted from notification pursuant to a block exemption regulation, in order to make sure that for regional investment aid granted:

- (i) they respect the regional aid ceilings as laid down in the regional aid maps, as modified in accordance with (a) above as from 1 January 2004, as regards sectors other than those mentioned in point 39;

- (ii) they provide for the individual notification of regional investment aid where the aid is more than the maximum allowable aid that an investment of EUR 100 million can obtain under the scale shown in point 21 of this framework as from 1 January 2004;

- (iii) they exclude from their scope aid to the steel industry as from 24 July 2002;

- (iv) they exclude from their scope aid to the synthetic fibres industry as from 1 January 2003 and until the list of sectors becomes applicable;

- (v) they limit regional investment aid in the motor vehicle sector as defined in Annex C in favour of projects that involve either eligible expenditure above EUR 50 million or an aid amount above EUR 5 million expressed in gross grant equivalent to 30 % of the corresponding regional aid ceiling, as from 1 January 2003 and until the list of sectors becomes applicable;

- (c) ensuring that the forms mentioned in point 36 are forwarded to the Commission from the date this framework becomes applicable;
 - (d) ensuring that the records mentioned in point 37 are maintained as from the date this framework becomes applicable;
 - (e) complying, until 31 December 2003, with the rules of the previous multisectoral framework on regional aid for large investment projects, and in particular with the notification requirements laid down therein.
46. The necessary amendments must be made by the Member States within a period ending on 31 December 2003, except for the measures regarding the steel sector, for which the amendments must be in place from 24 July 2002, and regarding the synthetic fibres sector and the motor vehicle sector for which the amendments must be in place as from 1 January 2003. The Member States are invited to give their explicit agreement to the proposed appropriate measures within 20 working days from the date on which the letter is notified to them. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

10. NOTIFICATIONS UNDER THIS FRAMEWORK

47. Member States are invited to use the notification form attached to this framework (Annex E) for the purpose of notifying aid proposals pursuant to this framework.

11. DEFINITION OF TERMS USED

48. The following definitions of the terms used in this framework will apply:

11.1. Investment project

49. 'Investment project' means an initial investment within the meaning of section 4 of the guidelines on national regional aid. An investment project should not be artificially divided into sub projects in order to escape the provisions of this framework. For the purpose of this framework an investment project includes all the fixed investments on a site, made by one or more undertakings, in a period of three years. For the purpose of this framework, a production site is an economically indivisible series of fixed capital items fulfilling a precise technical function, linked by a physical or functional link, and which have clearly identified aims, such as the production of a defined

product. Where two or more products are produced from the same raw materials, the production units of such products will be deemed to constitute a single production site.

11.2. Eligible expenditure

50. 'Eligible expenditure' shall be determined in accordance with the rules laid down in the guidelines on national regional aid for this purpose.

11.3. Regional aid ceiling

51. 'Regional aid ceiling' refers to the maximum aid intensity authorised for large companies in the assisted area concerned at the time of the granting of the aid. Maximum aid intensities are determined in accordance with the guidelines on national regional aid, on the basis of the regional aid map approved by the Commission.

11.4. Product concerned

52. 'Product concerned' means the product envisaged by the investment project and, where appropriate, its substitutes considered to be such, either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations). When the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned will be deemed to include the downstream products.

11.5. Apparent consumption

53. 'Apparent consumption' of the product concerned is production plus imports minus exports.
54. Where the Commission determines in accordance with this framework the average annual growth of the apparent consumption of the product concerned, it will take into consideration, where appropriate, any significant change in that trend.
55. Where the investment project concerns a service sector, and in order to determine the size and the evolution of the market, the Commission will, instead of using apparent consumption, use the turnover of the services concerned on the basis of the market segmentation generally accepted for the services concerned and for which statistical data are readily available.

ANNEX A

FORM FOR EX POST MONITORING

- Scheme title (or indicate if it is an 'ad hoc' aid)
 - Public entity providing the assistance
 - If the legal basis is an aid scheme approved by the Commission, provide the date of the approval and the State aid case reference number
 - Specify the region and the municipality
 - Specify company name, whether it is an SME or a large company and, where relevant, the name of the parent companies
 - Specify the type of the project and whether it is a new establishment or a capacity expansion or other
 - Specify the total cost and the eligible cost of capital expenditure to be invested over the lifetime of the project
 - Nominal amount of support and its gross and net grant equivalent
 - Provide the conditions attached to the payment of the proposed assistance, if any
 - Products or services concerned and their Prodcom nomenclature or CPA nomenclature for projects in the service sectors.
-

ANNEX B

DEFINITION OF THE STEEL INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The steel industry, for the purposes of the multisectoral framework consists of the undertakings engaged in the production of the steel products listed below:

Product	Combined nomenclature code (1)
Pig iron	7201
Ferro alloys	7202 11 20, 7202 11 80, 7202 99 11
Ferrous products obtained by direct reduction of iron ore and other spongy ferrous products	7203
Iron and non alloy steel	7206
Semi finished products of iron or non alloy steel	7207 11 11; 7207 11 14; 7207 11 16; 7207 12 10; 7207 19 11; 7207 19 14; 7207 19 16; 7207 19 31; 7207 20 11; 7207 20 15; 7207 20 17; 7207 20 32; 7207 20 51; 7207 20 55; 7207 20 57; 7207 20 71
Flat rolled products of iron and non alloy steel	7208 10 00; 7208 25 00; 7208 26 00; 7208 27 00; 7208 36 00; 7208 37; 7208 38; 7208 39; 7208 40; 7208 51; 7208 52; 7208 53; 7208 54; 7208 90 10; 7209 15 00; 7209 16; 7209 17; 7209 18; 7209 25 00; 7209 26; 7209 27; 7209 28; 7209 90 10; 7210 11 10; 7210 12 11; 7210 12 19; 7210 20 10; 7210 30 10; 7210 41 10; 7210 49 10; 7210 50 10; 7210 61 10; 7210 69 10; 7210 70 31; 7210 70 39; 7210 90 31; 7210 90 33; 7210 90 38; 7211 13 00; 7211 14; 7211 19; 7211 23 10; 7211 23 51; 7211 29 20; 7211 90 11; 7212 10 10; 7212 10 91; 7212 20 11; 7212 30 11; 7212 40 10; 7212 40 91; 7212 50 31; 7212 50 51; 7212 60 11; 7212 60 91
Bars and rods, hot rolled, in irregularly wound coils, of iron or non alloy steel	7213 10 00; 7213 20 00; 7213 91; 7213 99
Other bars and rods or iron and non alloy steel	7214 20 00; 7214 30 00; 7214 91; 7214 99; 7215 90 10
Angles, shapes and sections of iron or non alloy steel	7216 10 00; 7216 21 00; 7216 22 00; 7216 31; 7216 32; 7216 33; 7216 40; 7216 50; 7216 99 10
Stainless steel	7218 10 00; 7218 91 11; 7218 91 19; 7218 99 11; 7218 99 20
Flat rolled products of stainless steel	7219 11 00; 7219 12; 7219 13; 7219 14; 7219 21; 7219 22; 7219 23 00; 7219 24 00; 7219 31 00; 7219 32; 7219 33; 7219 34; 7219 35; 7219 90 10; 7220 11 00; 7220 12 00; 7220 20 10; 7220 90 11; 7220 90 31
Bars and rods of stainless steel	7221 00; 7222 11; 7222 19; 7222 30 10; 7222 40 10; 7222 40 30
Flat rolled products of other alloy steel	7225 11 00; 7225 19; 7225 20 20; 7225 30 00; 7225 40; 7225 50 00; 7225 91 10; 7225 92 10; 7225 99 10; 7226 11 10; 7226 19 10; 7226 19 30; 7226 20 20; 7226 91; 7226 92 10; 7226 93 20; 7226 94 20; 7226 99 20
Bars and rods of other alloys steels	7224 10 00; 7224 90 01; 7224 90 05; 7224 90 08; 7224 90 15; 7224 90 31; 7224 90 39; 7227 10 00; 7227 20 00; 7227 90; 7228 10 10; 7228 10 30; 7228 20 11; 7228 20 19; 7228 20 30; 7228 30 20; 7228 30 41; 7228 30 49; 7228 30 61; 7228 30 69; 7228 30 70; 7228 30 89; 7228 60 10; 7228 70 10; 7228 70 31; 7228 80
Sheet piling	7301 10 00
Rails and cross ties	7302 10 31; 7302 10 39; 7302 10 90; 7302 20 00; 7302 40 10; 7302 10 20
Seamless tubes, pipes and hollow profiles	7303; 7304
Welded iron or steel tubes and pipes, the external diameter of which exceeds 406,4 mm	7305

(1) OJ L 279, 23.10.2001, p. 1.

ANNEX C

DEFINITION OF MOTOR VEHICLE INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The 'motor vehicle industry' means the development, manufacture and assembly of 'motor vehicles', 'engines' for motor vehicles and 'modules or sub systems' for such vehicles or engines, either direct by a manufacturer or by a 'first tier component supplier' and, in the latter case, only in the context of an 'overall project'.

(a) Motor vehicles

The term 'motor vehicles' means passenger cars, vans, trucks, road tractors, buses, coaches and other commercial vehicles. It does not include racing cars, vehicles intended for off road use (for example, vehicles designed for use on snow or for carrying persons on golf courses), motorcycles, trailers, agricultural and forestry tractors, caravans, special purpose vehicles (for example, firefighting vehicles, mobile workshops), dump trucks, works' trucks (for example, forklift trucks, straddle carrier trucks and platform trucks) and military vehicles intended for armies.

(b) Engines for motor vehicles

The term 'motor vehicle engines' means compression and spark ignition engines as well as electric motors and turbine, gas, hybrid or other engines for motor vehicles.

(c) Modules and sub systems

A 'module' or a 'sub system' means a set of primary components intended for a vehicle or engine which is produced, assembled or fitted by a first tier component supplier and supplied through a computerised ordering system or on a just in time basis. Logistical supply and storage systems and subcontracted complete operations which form part of the production chain, such as the painting of sub assemblies, should likewise be classified among these modules and sub systems.

(d) First tier component suppliers

A 'first tier component supplier' means a supplier, whether independent or not, supplying a manufacturer, sharing responsibility for design and development (12), and manufacturing, assembling or supplying a vehicle manufacturer during the manufacturing or assembly stage with sub assemblies or modules. As industrial partners, such suppliers are often linked to a manufacturer by a contract of approximately the same duration as the life of the model (for example, until the model is restyled). A first tier component supplier may also supply services, especially logistical services, such as the management of a supply centre.

(e) Overall project

A manufacturer may, on the actual site of the investment or in one or several industrial parks in fairly close geographical proximity (13), integrate one or more projects of first tier component suppliers for the supply of modules or sub systems for the vehicles or engines being produced. An 'overall project' means one which groups together such projects. An overall project lasts for the life of the vehicle manufacturer's investment project. An investment of one first tier component supplier is integrated within the definition of a global project if at least half the output resulting from that investment is delivered to the manufacturer concerned at the plant in question.

ANNEX D

DEFINITION OF SYNTHETIC FIBRES INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The synthetic fibres industry is defined, for the purposes of the multisectoral framework, as:

- extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end uses, or
- polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used, or
- 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.

ANNEX E

NOTIFICATION FORM ⁽¹⁾

SECTION 1 — MEMBER STATE

1.1. Information on notifying public authority:

1.1.1. Name and address of notifying authority.

1.1.2. Name, telephone, fax and e mail address of, and position held by, the person(s) to be contacted in case of further inquiry.

1.2. Information of contact in permanent representation:

1.2.1. Name, telephone, fax and e mail address of, and position held by, the person to be contacted in case of further inquiry.

SECTION 2 — AID RECIPIENT

2.1. Structure of the company or companies investing in the project:

2.1.1. Identity of aid recipient.

2.1.2. If the legal identity of the aid recipient is different from the undertaking(s) that finance(s) the project or that receive(s) the aid, describe also these differences.

2.1.3. Identify the parent group of the aid recipient, describe the group structure and ownership structure of each parent company.

2.2. For a company or companies investing in the project, provide the following data for the last three financial years:

2.2.1. Worldwide turnover, EEA turnover, turnover in Member State concerned.

2.2.2. Profit after tax and cash flow (on a consolidated basis).

2.2.3. Employment worldwide, at EEA level and in Member State concerned.

2.2.4. Market breakdown of sales in the Member State concerned, in the rest of the EEA and outside the EEA.

2.2.5. Audited financial statements and annual report for the last three years.

2.3. If the investment takes place in an existing industrial location, provide the following data for the last three financial years of that entity:

2.3.1. Total turnover.

2.3.2. Profit after tax and cash flow.

2.3.3. Employment.

2.3.4. Market breakdown of sales: in the Member State concerned, in the rest of the EEA and outside the EEA.

⁽¹⁾ For aid granted outside authorised schemes, the Member State must provide information detailing the beneficial effects of the aid on the assisted area concerned.

SECTION 3 — PROVISION OF PUBLIC ASSISTANCE

For each measure of proposed public assistance, provide the following:

3.1. Details:

3.1.1. Scheme title (or indicate if it is an ad hoc aid).

3.1.2. Legal basis (law, decree, etc.).

3.1.3. Public entity providing the assistance.

3.1.4. If the legal basis is an aid scheme approved by the Commission, provide the date of the approval and the State aid case reference number.

3.2. Form of the proposed assistance:

3.2.1. Is the proposed assistance a grant, interest subsidy, reduction in social security contributions, tax credit (relief), equity participation, debt conversion or write off, soft loan, deferred tax provision, amount covered by a guarantee scheme, etc.?

3.2.2. Provide the conditions attached to the payment of the proposed assistance.

3.3. Amount of the proposed assistance:

3.3.1. Nominal amount of support and its gross and net grant equivalent.

3.3.2. Is the assistance measure subject to corporate tax (or other direct taxation)? If only partially, to what extent?

3.3.3. Provide a complete schedule of the payment of the proposed assistance. For the package of proposed public assistance, provide the following:

3.4. The characteristics of the assistance measures:

3.4.1. Are any of the assistance measures of the overall package not yet defined? If yes, specify.

3.4.2. Indicate which of the abovementioned measures does not constitute State aid and for what reason(s).

3.5. Financing from Community sources (EIB, ECSC instruments, Social Fund, Regional Fund, other):

3.5.1. Are some of the abovementioned measures to be co-financed by Community funds? Explain.

3.5.2. Is some additional support for the same project to be requested from any other European or international financing institutions? If so, for what amounts?

3.6. Cumulation of public assistance measures:

3.6.1. Estimated gross grant equivalent (before taxation) of the combined aid measures.

3.6.2. Estimated net grant equivalent (after taxation) of the combined aid measures.

SECTION 4 — ASSISTED PROJECT

4.1. Location of the project:

4.1.1. Specify the region and the municipality as well as the address.

- 4.2. Duration of the project:
- 4.2.1. Specify the start date of the investment project as well as the completion date of the investment.
 - 4.2.2. Specify the planned start date of the new production and the year by which full production may be reached.
- 4.3. Description of the project:
- 4.3.1. Specify the type of the project and whether it is a new establishment or a capacity expansion or other.
 - 4.3.2. Provide a short general description of the project.
- 4.4. Breakdown of the project costs:
- 4.4.1. Specify the total cost of capital expenditure to be invested and depreciated over the lifetime of the project.
 - 4.4.2. Provide a detailed breakdown of the capital and non capital (2) expenditure associated with the investment project.
- 4.5. Financing of total project costs:
- 4.5.1. Indicate the financing of the total cost of the investment project.

SECTION 5 — PRODUCT AND MARKET CHARACTERISTICS

- 5.1. Characterisation of product(s) envisaged by the project:
- 5.1.1. Specify the product(s) that will be produced in the aided facility upon the completion of the investment and the relevant (sub)sector(s) to which the product(s) belong(s) (indicate the Prodcom code or CPA nomenclature for projects in the service sectors).
 - 5.1.2. What product(s) will it replace? If these replaced products are not produced at the same location, indicate where they are currently produced.
 - 5.1.3. What other product(s) can be produced with the same new facilities at little or no additional cost?
- 5.2. Capacity considerations:
- 5.2.1. Quantify the impact of the project on the aid recipient's total viable capacity in the EEA (including at group level) for each of the product(s) concerned (in units per year in the year preceding the start year and on completion of the project).
 - 5.2.2. Provide an estimate of the total capacity of all EEA producers for each of the products concerned.
- 5.3. Market data:
- 5.3.1. Provide for each of the last six financial years data on apparent consumption of the product(s) concerned. If available, include statistics prepared by other sources to illustrate the answer.
 - 5.3.2. Provide for the next three financial years a forecast of the evolution of apparent consumption of the product(s) concerned. If available, include statistics prepared by independent sources to illustrate the answer.
 - 5.3.3. Is the relevant market in decline and for what reasons?
 - 5.3.4. An estimate of the market shares (in value) of the aid recipient or of the group to which the aid recipient belongs in the year preceding the start year and on completion of the project.
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Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty

(2002/C 152/03)

(Text with EEA relevance)

1. INTRODUCTION

1. By virtue of its Article 97, the Treaty establishing the European Coal and Steel Community (ECSC Treaty) expires on 23 July 2002 ⁽¹⁾. This means in principle that as from 24 July 2002 the sectors previously covered by the ECSC Treaty and the procedural rules and other secondary legislation derived from the ECSC Treaty will be subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty ⁽²⁾.

2. The purposes of this Communication are

— in its section 2, to summarise for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime,

— in its section 3, to explain how the Commission intends to deal with specific issues raised by the transition from the ECSC regime to the EC regime in the areas of antitrust ⁽³⁾, merger control ⁽⁴⁾ and State aid control.

3. The principles that underlie the competition rules of the two Treaties are similar. Articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7) of the ECSC Treaty. Furthermore, practices under the two Treaties have been converging for many years. In its Twentieth Report on Competition Policy (1990) ⁽⁵⁾, the Commission announced that the time had come to align the enforcement of ECSC competition rules as much as possible with the practice under the EC Treaty. In 1998, it published a notice ⁽⁶⁾ dealing with the alignment of procedures for processing mergers under the ECSC and EC Treaties. In practical terms, the changes, both substantial and procedural, arising from the expiry of the ECSC Treaty are likely to be limited in scope. The objective of this Communication is to facilitate the changeover by setting out how certain situations will be dealt with in the transition from the ECSC to the EC regime. This Communication is made without prejudice to

the interpretation of the ECSC rules and EC rules by the Court of First Instance and the European Court of Justice.

2. THE MOST IMPORTANT CHANGES DUE TO THE EXPIRY OF THE ECSC TREATY

2.1. Antitrust

2.1.1. Jurisdiction

4. Under the ECSC regime, as the Commission had exclusive jurisdiction, the national competition authorities and national courts could not apply either Articles 65 and 66 ECSC Treaty ⁽⁷⁾ or their national competition rules to deal with coal and steel cases.

5. With the transition to the EC regime, the national authorities and courts responsible for competition will become competent ⁽⁸⁾ to apply the European competition rules in the coal and steel sectors as the relevant provisions of the EC Treaty have direct effect, with the exception of Article 81(3), for which the Commission retains at present sole competence ⁽⁹⁾. Thus, under the principles of the EC regime, the Commission and the national authorities and courts will have parallel powers to apply Community competition law ⁽¹⁰⁾.

6. It should also be noted that, unlike Articles 65 and 66(7) ECSC Treaty, which did not include any conditions relating to effect on trade, Articles 81 and 82 EC Treaty apply only if trade between Member States is affected. Thus, where agreements or practices restricting competition, or an abuse of a dominant position, do not affect trade between Member States, the national competition authorities and the national courts will, from 24 July 2002, be authorised to apply their national competition rules in the field of coal and steel ⁽¹¹⁾.

7. The national competition authorities and the national courts, which had no powers to apply competition law under the ECSC regime, will now be able to apply either national law and Community law or, where trade between Member States is not affected, only the relevant national law.

2.1.2. Substantive antitrust rules

8. As regards the question of an appreciable restriction of competition under Article 81(1) of the EC Treaty, the Commission would first point out that the policy concerning agreements of minor importance in terms of market share⁽¹²⁾ (agreements that are not therefore covered by Article 81(1)⁽¹³⁾) will apply in full to the coal and steel sectors as from 24 July 2002.
9. Under the ECSC regime, joint ventures have generally been regarded as being covered by the provisions on concentrations (Article 66(1) to (6) of the ECSC Treaty)⁽¹⁴⁾. Joint ventures notified after 23 July 2002 that do not have the characteristics of a 'full-function' joint venture within the meaning of Regulation (EEC) No 4064/89⁽¹⁵⁾ will be regarded as agreements within the meaning of Article 81 EC Treaty⁽¹⁶⁾. Agreements concluded by such undertakings will therefore be covered by the relevant provisions of Regulation No 17⁽¹⁷⁾.
10. The system requiring price lists and conditions of sale to be notified to the Commission and made public will be abolished⁽¹⁸⁾. Effectively, the undertakings concerned will no longer be required systematically to communicate such data to the Commission before making use of it⁽¹⁹⁾.

2.1.3. Procedural rules relating to antitrust

11. The Commission has for many years⁽²⁰⁾ endeavoured to apply the same principles, *inter alia* at procedural level, to practices under the ECSC Treaty and to those under the EC Treaty: thus important procedural features such as access to the file, hearings or the closing of a case with a comfort letter were introduced into ECSC practice on the basis of EC practice. The transition to the EC regime will enhance the transparency of these practices.
12. As regards agreements restricting competition, two innovative factors will be introduced into the sectors concerned: the requirement, where parties apply to the Commission for negative clearance or exemption, that the agreements be notified on form A/B⁽²¹⁾ will be officially introduced⁽²²⁾. In addition, prior consultation of an Advisory Committee will be required before the adoption of any Commission decision mentioned in Article 10 of Regulation No 17.
13. Undertakings are also informed that the provisions implementing the ban on abuse of a dominant position are more straightforward under the EC regime than under the ECSC regime. Indeed, under the Article 82 EC Treaty procedure, the Commission can immediately adopt directly applicable decisions, whereas under Article 66(7) ECSC Treaty, it must first send the undertaking concerned an ECSC recommendation and only then can it take a decision in consultation with the Member State concerned.

2.2. Merger control

2.2.1. Jurisdiction

14. As far as jurisdiction is concerned, the ECSC Treaty gives the Commission exclusive jurisdiction over all concentrations involving coal and steel undertakings. On the other hand, the EC Merger Regulation⁽²³⁾ gives the Commission jurisdiction only over concentrations involving undertakings whose turnover exceeds certain thresholds. Therefore, some operations which would have required prior authorisation from the Commission under ECSC rules, but do not meet the thresholds under the EC Merger Regulation, will after the expiry of the ECSC Treaty fall outside the Commission's jurisdiction and fall to be examined by the national authorities in so far as national merger rules exist.

2.2.2. Substantive law relating to concentrations

15. In relation to substance, the tests under Article 66(2) ECSC Treaty⁽²⁴⁾ and under Article 2 EC Merger Regulation⁽²⁵⁾ though not expressed in the same language, are similar.

2.2.3. Procedural law relating to concentrations

16. The procedures for the treatment of concentrations have been aligned to a large extent since March 1998 when the Commission started to apply the provisions of its Notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties⁽²⁶⁾.
17. However, the timing of notifications under the ECSC regime and the EC regime is different. The ECSC rules allow notification at any time, while the proposed concentration cannot, however, be legally completed without the prior authorisation of the Commission. The EC Merger Regulation requires parties to notify within one week of the 'triggering event', i.e. the moment when the operation becomes irrevocable. The Commission must then adopt its decision(s) within the time limits prescribed by the EC Merger Regulation, otherwise the proposed operation is automatically authorised.

2.3. Control of State aid to the steel industry

2.3.1. Substantive rules relating to steel aid

18. As for the notion of State aid, Article 4(c) ECSC Treaty does not require the affectation of trade between Member States for a measure to be considered State aid, contrary to Article 87 EC Treaty. In practice, this difference will be, however, of very limited importance given the intense trade between Member States in steel products.

19. Under the EC rules, the criteria for assessment of compatibility of State aid with the common market will be in summary the following:

- Regional investment aid will continue to be forbidden⁽²⁷⁾. This prohibition also covers the granting of regional aid supplements to small and medium-sized enterprises (SMEs).
- Rescue and restructuring aid will continue to be forbidden⁽²⁸⁾.

— Under the ECSC rules, environment aid was permitted in accordance with the Community guidelines on State aid for environmental protection adopted in 1994⁽²⁹⁾ and with the annex to the Steel Aid Code⁽³⁰⁾. From 24 July 2002, the Community guidelines on State aid for environmental protection adopted in 2000 will apply⁽³¹⁾. The most important difference of these guidelines in comparison with the guidelines applicable to the steel industry before the expiry of the ECSC Treaty is that aid granted for conforming with standards will no longer be allowed (except for aid to SMEs in limited conditions).

— Research and development aid will continue to be permitted in line with the Community framework for State aid for research and development⁽³²⁾.

— Aid in connection with closures will continue to be permitted⁽³³⁾.

— Aid for small and medium-sized enterprises at aid rates of up to 15 % and 7,5 % respectively will be permitted in line with Commission Regulation (EC) No 70/2001⁽³⁴⁾ (except for large individual aid grants as defined in Article 6 of that Regulation which will continue to be forbidden).

— *De-minimis* aid will be permitted in line with Commission Regulation (EC) No 69/2001⁽³⁵⁾.

— Training aid will be permitted in line with Commission Regulation (EC) No 68/2001⁽³⁶⁾.

— Employment aid will be permitted in line with the guidelines on aid to employment⁽³⁷⁾.

2.3.2. Procedural rules relating to steel aid

20. Council Regulation (EC) No 659/1999⁽³⁸⁾ will apply as from 24 July 2002. This will not entail major changes

as compared with the provisions established in Article 6 of the Steel Aid Code⁽³⁹⁾.

21. As for notification requirements, unless otherwise established, aid granted to the steel industry under schemes authorised by the Commission will no longer be subject to the prior notification requirement established in the Steel Aid Code. The same applies to aid block-exempted by virtue of Commission Regulations (EC) No 70/2001⁽⁴⁰⁾ and (EC) No 68/2001⁽⁴¹⁾.

2.4. Control of State aid to the coal industry

2.4.1. Substantive rules relating to steel aid

22. Until the expiry of the ECSC Treaty, State aid to the coal industry will be assessed on the basis of the rules as laid down in Decision 3632/93/ECSC⁽⁴²⁾.

23. On 25 July 2001, the Commission adopted a proposal for a Council Regulation on State aid for the coal industry after the expiry of the ECSC Treaty⁽⁴³⁾. The proposal is based on Articles 87(3)(e) and 89 EC Treaty. It has to be adopted by the Council, after an opinion from the European Parliament⁽⁴⁴⁾. It would apply from 24 July 2002. The draft Regulation stipulates that aid covering costs for the year 2002 will, on the basis of a reasoned request by the Member State, continue to be subject to the rules and principles laid down in Decision No 3632/93/ECSC.

2.4.2. Procedural rules relating to coal aid

24. According to the proposal adopted by the Commission on 25 July 2001, in addition to the provisions of Article 88 EC Treaty and Council Regulation (EC) No 659/1999, State aid to the coal industry would be subject to special rules of notification, appraisal and authorisation as laid down in the State aid regime proposed by the Commission.

3. SPECIFIC ISSUES RAISED BY THE TRANSITION FROM THE ECSC REGIME TO THE EC REGIME

25. When assessing the impact of the expiry of the ECSC Treaty on cases which would so far have been covered by the ECSC rules, three situations have to be distinguished:

- First, cases, which have been completed in all factual and legal respects on or before 23 July 2002, will be subject to the ECSC rules only and are therefore unproblematic.

- Second, cases, in which all the relevant events occur after 23 July 2002, will be subject to the EC rules only and are therefore unproblematic, too.
 - Third, cases, which from a factual or legal point of view started before the expiry of the ECSC Treaty and which in some way or other continue after the expiry, may raise issues specifically caused by the expiry of the ECSC Treaty. The remaining part of this Communication sets out how the Commission intends to deal with such cases.
26. With regard to procedural law, the basic principle for all three areas (antitrust, merger control, State aid control) is that the rules applicable are those in force at the time of taking the procedural step in question ⁽⁴⁵⁾. This means that as from 24 July 2002 on, the Commission will exclusively apply the EC procedural rules in all pending and new cases. Unless otherwise stated in this Communication, procedural steps validly taken under the ECSC rules before expiry of the ECSC Treaty will after the expiry be taken to have fulfilled the requirements of the equivalent procedural step under the EC rules.
- 3.1. Antitrust**
- 3.1.1. *The position which restrictive agreements/concerted practices exempted by the Commission on the basis of Article 65(2) ECSC Treaty before or on 23 July 2002 will have after 23 July 2002*
27. From 24 July 2002, all the EC competition rules will apply to those agreements or practices which have previously been authorised or the subject of a comfort letter adopted under the ECSC rules. Authorisations granted under the ECSC regime will also cease to be valid upon expiry of the ECSC Treaty.
28. It will therefore be for the undertakings concerned to review the legality of their agreements or practices in the light of Articles 81 and 82 EC Treaty. The Commission draws attention to the many block exemptions and guidelines applicable in this area. In addition, in view of the similarity of Articles 65(2) ECSC Treaty and 81(3) EC Treaty and the convergence policy applied by the Commission when examining ECSC cases over the years, the Commission informs undertakings that it does not intend, after 23 July 2002, to initiate proceedings under Article 81 EC Treaty in respect of agreements previously authorised under the ECSC regime and that, under the circumstances, it does not intend to impose any financial penalty on undertakings which are party to such agreements. This presupposes that, where Commission approval was subject to conditions or obligations, these continue to be complied with by the parties concerned.
29. The Commission reserves the right, however, under the EC rules, to initiate proceedings in respect of the future implementation of the practices and agreements referred to in the preceding paragraph if, owing to substantial factual or legal developments, such practices and agreements are clearly not eligible for exemption under Article 81(3) EC Treaty. In that case, the Commission would respect the legitimate expectation of the undertakings concerned and would intervene only in the following cases: where there has been a change in any of the facts which were basic to the making of the authorising decision; where the parties commit a breach of any condition or obligation attached to the decision; where the decision is based on incorrect information or was induced by deceit; where the parties abuse the authorisation pursuant to Article 65(2) of the ECSC Treaty granted to them by the decision.
- 3.1.2. *Notification cases in which the Commission started its procedure before expiry of the ECSC Treaty and in which this procedure is still pending after 23 July 2002*
30. As regards notifications made under the ECSC regime that are still being examined at the time of the transition, the Commission will apply Article 65(2) of the ECSC Treaty as regards the period before the date of expiry of that Treaty and Article 81(3) of the EC Treaty as regards the period thereafter. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law.
- 3.1.3. *Application of Articles 65 ECSC Treaty and 81 EC Treaty to other types of agreements*
31. If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law ⁽⁴⁶⁾.
- 3.2. Merger control**
- 3.2.1. *Clearance decisions with conditions/obligations adopted by the Commission under the ECSC Treaty before expiry of that Treaty, compliance with these conditions/obligations to be monitored after 23 July 2002*
32. Where a concentration has been cleared under the ECSC Treaty subject to conditions and/or obligations, which continue after 23 July 2002, and these conditions and/or obligations are not satisfactorily fulfilled after 23 July 2002, the Commission will take action under the appropriate provisions of the EC Merger Regulation ⁽⁴⁷⁾.

33. Similarly, if it proves necessary to modify after 23 July 2002 conditions and/or obligations based on commitments given by undertakings in order to secure the authorisation of their concentrations prior to the expiry of the ECSC Treaty, the Commission will take action as if the original authorisation decision had been adopted under the EC Merger Regulation.

3.2.2. Concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty

34. Three principal possibilities arise in relation to concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty:

— Where the notified ECSC case does not meet the thresholds of the EC Merger Regulation, there is no longer a case with the Commission. In this situation, the parties must as of 24 July 2002 notify the case to the competent national authorities, where appropriate.

— If the notified ECSC case meets the thresholds of the EC Merger Regulation, its instruction by the Commission will continue under the EC Merger Regulation and it will be treated as though it had been originally notified under that Regulation, if the triggering event in the sense of that Regulation took place on or before 23 July 2002. If the triggering event occurs afterwards, the operation should be renotified.

— In cases where a triggering event has occurred and a case which meets the thresholds under the EC Merger Regulation has entered the informal second phase (initiated by means of a letter setting out the Commission's concerns) at the expiry of the ECSC Treaty, but where a statement of objections has not yet been adopted, the Commission will adopt a decision under Article 6(1)(c) EC Merger Regulation as soon as is practicably possible after the expiry of the ECSC Treaty. The Commission will endeavour in such cases to adhere to the timetable set out in the EC Merger Regulation to the greatest extent possible, counting from the date of notification. In particular, it will endeavour to ensure that the statement of objections is sent out at the appropriate time and that the overall five-month deadline for the adoption of a final decision is respected.

3.2.3. Form of notification

35. The approach to pending notified ECSC transactions outlined above only applies to ECSC notifications made

using Form CO and which are complete. Furthermore, it is clear from the EC Merger Regulation itself that its time periods only start to run once the Commission is in possession of a complete notification, in the form provided for ⁽⁴⁸⁾.

3.2.4. Operations exempted from the requirement of prior authorisation under Article 66 ECSC Treaty

36. Decision No 25/67/ECSC ⁽⁴⁹⁾ exempts certain operations from the requirement of prior authorisation under Article 66 ECSC Treaty. However neither the ECSC Treaty nor Decision No 25/67/ECSC set out when the exemption takes effect. There is no equivalent under the ECSC rules of the 'triggering event' under the EC Merger Regulation ⁽⁵⁰⁾. When an operation, which is exempted by Decision No 25/67/ECSC, has reached an irrevocable stage (for instance if the sale and purchase agreements have been finalised and signed) on or before 23 July 2002, then this operation remains exempted from the requirement of prior authorisation under the EC Merger Regulation. On the other hand, if the operation has not reached an irrevocable stage before 24 July 2002, the operation must be notified if necessary to the Commission under the EC Merger Regulation upon the occurrence of the triggering event.

3.2.5. Non-exempted ECSC transaction that has not been notified before expiry of the ECSC Treaty

37. Where a transaction which is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty has not been notified before expiry of that Treaty, the parties must notify the transaction under the EC Merger Regulation if the conditions for such notification are satisfied. Where the transaction is not notified in such circumstances, fines may be imposed for non-notification in accordance with Article 14(1)(a) of the EC Merger Regulation as of 31 July 2002 (i.e. one week after the EC Merger Regulation applied).

3.2.6. Non-exempted ECSC transaction that has been implemented and not been notified before expiry of the ECSC Treaty

38. Where a transaction, which in the sense of the preceding point 3.2.5. is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty and has not been notified, has in addition been implemented before the expiry of the ECSC Treaty, fines may be imposed for non-authorised implementation of the concentration in accordance with Article 14(2)(b) of the EC Merger Regulation as of 24 July 2002, provided the transaction comes within the scope of that Regulation ⁽⁵¹⁾.

3.2.7. Joint ventures

39. The practice under the ECSC Treaty has been to treat most joint ventures (with the exception of joint buying, joint selling and specialisation agreements and agreements strictly analogous to them) as concentrations under the provisions of Article 66. Therefore, certain operations which are subject to the requirement of prior authorisation under Article 66 ECSC Treaty may not be notifiable under the EC Merger Regulation, for example if they are not full function ⁽⁵²⁾. If notifications of such joint ventures which would not be notifiable under the EC Merger Regulation are pending at the time of the expiry of the ECSC Treaty, the notifications could, in appropriate cases be converted under the provisions of Article 5 of the Implementing Regulation ⁽⁵³⁾ into notifications under Regulation No 17.
40. The expiry of the ECSC Treaty will have no effect on joint ventures (full function or otherwise) authorised under Article 66(2) ECSC Treaty on or before 23 July 2002 or benefiting from an exemption within the meaning of paragraph 36 above.
41. After the expiry of the ECSC Treaty, Article 2(4) of the EC Merger Regulation will be applied to concentrations in the coal and steel sectors which fall within the scope of that Regulation. This Article, which has no equivalent in the ECSC rules, provides that where the creation of a full-function joint venture constituting a concentration in the sense of that Regulation has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 81 EC Treaty ⁽⁵⁴⁾.

3.3. Control of State aid to the steel industry

42. With regard to State aid authorised by the Commission under the Steel Aid Code ⁽⁵⁵⁾ or Article 95 ECSC Treaty subject to conditions, the Commission will after 23 July 2002 continue to monitor their fulfilment. In case of non-compliance, Article 88 EC Treaty will be applicable.
43. Where the aid was notified before or on 31 December 2001 ⁽⁵⁶⁾ and the Commission has initiated the procedure of Article 6(5) of the Steel Aid Code, it will endeavour to adopt a decision at the latest on 23 July 2002 on the basis of the information available to it. However, if for objective reasons, this is not possible, the Commission will continue the investigation under the provisions of Regulation (EC) No 659/1999 and adopt a final decision under Article 88(2) EC Treaty.
44. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without

prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁵⁷⁾. According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

3.4. Control of State aid to the coal industry

45. After the expiry of the ECSC Treaty, the Commission will continue to monitor the application by the Member States of the decisions authorising State aid adopted under Decision No 3632/93/ECSC ⁽⁵⁸⁾. In case of non-compliance, the case will be investigated following the procedures as laid down in Regulation (EC) No 659/1999.
46. It is expected that the majority of State aid which covers costs prior to 23 July 2002 will be the subject of Commission decisions before the expiry of the ECSC Treaty. However, there may be cases where the Commission is not in a position to adopt a decision before the expiry of the ECSC Treaty. These possible cases, and the Commission's proposed course of action in respect of them, are as follows.
- In accordance with Article 9(4) of Decision No 3632/93/ECSC, the Commission has to decide on the measures notified by a Member State within three months of receipt of notification. It may consequently happen that aid notified less than three months before the expiry of the ECSC Treaty (i.e. notification after 23 April 2002) is not the subject of a Commission decision before the expiry of this Treaty. This could also be the case of a notification made earlier, if the Commission considered that the notification was insufficient and requested further information from the Member State or, having doubts about the compatibility of the aid, decided to initiate the procedure provided for under Article 88 ECSC Treaty.
 - If there has been no Commission decision when three months from notification have passed, the expiry of the ECSC Treaty means that the Member State does not have the right to implement the notified measure at the end of the three-month period referred to above, as it would have had were Article 9(4) Decision No 3632/93/ECSC still in force. Indeed, any notification presented by the Member State before the expiry of the ECSC Treaty, which has not been the subject of a formal Commission decision, will have to be considered obsolete (i.e. non-existent from a legal point of view) after 23 July 2002.

- The Member State would have to proceed with a new notification under the provisions of the EC Treaty and of the possible new Council Regulation⁽⁵⁹⁾ which, once adopted, would be applicable as from 24 July 2002. Alternatively, and more simply, the Member State could inform the Commission that the initial notification can be regarded as a newly submitted notification. The period in which the Commission will have to decide would start to run as of the date of this (new) notification. If such a case arose, the Commission would make the utmost efforts to ensure that a decision on the measure is adopted as soon as possible.
- The draft Council Regulation⁽⁶⁰⁾, currently under discussion⁽⁶¹⁾ and intended to be applicable after the expiry of the ECSC Treaty, stipulates that Member States will be able to opt, for aid covering costs for

2002, for the application of the rules and of the principles laid down in Decision No 3632/93/ECSC.

47. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the specific provisions in the Council Regulation currently under discussion⁽⁶²⁾. When assessing aid, which does not fall under that Regulation and which has been granted on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid⁽⁶³⁾. According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

⁽¹⁾ Article 97 ECSC Treaty provides: 'This Treaty is concluded for a period of 50 years from its entry into force.'

⁽²⁾ The question which rules are applicable to individual cases, which started before the expiry of the ECSC Treaty and are not fully completed by 23.7.2002, is tackled under section 3 below.

⁽³⁾ In this Communication, the term 'antitrust' refers to the prohibition of restrictive agreements between undertakings, decisions by associations of undertakings and concerted practices, as well as the prohibition of abuses of dominant positions (Articles 65 and 66(7) ECSC Treaty; Articles 81 and 82 EC Treaty).

⁽⁴⁾ In this communication, the term 'merger control' refers to the control of any concentrations no matter whether they are effected by mergers between previously independent undertakings or acquisition of control of other undertakings (see Article 66(1) ECSC Treaty and Article 3 Council Regulation (EEC) No 4064/89 as amended by Regulation (EC) No 1310/97).

⁽⁵⁾ European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.

⁽⁶⁾ Commission notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties (OJ C 66, 2.3.1998, p. 36).

⁽⁷⁾ See judgment of the European Court of Justice (ECJ) of 13.4.1994, Case C-128/92, *Banks*, [1994] ECR I-1209 at paragraphs 17 and 18.

⁽⁸⁾ Where national administrations are concerned, on condition that their national law allows them to apply Community law.

⁽⁹⁾ The proposed amendment of Council Regulation No 17 (COM(2000) 582 final of 27.9.2000), currently before the Council and the European Parliament, foresees to give the national competition authorities and the national courts the power to apply Articles 81 and 82 EC Treaty in full.

⁽¹⁰⁾ The details of the cooperation between the Commission and the competent national authorities are defined in the Notice on cooperation between the national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13.2.1993, p. 6) and in the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ C 313, 15.10.1997, p. 3).

⁽¹¹⁾ This does not of course prevent national law from applying in parallel with Community law where the condition of effect on trade is satisfied.

⁽¹²⁾ Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (OJ C 368, 22.12.2001, p. 13).

⁽¹³⁾ Provided they do not contain any 'hard core' restrictions.

⁽¹⁴⁾ However, in the case of undertakings whose object was a joint buying or a joint selling agreement, a specialisation agreement or agreements analogous to specialisation agreements, Article 65(2) ECSC Treaty was applicable.

⁽¹⁵⁾ Concept described in the Commission notice on the concept of full-function joint ventures under Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998).

⁽¹⁶⁾ The sole exception will be transactions which benefited from an exemption from the requirement of prior authorisation under Article 66 of the ECSC Treaty and which have become irrevocable before 24 July 2002; see paragraph 36 below.

⁽¹⁷⁾ This will involve a modification of the timetable (there being much fewer rules on the time limits for the examination of such agreements by the Commission than for 'merger'-type procedures, except in the specific case of cooperative joint ventures 'of a structural character' where an accelerated procedure is established by Commission Regulation (EC) No 3385/94 of 21 December 1994), and of the criterion of compatibility of the agreement.

⁽¹⁸⁾ Pursuant to Article 60(2) ECSC Treaty, Decision No 4-53 of 12.2.1953 (OJ of the High Authority of 12.2.1953, p. 3) and, as regards coal only, Decision 72/443/ECSC of 22.12.1972 on alignment of prices for sales of coal in the common market (OJ L 297, 30.12.1972, p. 45). In practice, the implementation of this obligation had been gradually relaxed, but certain undertakings in the coal sector nonetheless continued to send this information to the Commission.

⁽¹⁹⁾ The removal of this requirement is without prejudice to the Commission's power to seek from the undertakings concerned all the information it requires to carry out the tasks assigned to it by the Treaty and Community law.

⁽²⁰⁾ European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.

⁽²¹⁾ Commission Regulation (EC) No 3385/94 of 21 December 1994.

- (22) The Commission had already asked the undertakings concerned to use a simplified form for their applications for authorisation (Twenty-first Report on Competition Policy (1991), paragraph 138).
- (23) Council Regulation (EEC) No 4064/89 as amended by Regulation (EC) No 1310/97.
- (24) Article 66(2) ECSC Treaty provides: 'The Commission shall grant the authorisation referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:
— to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products, or
— to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets'.
- (25) Article 2(2) EC Merger Regulation provides: 'A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'.
- (26) OJ C 66, 2.3.1998, p. 36.
- (27) Communication from the Commission, Multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8).
- (28) Communication from the Commission, Rescue and restructuring aid and closure aid for the steel sector, (OJ C 70, 19.3.2002, p. 21).
- (29) OJ C 72, 10.3.1994, p. 3.
- (30) Commission Decision No 2496/96/ECSC of 18.12.1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (31) OJ C 37, 3.2.2001, p. 3.
- (32) OJ C 45, 17.2.1996, p. 5.
- (33) Communication from the Commission, Rescue and restructuring aid and closure aid for the steel sector, OJ C 70, 19.3.2002, p. 21.
- (34) OJ L 10, 13.1.2001, p. 33.
- (35) OJ L 10, 13.1.2001, p. 30.
- (36) OJ L 10, 13.1.2001, p. 20.
- (37) OJ C 334, 12.12.1995, p. 4. New rules are under preparation.
- (38) Council Regulation (EC) No 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
- (39) Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (40) OJ L 10, 13.1.2001, p. 33.
- (41) OJ L 10, 13.1.2001, p. 20.
- (42) Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ L 329, 30.12.1993, p. 12).
- (43) OJ C 304, 30.10.2001, p. 202.
- (44) The Council reached a political agreement on this proposal on 7 June 2002.
- (45) Judgment of the ECJ of 6.7.1993 in Joined Cases C-121/91 and C-122/91, *CT Control v Commission*, [1993] ECR I-3873 at paragraph 22; Judgment of the ECJ of 12.11.1981 in Joined Cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Salumi*, [1981] ECR 2735 at paragraph 9.
- (46) Including the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).
- (47) Articles 6(3) and 8(5) of the EC Merger Regulation.
- (48) Article 10(1) EC Merger Regulation, Articles 3 and 4 of the Implementing Regulation (Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1)).
- (49) Decision No 25-67 of 22 June 1967 laying down in implementation of Article 66(3) of the ECSC Treaty a regulation concerning exemption from prior authorisation (OJ 154, 14.7.1967, p. 11). English special edition: Series-I 67, p. 186.
- (50) The 'triggering event' within the meaning of the EC Merger Regulation is defined as the moment when the operation becomes irrevocable, see above paragraph 17.
- (51) As regards implementation without notification or prior authorisation of a non-exempted ECSC concentration, see also Article 66(6) of the ECSC Treaty.
- (52) Commission notice on the concept of full function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 1).
- (53) Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1).
- (54) Where a concentration in the coal or steel sectors was implemented without authorisation before expiry of the ECSC Treaty and the undertakings involved actually engaged in anti-competitive practices inconsistent with Article 65 ECSC Treaty, the principles set out in point 3.1.3 will apply.
- (55) Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (56) Under Article 6(1) and (2) of the Steel Aid Code notifications of aid plans must be lodged with the Commission at the latest by 31 December 2001.
- (57) OJ C 119, 22.5.2002, p. 22.
- (58) Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ L 329, 30.12.1993, p. 12).
- (59) See paragraph 23 above.
- (60) See paragraph 23 above.
- (61) See footnote 44.
- (62) See paragraph 23 above.
- (63) OJ C 119, 22.5.2002, p. 22.

Communication from the Commission**Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks****(Text with EEA relevance)**

(2009/C 235/04)

1. INTRODUCTION

1. Broadband connectivity is a key component for the development, adoption and use of information and communication technologies (ICT) in the economy and in society. Broadband is of strategic importance because of its ability to accelerate the contribution of these technologies to growth and innovation in all sectors of the economy and to social and territorial cohesion. The Commission actively supports the widespread availability of broadband services for all European citizens as laid down in the Lisbon strategy and subsequent Communications ⁽¹⁾.

2. On 26 November 2008, the Commission adopted a European Economic Recovery Plan (the 'Recovery Plan') ⁽²⁾ as a means to drive Europe's recovery from the financial and economic crisis. The broadband strategy is an important part of the Recovery Plan ⁽³⁾. In particular, the aim of the plan is to boost EU investment in defined strategic sectors, such as broadband, that can help support the economy in the short run and over the longer term create essential infrastructures for sustainable economic growth.

3. As part of the Recovery Plan and with the aim of achieving 100 % high speed Internet coverage for all citizens by 2010, the Commission decided to inject EUR 1,02 billion into the European Agricultural Fund for Rural Development (EAFRD). Part of this amount will be used for deploying broadband infrastructures in rural areas to help rural areas get online, create new jobs and help business grow further ⁽⁴⁾. In addition, a number of Member States have already announced plans to support investment not only in high-speed broadband infrastructure for rural and underserved areas, but also to accelerate the deployment of very high speed, next-generation access ('NGA') ⁽⁵⁾ networks in large areas of their territories, including urban areas or areas already served by basic broadband infrastructures.

4. It should be recalled that in the 'State aid Action Plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009' ⁽⁶⁾, the Commission noted that State aid measures can, under certain conditions, be effective tools for achieving objectives of common interest. In particular State aid can correct market failures, thereby improving the efficient functioning of markets and enhancing competitiveness. Further, where markets provide efficient outcomes but these are deemed unsatisfactory from a cohesion policy point of view, State aid may be used to obtain a more desirable, equitable market outcome. In particular, a well targeted State intervention in the broadband field can contribute to reducing the 'digital divide' ⁽⁷⁾ that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not.

⁽¹⁾ See for instance 'i2010 — A European Information Society for growth and employment', COM(2005) 229 final, 1 June 2005, 'eEurope 2005: An information society for all', COM(2002) 263 final, 'Bridging the broadband gap', COM(2006) 129.

⁽²⁾ Communication from the Commission to the European Council, COM(2008) 800.

⁽³⁾ Brussels European Council, 19 and 20 March 2009 Presidency Conclusions.

⁽⁴⁾ See Regulation (EC) No 473/2009 of 25 May 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (OJ L 144, 9.6.2009, p. 3).

⁽⁵⁾ For the purpose of this document NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks (see also below footnote 60).

⁽⁶⁾ COM(2005) 107 final.

⁽⁷⁾ During the past decade, Information and Communications Technologies (ICTs) have become accessible and affordable for the general public. The term 'digital divide' is most commonly used to define the gap between those individuals and communities that have access to the information technologies and those that do not. Although there are several reasons for this 'digital divide', the most important is the lack of an adequate broadband infrastructure. Looking at the regional dimension, the degree of urbanisation is an important factor for access to and use of ICTs. Internet penetration remains thus much lower in thinly populated areas throughout the European Union.

5. At the same time, it must be ensured that State aid does not crowd out market initiative in the broadband sector. If State aid for broadband were to be used in areas where market operators would normally choose to invest or have already invested, this could affect investments already made by broadband operators on market terms and might significantly undermine the incentives of market operators to invest in broadband in the first place. In such cases, State aid to broadband might become counterproductive to the objective pursued. The primary objective of State aid control in the field of broadband is to ensure that State aid measures will result in a higher level of broadband coverage and penetration, or at a faster rate, than would occur without the aid, and to ensure that the positive effects of aid outweigh its negative effects in terms of distortion of competition.
6. It should be recalled that the regulatory framework for electronic communications also deals with issues related to broadband access⁽⁸⁾. Thus wholesale broadband markets are to date subject to ex ante regulation in all Member States. In this regard, the Commission⁽⁹⁾ and the national authorities⁽¹⁰⁾ have already taken a number of initiatives that aim to address the new challenges that NGA networks raise from a regulatory point of view, in particular regarding access issues.
7. The present Guidelines summarise the Commission's policy in applying the State aid rules of the Treaty to measures that support the deployment of traditional broadband networks (Section 2) and also address a number of issues relating to the assessment of measures aiming to encourage and support the rapid roll-out of NGA networks (Section 3).
8. The Commission will apply the Guidelines set out in this Communication in the assessment of State aid to broadband, thereby increasing legal certainty and the transparency of its decision-making practice.

2. THE COMMISSION POLICY ON STATE AID FOR BROADBAND PROJECTS

2.1. The application of the State aid rules

9. The Commission has taken an overwhelmingly favourable view towards State measures for broadband deployment for rural and underserved areas, whilst being more critical for aid measures in areas where a broadband infrastructure already exists and competition takes place. Where State intervention to support broadband deployment satisfied the conditions of State aid within the meaning of Article 87(1), its compatibility has been assessed so far by the Commission mainly under Article 87(3). The Commission State aid policy towards State measures to support broadband network deployments can be summarised in Sections 2.2 and 2.3 below.

2.2. Article 87.1: Presence of aid

10. According to Article 87(1) of the Treaty establishing the European Community, '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'. It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met:

- (a) the measure has to be granted out of State resources;
- (b) it has to confer an economic advantage to undertakings;

⁽⁸⁾ See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21) and Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and inter-connection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7).

⁽⁹⁾ See Commission draft Recommendation 'on regulated access to Next Generation Access Networks (NGA)', at http://ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/nga/dr_recomm_nga.pdf

⁽¹⁰⁾ See for instance, European Regulators Group Statement on the development of NGA Access, ERG (08) 68, at http://www.erg.eu.int/doc/publications/erg_08_68_statement_on_nga_development_081211.pdf Ofcom, 'Delivering super fast broadband in the UK. Promoting investment and competition' Statement, 3 March 2009. See also the recent legislation adopted in France on 15 January 2009 to promote the deployment of fibre-based networks: *Journal Officiel de la république française*, 16 janvier 2009.

- (c) the advantage has to be selective and distort or threaten to distort competition;
- (d) the measure has to affect intra-Community trade.
11. As the Commission's State aid decision-making practice in the broadband field shows, public support for broadband projects often involves the presence of State aid within the meaning of Article 87(1) of the Treaty ⁽¹¹⁾.
12. First, the measures typically involve State resources (for instance, where the State supports broadband projects through subsidies, tax rebates or other types of preferential financing conditions) ⁽¹²⁾.
13. Second, as regards support granted for an economic activity, State measures supporting broadband deployment projects usually address the exercise of an economic activity (such as building, operating, and enabling access to broadband infrastructure including backhaul facilities and ground equipment, such as fixed, terrestrial wireless, satellite-based, or a combination thereof). However, in exceptional cases where the network thus financed is not used for commercial purposes (e.g. the network only provides broadband access to non-commercial websites, services and information) ⁽¹³⁾, such state intervention would not involve the granting of an economic advantage on undertakings, and consequently would not constitute State aid within the meaning of Article 87(1) of the Treaty.
14. Third, as regards the granting of an advantage, the aid is usually granted directly to investors ⁽¹⁴⁾ of the network, which in most cases are chosen by means of an open tender ⁽¹⁵⁾. While the use of a tender ensures that any aid is limited to the minimum amount necessary for the particular project, the financial support might enable the successful bidder to conduct a commercial activity on conditions which would not otherwise be available on the market. Indirect beneficiaries might include third party operators that obtain wholesale access to the infrastructure thus built, and also business users who get broadband connectivity under terms and conditions that would not apply without State intervention ⁽¹⁶⁾.
15. Fourth, as regards the selectivity criterion, State measures supporting the deployment of broadband networks are selective in nature in that they target undertakings which are active only in certain regions or in certain segments of the overall electronic communications services market. Moreover, concerning the distortion of competition, the intervention of the State tends to alter existing market conditions, in that a number of firms would now choose to subscribe to the services provided by the selected suppliers instead of existing, possibly more expensive alternative market-based solutions ⁽¹⁷⁾. Therefore, the fact that a broadband service becomes available, either at all or at a lower price than otherwise would have been the case, has the effect of distorting competition. Moreover, State support to broadband might reduce profitability and crowd out investment by market players that would otherwise be willing to invest in the targeted area or parts of it.
16. Finally, insofar as the State intervention is liable to affect service providers from other Member States, it also has an effect on trade since the markets for electronic communications services (including the wholesale and the retail broadband markets) are open to competition between operators and service providers ⁽¹⁸⁾.

⁽¹¹⁾ For a list of all Commission decisions taken under the State aid rules in the broadband field, see http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf

⁽¹²⁾ See also Section 2.2.2 on the application of the market economy investor principle.

⁽¹³⁾ See Commission Decision of 30 May 2007 in Case NN 24/07 — Czech Republic, *Prague Municipal Wireless Network*.

⁽¹⁴⁾ The term 'investors' denotes undertakings or electronic communications network operators that invest in the construction and deployment of broadband infrastructure.

⁽¹⁵⁾ The Commission has only approved one case of a measure that did not involve an open tender but which involved a tax credit scheme to support the roll-out of broadband in underserved areas of Hungary, see Decision N 398/05 — Hungary 'Development of Tax Benefit for Broadband'.

⁽¹⁶⁾ See for instance, Commission Decision N 570/07 — Germany, *Broadband in rural areas of Baden-Württemberg*; Decision N 157/06 — United Kingdom, *South Yorkshire Digital Region Broadband Project*; Decision N 262/06 — Italy, *Broadband for rural Tuscany*; Decision N 201/06 — Greece, *Broadband access development in underserved territories*; and Decision N 131/05 — United Kingdom, *FibreSpeed Broadband Project Wales*. Residential users, although also beneficiaries of such measures, are not however subject to the State aid rules since they are neither undertakings nor economic operators within the meaning of Article 87(1).

⁽¹⁷⁾ See Commission Decision N 266/08 — Germany, *Broadband in rural areas of Bayern*.

⁽¹⁸⁾ See Commission Decision N 237/08 — Germany, *Broadband support in Niedersachsen*.

2.2.1. Absence of aid: the application of the market economy investor principle

17. Where the State supports the roll-out of broadband by way of an equity participation or capital injection into a company that is to carry out the project, it becomes necessary to assess whether this investment involves State aid. Article 295 of the Treaty provides that '[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. According to the case-law of the Court of Justice of the European Communities ('the Court'), it follows from the principle of equal treatment that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid.
18. When equity participation or capital injections by a public investor do not present sufficient prospects of profitability, even in the long term, such intervention must be regarded as aid within the meaning of Article 87 of the Treaty, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision⁽¹⁹⁾.
19. The Commission has examined the application of the principle of the market economy private investor in the broadband field in its Amsterdam decision⁽²⁰⁾. As underlined in this decision, the conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, either by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment. Where private investors take part in the project, it is a *sine qua non* condition that they would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor.

2.2.2. Absence of aid: Public service compensation and the Altmark criteria

20. In some instances, Member States may consider that the provision of a broadband network should be regarded as a service of a general economic interest ('SGEI') within the meaning of Article 86(2) of the Treaty⁽²¹⁾.
21. According to the case-law of the Court, provided that four main conditions (commonly referred to as the *Altmark* criteria) are met, State funding for the provision of an SGEI may fall outside the scope of Article 87(1) of the Treaty⁽²²⁾. The four conditions are: (a) the beneficiary of a State funding mechanism for an SGEI must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined; (b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, the level of compensation granted must be determined on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

⁽¹⁹⁾ Case C-303/88, *Italy v Commission*, [1991] ECR I-1433, at paragraphs 20-22.

⁽²⁰⁾ Commission Decision of 11 December 2007 in Case C 53/2006 *Citynet Amsterdam — investment by the city of Amsterdam in a fibre-to-the home (FTTH) network*, OJ L 247, 16.9.2008, p. 27. The case concerned the construction of a 'Fibre-to-the-Home' (FTTH) broadband access network connecting 37 000 households in Amsterdam, which were already served by several competing broadband networks. The Amsterdam municipality had decided to invest in the passive layer of the network together with two private investors and five housing corporations. The passive infrastructure was owned and managed by a separate entity of which the Amsterdam municipality owned one third of its shares, two other private investors ('ING Real Estate' and 'Reggefiber') another third, while housing corporations owned the remaining third.

⁽²¹⁾ According to the case-law, undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority. In this respect, a service of general economic interest may be entrusted to an operator through the grant of a public service concession; see Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paragraph 126 and Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031, paragraphs 186, 188-189.

⁽²²⁾ See Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747 ('Altmark judgment').

22. In two decisions ⁽²³⁾ concerning measures taken by regional authorities to award a (subsidised) public service concession ⁽²⁴⁾ to private operators for the deployment of basic broadband networks in under-served regions, the Commission came to the conclusion that the notified support schemes were in line with the four criteria laid down in *Altmark*, and did not therefore fall under Article 87(1) ⁽²⁵⁾. In particular, in both cases, the successful bidder was chosen on the basis of the lowest amount of aid requested and the amount of compensation granted was established on the basis of pre-determined and transparent criteria. Moreover, the Commission found no evidence or risk of overcompensation.
23. Conversely, the Commission has ruled that the notion of an SGEI and the subsequent reliance on the *Altmark* case-law could not be accepted where the provider had neither a clear mandate nor was he under any obligation to provide broadband access to and connect all citizens and businesses in under-served areas but was more oriented towards connecting businesses ⁽²⁶⁾.
24. Moreover, according to the case-law, although Member States have wide discretion to define what they regard as services of general economic interest, the definition of such services or tasks by a Member State can be questioned by the Commission in the event of a manifest error ⁽²⁷⁾. In other words, although the determination of the nature and scope of an SGEI mission falls within the competence and discretionary powers of Member States, such competence is neither unlimited nor can it be exercised arbitrarily ⁽²⁸⁾. In particular, for an activity to be considered as an SGEI, it should exhibit special characteristics as compared with ordinary economic activities ⁽²⁹⁾. In this respect, the Commission will consider that in areas where private investors have already invested in a broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with an adequate broadband coverage, setting up a parallel competitive and publicly-funded broadband infrastructure should not be considered as an SGEI within the meaning of Article 86 of the Treaty ⁽³⁰⁾. Where however it can be demonstrated that private

⁽²³⁾ See Commission Decision N 381/04 — France, *Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques*, and Commission Decision 382/04 — France, *Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL)*.

⁽²⁴⁾ Although reference is made in these guidelines to a public service 'concession', the form of the contractual instrument chosen for the award of a public service mission or SGEI may vary from one Member State to another. However, the instrument should specify at least the precise nature, scope and duration of the public service obligations imposed and the identity of undertakings concerned, and the costs to be borne by the undertaking concerned.

⁽²⁵⁾ In particular, given that Member States enjoy a wide discretion in defining the scope of an SGEI, the Commission recognised in the above two decisions that to the extent that the provision of a ubiquitous broadband infrastructure would be open to all other network providers and would remedy a market failure and would provide connectivity to all users in the regions concerned, the Member State concerned had not committed a manifest error in considering that the provision of such a service fell within the notion of an SGEI.

⁽²⁶⁾ See Commission Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks (MANs), phases II and III*, at paragraphs 23, 37-40. In that case the Commission considered that the support given for the roll-out and operation of Metropolitan Area Networks (MANs) in a number of towns in Ireland was not a compensation for an SGEI on the ground that notified measure resembled more a 'private-public-partnership' than an entrustment and implementation of an SGEI. See also Decision N 890/06 — France, *Aide du Sicoval pour un réseau de très haut débit*. In that case, the Commission pointed out that the notified measure concerned support for the provision of broadband connectivity only for business parks and public sector organisations in a part of Toulouse, excluding the residential sector. Moreover, the project was covering only a part of the region. Accordingly, the Commission found that this was not an SGEI on the grounds that the notified measure did not aim to serve the citizens' interests, but those of the business sector.

⁽²⁷⁾ See Case T-289/03, *Bupa and others v Commission*, [2008] ECR II-000, at paragraph 165, and Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229, paragraph 99. See also paragraph 14 of the Commission Communication on services of general interest in Europe (OJ C 17, 19.1.2001, p. 4).

⁽²⁸⁾ See Case T-442/03, *SIC v Commission* [2008] ECR II-000, paragraph 195, Case T-289/03, *op.cit.*, at paragraph 166, and Case T-17/02, *op.cit.*, at paragraph 216. According to paragraph 22 of the Commission Communication on services of general interest in Europe, 'Member States' freedom to define [services of general economic interest] means that Member States are primarily responsible for defining what they regard as [such] services ... on the basis of the specific features of the activities. This definition can only be subject to control for manifest error'.

⁽²⁹⁾ This implies that the general interest objective pursued by the public authorities cannot simply be that of development of certain economic activities or economic areas as foreseen in Article 87(3)(c). See decision N 381/04 — France, *Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques*, paragraph 53, and Commission Decision N 382/04 — France, *Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL)*.

⁽³⁰⁾ In this respect, the networks to be taken into consideration for assessing the need for an SGEI should be always of comparable architecture, namely either basic broadband or NGA networks.

investors may not be in a position to provide in the near future ⁽³¹⁾ adequate broadband coverage to all citizens or users leaving thus a significant part of the population unconnected, a public service compensation may be granted to an undertaking entrusted with the operation of an SGEI provided that the conditions set out in paragraphs 25 to 29 are met. As a preliminary point, it should be stressed that the considerations set out in those paragraphs are based on the specificities of the broadband sector and reflect the experience gained so far by the Commission in this area. Thus, the conditions set out in those paragraphs although they are not exhaustive, are however indicative of the Commission's approach in assessing on a case-by-case basis whether the activities in question can be defined as an SGEI, and whether the public financing granted in this regard complies with the State aid rules of the Treaty.

25. With regard to the definition of the scope of an SGEI mission for the purposes of ensuring widespread deployment of a broadband infrastructure Member States are required to describe the reasons why they consider that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities ⁽³²⁾. They should further ensure that the SGEI mission satisfies certain minimum criteria common to every SGEI mission and demonstrate that those criteria are indeed satisfied in the particular case.
26. These criteria include, at least, (a) the presence of an act of the public authority entrusting the operators in question with an SGEI mission and (b) the universal and compulsory nature of that mission ⁽³³⁾. Thus in assessing whether the definition of an SGEI for broadband deployment does not give rise to a manifest error of appreciation, Member States should ensure that the broadband infrastructure to be deployed should provide universal connectivity to all users in a given area, residential and business users alike. Moreover, the compulsory nature of the SGEI mission implies that the provider of the network to be deployed will not be able to refuse access to the infrastructure on a discretionary and/or discriminatory basis (because for instance, it may not be commercially profitable to provide access services to a given area).
27. Given the state of competition that has been achieved since the liberalisation of the electronic communications sector in the Community, and in particular the competition that exists today on the retail broadband market, a publicly-funded network set up within the context of an SGEI should be available for all interested operators. Accordingly, the recognition of an SGEI mission for broadband deployment should be based on the provision of a passive, neutral ⁽³⁴⁾ and open access infrastructure. Such a network should provide access seekers with all possible forms of network access and allow effective competition at the retail level, ensuring the provision of competitive and affordable services to end-users ⁽³⁵⁾. Therefore, the SGEI mission should only cover the deployment of a broadband network providing universal connectivity and the provision of the related wholesale access services, without
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- ⁽³¹⁾ The term in the 'near future' should be understood as referring to a period of three years. In this regard, investment efforts planned by private investors should be such as to guarantee that at least significant progress in terms of coverage will be made within the three-year time period, with completion of the planned investment foreseen within a reasonable time frame thereafter (depending on the specificities of each area and of each project).
- ⁽³²⁾ In the absence of such reasons, even a marginal review by the Commission on the basis of both the first *Altmark* condition and Article 86(2) EC with respect to the existence of a manifest error by the Member State in the context of its discretion would not be possible, Case T-289/03, *BUPA and Others v Commission* [2008] ECR II-0000, paragraph 172.
- ⁽³³⁾ It follows from the case-law on Article 86(2) that a Member State must indicate the reasons why it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities. In the absence of such reasons, even a marginal review by the Commission on the basis of both the first *Altmark* condition and Article 86(2) EC with respect to the existence of a manifest error by the Member State in the context of its discretion would not be possible, Case T-289/03, *BUPA and Others v Commission* [2008] ECR II-0000, paragraph 172.
- ⁽³⁴⁾ A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users. Although such a requirement may be of limited application in relation to the deployment of an ADSL network infrastructure, this may not be the case in relation to a NGA, fibre-based network where operators may use different fibre technologies to provide services to end-users (i.e., point-to-point or G-PON).
- ⁽³⁵⁾ For example, an ADSL network should provide bitstream and full unbundling, whereas a NGA fibre-based network should provide at least access to dark fibre, bitstream, and if a FTTC network is being deployed, access to sub loop unbundling.

including retail communication services⁽³⁶⁾. Where the provider of the SGEI mission is also a vertically integrated broadband operator, adequate safeguards should be put in place to avoid any conflict of interest, undue discrimination and any other hidden indirect advantages⁽³⁷⁾.

28. Given that the market for electronic communications is fully liberalised, it follows that an SGEI for broadband deployment cannot be based on the award of an exclusive or special right to the provider of the SGEI within the meaning of Article 86(1).
29. In complying with its universal coverage mission, an SGEI provider may need to deploy a network infrastructure not only in areas which are unprofitable but also in profitable areas, that is areas in which other operators may have already deployed their own network infrastructure or may plan to do so in the near future. However, given the specificities of the broadband sector, in this case any compensation granted should only cover the costs of rolling out an infrastructure to the non-profitable areas⁽³⁸⁾. Where an SGEI for the deployment of a broadband network is not based on the deployment of a publicly-owned infrastructure adequate review and claw back mechanisms should be put in place in order to avoid that the SGEI provider obtains an undue advantage by retaining ownership of the network that was financed with public funds after the end of the SGEI concession. Finally, the SGEI compensation should in principle be granted through an open, transparent, non-discriminatory tender requiring all candidate operators to define in a transparent manner the profitable and non-profitable areas, estimate the expected revenues and request the corresponding amount of compensation that they consider strictly necessary, avoiding any risk of overcompensation. A tender organised under such conditions should guarantee that the fourth condition set out in *Altmark* is fulfilled (see paragraph 21).
30. Where the four criteria set out in *Altmark* are not met, and if the general criteria for the applicability of Article 87(1) of the Treaty are fulfilled, public service compensation for the deployment of a broadband infrastructure will constitute State aid and will be subject to Articles 73, 86, 87 and 88 of the Treaty. In this case, State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (see paragraphs 25-29 above) could be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) of the Treaty if the requirements set out in the Commission Decision of 28 November 2005 'on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest' are met⁽³⁹⁾.

2.3. The compatibility assessment under Article 87(3)

31. Where a notified measure has been found by the Commission to constitute aid within the meaning of Article 87(1) of the Treaty, the compatibility assessment has so far been based directly on Article 87(3)(c)⁽⁴⁰⁾.

⁽³⁶⁾ This limitation is justified by the fact that, once a broadband network providing universal connectivity has been deployed, the market forces are normally sufficient to provide communication services to all users at a competitive price.

⁽³⁷⁾ Such safeguards may include, in particular, an obligation of accounting separation, and may also include the setting up of a structurally and legally separate entity from the vertically integrated operator. Such entity should have sole responsibility for complying with and delivering the SGEI mission assigned to it.

⁽³⁸⁾ It is for Member States to devise given the particularities of each case the most appropriate methodology to ensure that the compensation granted will only cover the costs of serving the SGEI mission in the non-profitable areas. For instance, the compensation granted could be based on a comparison between revenues accruing from the commercial exploitation of the infrastructure in the profitable areas and the revenues accruing from the commercial exploitation in the non-profitable areas. Any excess profits, that is profits beyond the average industry return on capital for deploying a given broadband infrastructure, could be assigned to the financing of the SGEI in the non-profitable areas with the remainder being the subject of the financial compensation granted.

⁽³⁹⁾ OJ L 312, 29.11.2005, p. 67. See also, 'Community framework for State aid in the form of public service compensation', OJ C 297, 29.11.2005, p. 4.

⁽⁴⁰⁾ It should be recalled that according to Article 87(3)(a) of the Treaty, 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may also be considered to be compatible with the common market.

32. The areas covered by a broadband State aid project may also be assisted areas within the meaning of Article 87(3)(a) and (c), and the Regional Aid Guidelines⁽⁴¹⁾. In this case, aid to broadband may also qualify as aid for initial investment within the meaning of Regional Aid Guidelines. However, in many of the cases examined so far by the Commission there were also other areas targeted by the notified measures which were not 'assisted', and as a result the Commission's assessment could not be carried out under the Regional Aid Guidelines⁽⁴²⁾.

33. Where a measure falls within the scope of the Regional Aid Guidelines ('RAG'), and where it is envisaged to grant individual ad hoc aid to a single firm, or aid confined to one area of activity, it is the responsibility of the Member State to demonstrate that the conditions of the RAG are fulfilled. This includes in particular that the project in question contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition.

2.3.1. *The balancing test and its application to aid for broadband network deployment*

34. In assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.

35. In applying this balancing test, the Commission will assess the following questions:

(a) is the aid measure aimed at a well-defined objective of common interest, i.e. does the proposed aid address a market failure or other objective⁽⁴³⁾?

(b) is the aid well designed to deliver the objective of common interest? In particular:

(i) is State aid an appropriate policy instrument, i.e. are there other, better-placed instruments?

(ii) is there an incentive effect, i.e. does the aid change the behaviour of undertakings?

(iii) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

(c) are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

36. The individual steps of the balancing test in the field of broadband are set out in further detail in Sections 2.3.2 and 2.3.3.

2.3.2. *Objective of the measure*

37. As indicated in the introduction, widespread and affordable access to broadband is of great importance because of its ability to accelerate the contribution of these technologies to growth and innovation in all sectors of the economy and to social and territorial cohesion.

38. The economics of broadband provision are such that the market will not always find it profitable to invest in it. Due to economics of density, broadband networks are generally more profitable to roll-out where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs of investment, unit costs increase strongly as population densities drop. As a result, broadband networks tend to profitably cover only part of the population. Likewise, in certain areas, it may only be profitable for a single provider to set up a network, not for two or more.

⁽⁴¹⁾ Guidelines on national regional aid for 2007-2013, OJ C 54, 4.3.2006, pp. 13-45.

⁽⁴²⁾ Moreover, although the aid granted was in some cases confined to 'assisted areas' and it could also have been qualified as aid for initial investment within the meaning of the above-mentioned Guidelines, often the aid intensity could exceed the ceiling allowed for regional aid in such areas.

⁽⁴³⁾ See for instance, Commission Decision N 508/08 — United Kingdom, *Provision of remote Broadband services in Northern Ireland*, Decision N 201/06 — Greece, *Broadband access development in underserved areas*, and Decision N 118/06 — Latvia, *Development of broadband communications networks in rural areas*.

39. Where the market does not provide sufficient broadband coverage or the access conditions are not adequate, State aid may play a useful role. Specifically, State aid in the broadband sector may remedy a market failure, i.e. situations where individual market investors do not invest, even though this would be efficient from a wider economic perspective, e.g. due to the positive spill-over effects. Alternatively, State aid for broadband may also be viewed as a tool to achieve equity objectives, i.e. as a way to improve access to an essential means of communication and participation in society as well as freedom of expression to all actors in society, thereby improving social and territorial cohesion.
40. From the outset it is useful to introduce a fundamental distinction between the types of areas that may be targeted, depending on the level of broadband connectivity that is already available. The Commission has consistently made a distinction between areas where no broadband infrastructure exists or is unlikely to be developed in the near term (white areas), areas where only one broadband network operator is present (grey areas) and areas where at least two or more broadband network providers are present (black areas) ⁽⁴⁴⁾.

2.3.2.1. 'White areas': promoting territorial cohesion and economic development objectives

41. As a matter of policy, the Commission has always considered support for broadband network deployment in rural and underserved white areas to be in line with existing Community policies, since it promotes territorial social and economic cohesion and addresses market failures. In almost all of its decisions in this field, the Commission has underlined that broadband networks tend to profitably cover only part of the population, so that State support is needed to achieve ubiquitous coverage.
42. The Commission accepts that by providing financial support for the provision of broadband services in areas where broadband is currently not available and where there are no plans by private investors to roll out such an infrastructure in the near future, Member States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest ⁽⁴⁵⁾. The term in the 'near future' should be understood as referring to a period of three years. In this regard, investment efforts planned by private investors should be such as to guarantee that at least significant progress in terms of coverage will be made within the three-year period, with completion of the planned investment foreseen within a reasonable time frame thereafter (depending on the specificities of each project and of each area). Public authorities may require the submission of a business plan, together with a detailed calendar deployment plan as well as proof of adequate financing or any other type of evidence that would demonstrate the credible and plausible character of the planned investment by private network operators.

2.3.2.2. 'Black areas': no need for State intervention

43. When in a given geographical zone at least two broadband network providers are present and broadband services are provided under competitive conditions (facilities-based competition), there is no market failure. Accordingly, there is very little scope for State intervention to bring further benefits. On the contrary, State support for the funding of the construction of an additional broadband network will, in principle, lead to an unacceptable distortion of competition, and the crowding out of private investors. Accordingly, in the absence of a clearly demonstrated market failure, the Commission will view negatively measures funding the roll-out of an additional broadband infrastructure in a 'black zone' ⁽⁴⁶⁾.

⁽⁴⁴⁾ See for instance Commission Decision N 201/06 — Greece, *Broadband access development in underserved areas*.

⁽⁴⁵⁾ See for instance, Decision N 118/06 — Latvia, *Development of broadband communication networks in rural areas*.

⁽⁴⁶⁾ See Commission Decision of 19 July 2006 on the measure No C 35/05 (ex N 59/05) which the Netherlands are planning to implement concerning a broadband infrastructure in Appingedam, OJ L 86, 27.3.2007, p. 1. The case involved the deployment of a passive network (i.e. ducts and fibre) that would be owned by the municipality, while the active layer (i.e. the management and operation of the network) would be tendered to a private-sector wholesale operator that would have to offer wholesale access services to other service providers. In its decision, the Commission noted that the Dutch broadband market was a fast-moving market in which providers of electronic communications services, including cable operators and Internet Service Providers, were in the process of introducing very high capacity broadband services without any State support. The situation in Appingedam was no different from the rest of the Dutch broadband market. Both the fixed-line incumbent and a cable operator were already offering 'triple play services' in Appingedam (telephony, broadband and digital/analogue TV) and both operators had the technical capabilities to further increase the bandwidth capacity of their networks.

2.3.2.3. 'Grey areas': need for a more detailed assessment

44. The existence of a network operator in a given area does not necessarily imply that no market failure or cohesion problem exists. Monopoly provision may affect the quality of service or the price at which services are offered to the citizens. On the other hand, in areas where only one broadband network operator is present, by definition, subsidies for the construction of an alternative network can distort market dynamics. Therefore State support for the deployment of broadband networks in 'grey' areas calls for a more detailed analysis and careful compatibility assessment.
45. Although a network operator may be present in the zone targeted by the State intervention, certain categories of users may still not be adequately served in the sense that either some broadband services requested by the users were not available to them or, in the absence of regulated wholesale access tariffs, retail prices were not affordable compared to the same services offered in other more competitive areas or regions of the country⁽⁴⁷⁾. If, in addition, there are only limited prospects that third parties would build an alternative infrastructure, the funding of an alternative infrastructure could be an appropriate measure. This would remedy the absence of infrastructure competition and thus reduce the problems arising from the *de facto* monopoly position of the incumbent operator⁽⁴⁸⁾. However, the granting of aid under these circumstances is subject to a number of conditions that would have to be met by the Member State concerned.
46. Accordingly, the Commission may declare compatible, under certain conditions, State aid measures that target areas where the provision of a broadband infrastructure is still a *de facto* monopoly provided that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals. For the purpose of establishing the above, the Commission will assess in particular whether:
- (a) the overall market conditions are not adequate, by looking, inter alia, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto;
 - (b) in the absence of ex ante regulation imposed by a national regulatory authority ('NRA'), effective network access is not offered to third parties or access conditions are not conducive to effective competition;
 - (c) overall entry barriers preclude potential entry of other electronic communication operators; and
 - (d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider have not been able to overcome such problems.

2.3.3. Design of the measure and the need to limit distortions of competition

47. When broadband coverage is considered insufficient, State intervention may be necessary. A first question to be asked is whether State aid is an appropriate policy instrument to address the problem or whether there are other, better-placed instruments.

⁽⁴⁷⁾ As mentioned in paragraph 6, it should be recalled that broadband access is to date regulated ex ante in all EU countries.

⁽⁴⁸⁾ In its Decision N 131/05 — United Kingdom, *FibreSpeed Broadband Project Wales*, the Commission had to assess whether the financial support given by the Welsh authorities for the construction of an open, carrier-neutral, fibre-optic network linking 14 business parks could still be declared compatible even if the target locations were already served by the incumbent network operator, who provided price regulated leased lines. The Commission found that the leased lines offer by the incumbent operator was very expensive, almost unaffordable for SMEs. The targeted business parks could not either get symmetrical ADSL services beyond 2 Mbps because of their distance from the incumbent's telephone exchanges. Moreover, the incumbent was not making available its ducts and dark fibre to third parties. Therefore, the presence of the incumbent in the targeted areas could not guarantee affordable high speed Internet services to SMEs. There was no prospect that third parties would build an alternative infrastructure to provide high speed services to the business parks in question. See also Commission Decision N 890/06 — France, *Aide du Sicoval pour un réseau de très haut débit* and Commission Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks (MANs), phases II and III*.

48. In this respect, the Commission has noted in previous decisions that whilst *ex ante* regulation has in many cases facilitated broadband deployment in urban and more densely populated areas, it may not be a sufficient instrument to enable the supply of broadband service, especially in underserved areas where the inherent profitability of investment is low ⁽⁴⁹⁾.
49. Likewise, demand-side measures in favour of broadband (such as vouchers for end users) although they can contribute positively to broadband penetration and should be encouraged as an alternative or a complement to other public measures, they cannot always solve the lack of broadband provision ⁽⁵⁰⁾. Hence, in such situations there may be no alternative to granting public funding to overcome the lack of broadband connectivity.
50. Regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid.
51. In assessing the proportional character of the notified measures in 'white' or 'grey' areas, through its decision-making practice, the Commission has highlighted a number of necessary conditions to minimise the State aid involved and the potential distortions of competition. The lack of any of the following conditions in (a) to (h) would require an in-depth assessment ⁽⁵¹⁾ and most likely it would lead to a negative conclusion on the compatibility of the aid with the common market.
- (a) *Detailed mapping and coverage analysis*: Member States should clearly identify which geographic areas will be covered by the support measure in question. By conducting in parallel an analysis of the competitive conditions and structure prevailing in the given area and consulting with all stakeholders affected by the relevant measure, Member States minimise distortions of competition with existing providers and with those who already have investment plans for the near future and enable these investors to plan their activities ⁽⁵²⁾. A detailed mapping exercise and a thorough consultation exercise ensure accordingly not only a high degree of transparency but serve also as an essential tool for defining the existence of 'white', 'grey' and 'black' zones ⁽⁵³⁾.
- (b) *Open tender process*: The open tender approach ensures that there is transparency for all investors wishing to bid for the realisation of the subsidised project. Equal and non-discriminatory treatment of all bidders is an indispensable condition for an open tender. An open tender is a method to minimise the potential State aid advantage involved and at the same time reduces the selective nature of the measure in so far as the choice of the beneficiary is not known in advance ⁽⁵⁴⁾.
- (c) *Most economically advantageous offer*: Within the context of an open tender procedure, in order to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid ⁽⁵⁵⁾. In this way the Member State can shift the burden of how much aid is really necessary to the market and reduce thus the information asymmetry that most of the times benefits private investors.

⁽⁴⁹⁾ See for instance, Commission Decision N 473/07 — Italy, *Broadband connection for Alto Adige*, Decision N 570/07 — Germany, *Broadband in rural areas of Baden-Württemberg*, Decision N 131/05 — United Kingdom, *FibreSpeed Broadband Project Wales*, Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks ('MANs'), phases II and III*, Decision N 118/06 — Latvia, *Development of broadband communication networks in rural areas*, and Decision N 157/06 — United Kingdom, *South Yorkshire Digital Region Broadband Project*.

⁽⁵⁰⁾ See for instance Commission Decision N 222/06 — Italy, *Aid to bridge the digital divide in Sardinia*, Decision N 398/05 — Hungary, *Development Tax Benefit for Broadband*, and Decision N 264/06 — Italy, *Broadband for rural Tuscany*.

⁽⁵¹⁾ Normally within the framework of an Article 88(2) procedure.

⁽⁵²⁾ In case where it can be demonstrated that existing operators did not provide any meaningful information to a public authority for the purposes of the required mapping exercise, such authorities would have to rely only on whatever information has been made available to them.

⁽⁵³⁾ See for instance, Decision No 201/06 — Greece, *Broadband access development in underserved areas*, Decision No 264/06 — Italy, *Broadband for rural Tuscany*, Decision No 475/07 — Ireland, *National Broadband Scheme ('NBS')*, and Decision No 115/08 — Germany, *Broadband in rural areas of Germany*.

⁽⁵⁴⁾ See for instance, Commission Decision N 508/08 — United Kingdom, *Provision of Remote Broadband Services in Northern Ireland*, Decision N 475/07 — Ireland, *National Broadband Scheme ('NBS')*, Decision N 157/06 — United Kingdom, *South Yorkshire Digital region Broadband Project*.

⁽⁵⁵⁾ For the purposes of determining the most economically advantageous offer, the awarding authority should specify in advance the relative weighting which it will give to each of the (qualitative) criteria chosen.

- (d) *Technological neutrality*: Given that broadband services can be delivered on a host of network infrastructures based on wireline (xDSL, cable), wireless (Wi-Fi, WiMAX), satellite and mobile technologies, Member States should not favour any particular technology or network platform unless they can show that there is an objective justification for this⁽⁵⁶⁾. Bidders should be entitled to propose the provision of the required broadband services using or combining whatever technology they deem most suitable.
- (e) *Use of existing infrastructure*: Where possible, Member States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources. In order to try and limit the economic impact on existing network operators, the latter should be given the possibility to contribute their infrastructure to a notified project. At the same time, this condition should not end up favouring existing incumbents especially in case where third parties may not have access to this infrastructure or inputs that are necessary to compete with an incumbent. Likewise, in case of 'grey areas', where it is shown that dependence on the incumbent operator is part of the problem, it may be necessary to allow for more facilities-based competition.
- (f) *Wholesale access*: Mandating third parties effective wholesale access to a subsidised broadband infrastructure is a necessary component of any State measure funding the construction of a new broadband infrastructure. In particular, wholesale access enables third party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of regional service monopolies. Effective wholesale access to the subsidised infrastructure should be offered for at least a period of 7 years. This condition is not contingent on any prior market analysis within the meaning of Article 7 of the Framework directive⁽⁵⁷⁾. However, if at the end of the 7 years period the operator of the infrastructure in question is designated by the NRA under the applicable regulatory framework as having significant market power (SMP) in the specific market concerned⁽⁵⁸⁾, the access obligation should be extended accordingly.
- (g) *Benchmarking pricing exercise*: In order to ensure effective wholesale access and to minimise potential distortion of competition, it is crucial to avoid excessive wholesale prices or, by contrast, predatory pricing or price squeezes by the selected bidder. Access wholesale prices should be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country or the Community or, in the absence of such published prices, on prices already set or approved by the NRA for the markets and services concerned. Thus, where ex ante regulation is already in place (i.e., in a grey area) wholesale prices for access to a subsidised infrastructure should not be lower than the access price set by the NRA for the same area. Benchmarking is an important safeguard since it enables Member States to avoid having to set in advance detailed retail or wholesale access prices, as well as to ensure that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets. The benchmarking criteria should be clearly indicated in the tender documents.

⁽⁵⁶⁾ Only in one case has the Commission so far accepted the justified use of a specific technological solution: see Commission Decision N 222/06 — Italy, *Aid to bridge the digital divide in Sardinia*. In that case the Commission took the view that given the specific circumstances namely 'the topography of the region, the absence of cable networks and the need to maximise the benefits of the aid, the use of ADSL technology appears to be the appropriate technology delivering the objectives of the project', at paragraph 45.

⁽⁵⁷⁾ Moreover, whenever Member States opt for a management model whereby the subsidised broadband infrastructure offers only wholesale access services to third parties, not retail services, the likely distortions of competition are further reduced as such a network management model helps to avoid potentially complex issues of predatory pricing and hidden forms of access discrimination.

⁽⁵⁸⁾ In this regard, the NRA should take into consideration the possible persistence of the specific conditions that justified in the first place the granting of an aid to the operator of the infrastructure in question.

- (h) *Claw-back mechanism to avoid over-compensation*: To ensure that the selected bidder is not over-compensated if demand for broadband in the target area grows beyond anticipated levels, Member States should include a reverse payment mechanism into the contract with the successful bidder⁽⁵⁹⁾. The provision of such a mechanism can minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.

3. STATE AID FOR NGA NETWORKS

3.1. Supporting the rapid deployment of NGA networks

52. To date, a number of Member States are turning their attention towards support for broadband networks that can deliver services at very high speeds and support a multitude of advanced digital converged services. These NGA networks are mainly fibre-based or advanced upgraded cable networks that are intended to replace in whole or to a large extent the existing copper-based broadband networks or current cable networks.
53. NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks⁽⁶⁰⁾.
54. In essence, NGA networks will have the speed and capacity to deliver in the future high definition content, support on-demand bandwidth hungry applications as well as bring to business affordable symmetrical broadband connections generally available today only to large businesses. Overall, NGA networks have the potential to facilitate the improvement of all aspects of broadband technology and broadband services.
55. The Commission has already dealt with some State aid notifications that involved support for the roll-out of fibre-based networks. These cases involved either the construction of a regional 'core' NGA network⁽⁶¹⁾ or the provision of fibre connectivity for a limited number of business users only⁽⁶²⁾.
56. As with the so-called 'first generation' roll-out of basic broadband networks, State, municipal and regional authorities justify their support for a rapid roll-out of fibre networks on the grounds of a market failure or cohesion objective. If for the roll-out of basic broadband infrastructure, examples of state intervention have mainly related to rural communities/areas (low density, high capital cost) or areas which are economically underdeveloped (low ability to pay for services), this time the economics of NGA networks model is said to discourage deployment of NGA networks not only in sparsely populated areas, but also in certain urban zones. In particular, the main issue affecting the rapid and wide deployment of NGA networks, appears to be costs and to a lesser extent density of population⁽⁶³⁾.

⁽⁵⁹⁾ In exceptional circumstances duly demonstrated by the notifying Member State, setting up such mechanism for very low aid amounts or small scale, 'one-off' projects based on simple procurement principles may impose a disproportionate burden on the granting authorities and will not therefore be required by the Commission.

⁽⁶⁰⁾ At this stage of technological and market development, neither satellite nor mobile network technologies appear to be capable of providing very high speed symmetrical broadband services although in the future the situation may change especially with regard to mobile services (the next major step in mobile radio communications, 'Long Term Evolution' may theoretically reach, if and when adopted, increased peak data rates of 100 Mbps downlink and 50 Mbps uplink).

⁽⁶¹⁾ See Decision N 157/06 — United Kingdom, *South Yorkshire Digital region Broadband Project* and Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks ('MANs'), phases II and III*.

⁽⁶²⁾ Only in two cases so far (*Appingedam* and *Amsterdam*) was State support granted for the roll-out of an 'access' next generation network that would bring fibre connectivity to the residential segment of the market.

⁽⁶³⁾ Broadband network operators have argued that rolling out of a fibre-based network is still a very expensive and risky investment, save in areas of dense population/business where operators have already a substantial base of broadband customers that can be migrated to higher speeds. In certain cases, the cost of deploying NGAs and fibre networks are said to be too high relative to the revenue that can be expected so that either no or too few private sector providers would enter the market.

57. For public authorities, direct intervention may thus be warranted in order to ensure that areas which are deemed by network operators as being unprofitable will still benefit from the substantial spill-over effects that NGA networks may bring to the economy and will not suffer a new digital, 'NGA divide'. Thus, Member States may wish to foster NGA network developments in areas where investments by existing broadband network operators in such networks would take several years to arrive because they are financially less attractive than certain major urban zones. In certain cases, Member States may decide to invest themselves or provide financial support to private operators in order to obtain NGA network connectivity, or to obtain connectivity earlier than anticipated, in order to ensure that employment and other economic opportunities are leveraged as quickly as possible.
58. Any public intervention seeking to support the provision or acceleration of NGA network deployment must ensure that it is compatible with the State aid rules.

3.2. Types of public intervention

59. Member States may choose different degrees of market intervention in order to foster or accelerate deployment of NGA networks. In this respect, the considerations set out above in Section 2.2.1 and 2.2.2 (application of the market economy investor principle, public service compensation and the Altmark criteria) apply *mutatis mutandis* with regard to State interventions in the field of NGA network deployment. Depending on the nature and effects of the intervention chosen a different analytical approach may be warranted under the State aid rules.
60. In areas where private investors are expected to roll out in the future NGA networks, Member States may decide to adopt a set of measures to accelerate the investment cycle and thus encourage investors to bring forward their investment plans. These measures do not necessarily need to involve State aid within the meaning of Article 87(1). Given that a large part of the cost of deploying fibre networks is in civil work (for instance digging, laying down cables, in-house wirings, etc.), Member States may decide in accordance with the Community regulatory framework for e-communications, for instance, to ease the acquisition process of rights of ways, require that network operators coordinate their civil works and/or share part of their infrastructure⁽⁶⁴⁾. In the same vein, Member States may decree that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a fibre connection should be in place.
61. Likewise, public authorities may decide to undertake some civil works (such as digging of the public domain, construction of ducts) in order to enable and accelerate the deployment by the operators concerned of their own network elements. However, such civil works should not be 'industry or sector specific', but should in principle be open to all potential users and not just electronic communications operators (i.e. electricity gas, water utilities etc.). Provided that such public interventions aim to create the necessary pre-conditions for the deployment by utility operators of own infrastructure without discriminating in favour of a given sector or a company (by lowering in particular the capital costs of the latter), they fall outside the scope of Article 87(1).
62. Similar measures may also be adopted by the NRAs in order to provide for equal and non-discriminatory access to poles or sharing of ducts owned by utilities or existing network operators.

⁽⁶⁴⁾ Such measures should not target specifically electronic communications operators but should apply without distinction to all operators across all sectors concerned (including for instance other utility operators such as gas, electricity and/or water undertakings). Measures that would apply to electronic communications operators only could constitute a sectoral aid and thus fall within the prohibition of Article 87(1) of the Treaty.

63. As the Commission's decision-making practice in the area of basic broadband illustrates, in most cases, State aid for broadband networks is granted by local or regional authorities that aim to either remedy the region's lack of broadband connectivity or to increase the region's competitiveness by improving further the existing broadband coverage and network connectivity. To achieve these two objectives public authorities have so far either tendered out the construction and management of a publicly-owned broadband infrastructure or have financially supported the construction of a privately-owned broadband network ⁽⁶⁵⁾.
64. If public interventions constitute State aid pursuant to Article 87(1) EC, they have to be notified to the Commission, which will assess their compatibility with the common market in line with the principles set out in Sections 3.3 and 3.4s ⁽⁶⁶⁾.

3.3. The distinction between white, grey and black areas for NGA networks

65. As recalled in paragraph 40, the Commission has assessed the compatibility of State aid for the development of traditional broadband by reference to the distinction between 'white', 'grey' and 'black' areas. The Commission considers that this distinction is still relevant for assessing whether State aid for NGA networks is compatible under Article 87(3)(c), but requires a more refined definition to take account of the specificities of the NGA networks.
66. In this respect, one should bear in mind that in the longer term NGA networks are expected to supersede existing basic broadband networks. To the extent that NGA networks imply a different network architecture, offering significantly better quality broadband services than today as well as the provision of services that could not be supported by today's broadband networks, it is likely that in the future there will be marked differences emerging between areas that will be covered and areas that will not be covered by NGA networks ⁽⁶⁷⁾.
67. At present, some advanced basic broadband networks (for instance ADSL 2+ ⁽⁶⁸⁾) can, up to a certain point, also support some of the types of broadband services that in the near future are likely to be offered over NGA networks (such as basic triple play services). However, and without prejudice to the imposition of ex-ante regulation, it should be noted that novel products or services which are not substitutable from both demand and supply side perspectives may emerge and will require broadband speeds in excess of the upper physical limits of basic broadband infrastructure.
68. Accordingly, for the purposes of assessing State aid for NGA networks, an area where such networks do not at present exist and where they are not likely to be built and be fully operational in the near future by private investors should be considered to be a 'white NGA' area ⁽⁶⁹⁾. In that regard, the term 'in the near future' should correspond to a period of three years ⁽⁷⁰⁾. Public authorities should be entitled to

⁽⁶⁵⁾ See for instance, Commission Decision N 157/06 — United Kingdom, *South Yorkshire Digital Region Broadband Project*, Decision N 201/06 — Greece, *Broadband access development in underserved territories*, and Decision N 131/05 — United Kingdom, *FibreSpeed Broadband Project Wales*, Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks (MANs), phases II and III*, Decision N 381/04 — France, *Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques*, Decision N 382/05 — France, *Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL)*, N 57/05 — United Kingdom, *Regional Innovative Broadband Support in Wales*, and Decision N 14/08 — United Kingdom, *Broadband in Scotland — Extending Broadband Reach*.

⁽⁶⁶⁾ This is without prejudice to the possible application of the Regional Aid Guidelines as referred to above in paragraph 33.

⁽⁶⁷⁾ If today the differences between an area where only narrowband Internet is available (dial-up) and an area where broadband exists means that the former is a 'white' area, likewise an area that lacks a next generation broadband infrastructure, but may still have one basic broadband infrastructure in place should also be considered a 'white' area.

⁽⁶⁸⁾ ADSL 2+ extends the capability of basic ADSL network up to a maximum bandwidth of 24 Mbps.

⁽⁶⁹⁾ A white NGA area may consist in an area where there is no basic broadband infrastructure in place (traditional white areas), as well as in an area where only one basic broadband provider is present (i.e. a traditional grey area) or there are several basic broadband providers (i.e. a traditional black area). As indicated in Section 3.4, different conditions are required for the compatibility of State aid for broadband development in these different circumstances.

⁽⁷⁰⁾ This period appears to correspond to an average period needed for the deployment of a next generation access network covering a town or a city. In this regard, an operator should be able to demonstrate that within a coming period of 3 years it would have carried out the necessary infrastructure investments in order to have covered by then a substantial part of the territory and of the population concerned thereby.

intervene, under certain conditions, in order to address social cohesion issues, regional development or a market failure when it can be demonstrated that private investors have no intention to deploy NGA networks in the coming 3 years. The investments efforts planned by private investors should be such as to guarantee that at least significant progress in terms of coverage will be made within the three-year period, with completion of the planned investment foreseen within a reasonable time frame thereafter (depending on the specificities of each area and of each project). It would not be appropriate to take a longer time horizon as this may risk damaging the interests of underserved regions relative to other parts of a country that are adequately served by such advanced broadband networks. Public authorities may require the submission of a business plan, together with a detailed calendar deployment plan as well as proof of adequate financing or any other type of evidence that would demonstrate the credible and plausible character of the planned investment by private network operators.

69. In the same vein, an area should be considered to be 'NGA grey' where only one NGA network is in place or is being deployed in the coming three years and there are no plans by any operator to deploy a NGA network in the coming three years ⁽⁷¹⁾. In assessing whether other network investors could deploy additional NGA networks in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructure etc.).
70. If more than one NGA network exists in a given area or will be deployed in the coming three years, such an area should, in principle, be considered to be 'NGA black' ⁽⁷²⁾.

3.4. The compatibility assessment

71. As mentioned in paragraphs 66 and 67, although NGA networks are qualitatively far more advanced than existing traditional copper-based broadband networks, in assessing the compatibility of State aid for the deployment of a NGA network with the State aid rules, the Commission will also look into the effects of such aid on existing broadband networks given the degree of substitution that at present appears to exist with regard to broadband services offered over broadband and NGA networks alike. Moreover, in assessing the compatibility of State aid to NGA networks, the Commission will also apply the balancing test (see paragraph 35). In particular, in assessing the proportional character of a notified measure the Commission will look into whether the conditions set out in paragraph 51 are fulfilled (detailed mapping exercise and coverage analysis, open tender process, best economic offer, technological neutrality, use of existing infrastructure, mandated wholesale open access, benchmarking exercise and claw-back mechanism). The following points, however, are specifically relevant in the context of the assessment of NGA networks.

3.4.1. White NGA areas: support for NGA network deployment in underserved areas

72. As with basic broadband services, subject to a set of conditions that should be met by Member States (see paragraphs 51 and 71), the Commission will consider as being compatible with the State aid rules of the Treaty measures that support the deployment of NGA networks in areas where no broadband infrastructure currently exists or for areas where existing broadband operators consider it unprofitable to deploy NGA networks.
73. In white NGA areas where one basic broadband network already exist (traditional grey area), the grant of aid for NGA networks is subject to the demonstration by the Member State concerned (i) that the broadband services provided over the said networks are not sufficient to satisfy the needs of citizens and business users in the area in question (also taking into account a possible future upgrade); and that (ii) there are no less distortive means (including ex ante regulation) to reach the stated goals.

⁽⁷¹⁾ A grey NGA area may consist in an area where (a) there is no other basic broadband infrastructure beside the NGA; (b) as well as in an area where one or more basic broadband providers are also present (which can be considered as a traditional grey or black area). As indicated in Section 3.4, different conditions are required for the compatibility of State aid for broadband development in these different circumstances.

⁽⁷²⁾ A black NGA area may also consist of an area with one broadband provider (traditional grey area) or more (traditional black area) present. As indicated below, different conditions are required for the compatibility of State aid for broadband development in these different circumstances.

3.4.2. Grey NGA areas: need for a more detailed analysis

74. In areas where one private investor has already deployed a NGA network or may be in the process of deploying it in the next three years (see also paragraph 68) and there are no plans by any private investor to deploy a second NGA network in the coming three years, the Commission will need to carry out a more detailed analysis in order to verify whether State intervention in such areas can be considered compatible with the State aid rules. In fact, State intervention in such areas risks crowding out existing investors and distorting competition.
75. For the Commission to make a finding of compatibility, Member States should be able to demonstrate firstly, that the existing or planned NGA network is not or would not be sufficient to satisfy the needs of citizens and business users in the areas in question and, secondly, that there are no less distortive means (including ex ante regulation) to reach the stated goals. In the context of its detailed assessment the Commission will in particular assess whether:
- (a) the overall market conditions are not adequate, by looking, inter alia, into the level of current NGA broadband prices, the type of services offered to residential and business users and the conditions attached thereto and whether there exists, or is likely to appear, demand for new services that cannot be met by the existing NGA network;
 - (b) in the absence of ex ante regulation imposed by a NRA, effective network access is not offered to third parties or access conditions are not conducive to effective competition;
 - (c) overall entry barriers preclude potential entry by other NGA network investors;
 - (d) the NGA network already in place was built on the basis of a privileged use/access to ducts not accessible by or not shared with other network operators;
 - (e) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider have not been able to overcome the problems.

3.4.3. Black NGA areas: no need for State intervention

76. In areas where there already exists more than one NGA network or private investors may be in the process of deploying competing NGA networks, the Commission will consider that state support for an additional publicly-funded, competing NGA network is likely to seriously distort competition and is incompatible with the State aid rules.

3.4.4. The specific case of existing (basic broadband) black areas: some further safeguards

77. The Commission considers that traditional black areas, that is areas where current broadband services are being delivered by competing broadband infrastructures (xDSL and cable networks), are areas in which existing network operators should have the incentives to upgrade their current traditional broadband networks to very fast NGA networks to which they could migrate their existing customers. In such areas no further State intervention should in principle be necessary.
78. However a Member State can rebut such an argument by showing that existing basic broadband operators do not plan to invest in NGA networks in the coming three years by demonstrating for instance that the historical pattern of the investments made by the existing network investors over the last years in upgrading their broadband infrastructures to provide higher speeds in response to users' demands was not satisfactory. In such cases, state support for the deployment of NGA networks would be subject to the detailed analysis paragraph 75 and to the fulfilment of the set of conditions discussed in more detail in Section 3.4.5.

3.4.5. Design of the measure and the need to limit distortions of competition

79. As with the policy followed with respect to basic broadband deployment, State aid in favour of NGA network deployment may constitute an appropriate and justified instrument, provided that a number of fundamental conditions are complied with. With the exception of white NGA areas which are also white areas with regards to basic broadband (where no additional requirements are needed), the Commission considers that, in addition to the safeguards set out in Section 2.3.3 and in particular in paragraph 51 (*detailed mapping exercise and coverage analysis, open tender process, best economic offer, technological neutrality, use of existing infrastructure, mandated wholesale open access, benchmarking exercise and claw-back mechanism*), the following conditions need also to be met:

- in exchange for receiving state support, the beneficiary should be required to provide third parties with effective wholesale access for at least seven years. In particular, the access obligation imposed should also include the right to use ducts or street cabinets in order to allow third parties to have access to passive and not only active infrastructure. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted after the expiry of that period ⁽⁷³⁾. An 'open access' obligation is all the more crucial in order to deal with the temporary substitution between the services offered by existing ADSL operators and those offered by future NGA network operators. An open access obligation will ensure that ADSL operators can migrate their customers to a NGA network as soon as a subsidised network is in place and thus start planning their own future investments without suffering any real competitive handicap,
- moreover, in setting the conditions for wholesale network access, Member States should consult the relevant NRA. NRAs are expected in the future to continue either to regulate ex ante or to monitor very closely the competitive conditions of the overall broadband market and impose where appropriate the necessary remedies provided by the applicable regulatory framework. Thus, by requiring that access conditions should be approved or set by the NRA under the applicable Community rules, Member States will ensure that, if not uniform, at least very similar access conditions will apply throughout all broadband markets identified by the NRA concerned,
- in addition, whatever the type of the NGA network architecture that will benefit from State aid, it should support effective and full unbundling and satisfy all different types of network access that operators may seek (including but not limited to access to ducts, fibre and bitstream). In this respect it should be noted that 'multiple fibre' architecture allows full independence between access seekers to provide high-speed broadband offers and is therefore conducive to long-term sustainable competition. In addition, the deployment of NGA networks based on multiple fibre lines supports both 'point-to-point' and 'point-to-multipoint' topologies and is therefore technology neutral.

4. TRANSITIONAL PROVISIONS

80. These Guidelines will be applied from the first day following its publication in the *Official Journal of the European Union*.

81. The Commission will apply these Guidelines to all notified aid measures in respect of which it is called upon to take a decision after the Guidelines are published in the *Official Journal*, even where the projects were notified prior to that date.

⁽⁷³⁾ In this regard, the possible persistence of the specific market conditions that justified in the first place the granting of an aid for the infrastructure in question should be taken into consideration.

82. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁷⁴⁾, the Commission will apply these Guidelines in the case of non-notified aid granted after its publication.

5. FINAL PROVISIONS

83. No later than 3 years from the publication of these Guidelines the Commission will review the present Guidelines on the basis of future important market, technological and regulatory developments.
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⁽⁷⁴⁾ OJ C 119, 22.5.2002, p. 22.

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

REGULATIONS

REGULATION (EC) No 1370/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 23 October 2007
on public passenger transport services by rail and by road and repealing Council Regulations (EEC)
Nos 1191/69 and 1107/70

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 71 and 89 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

(1) Article 16 of the Treaty confirms the place occupied by services of general economic interest in the shared values of the Union.

(2) Article 86(2) of the Treaty lays down that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

(3) Article 73 of the Treaty constitutes a *lex specialis* in relation to Article 86(2). It establishes rules applicable to the compensation of public service obligations in inland transport.

(4) The main objectives of the Commission's White Paper of 12 September 2001 'European transport policy for 2010: time to decide' are to guarantee safe, efficient and high-quality passenger transport services through regulated competition, guaranteeing also transparency and performance of public passenger transport services, having regard to social, environmental and regional development factors, or to offer specific tariff conditions to certain categories of traveller, such as pensioners, and to eliminate the disparities between transport undertakings from different Member States which may give rise to substantial distortions of competition.

(5) At the present time, many inland passenger transport services which are required in the general economic interest cannot be operated on a commercial basis. The competent authorities of the Member States must be able to act to ensure that such services are provided. The mechanisms that they can use to ensure that public passenger transport services are provided include the following: the award of exclusive rights to public service operators, the grant of financial compensation to public service operators and the definition of general rules for the operation of public transport which are applicable to all operators. If Member States, in accordance with this Regulation, choose to exclude certain general rules from its scope, the general regime for State aid should apply.

⁽¹⁾ OJ C 195, 18.8.2006, p. 20.

⁽²⁾ OJ C 192, 16.8.2006, p. 1.

⁽³⁾ Opinion of the European Parliament of 14 November 2001 (OJ C 140 E, 13.6.2002, p. 262), Council Common Position of 11 December 2006 (OJ C 70 E, 27.3.2007, p. 1) and Position of the European Parliament of 10 May 2007. Council Decision of 18 September 2007.

- (6) Many Member States have enacted legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several public service operators are now providing public passenger transport services in more than one Member State. However, developments in national legislation have led to disparities in the procedures applied and have created legal uncertainty as to the rights of public service operators and the duties of the competent authorities. Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway ⁽¹⁾, does not deal with the way public service contracts are to be awarded in the Community, and in particular the circumstances in which they should be the subject of competitive tendering. The Community legal framework ought therefore to be updated.
- (7) Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the Commission, the Council and the Member States, each in accordance with their respective powers, to 'speed up liberalisation in areas such as ... transport'.
- (8) Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements.
- (9) In order to be able to organise their public passenger transport services in the manner best suited to the needs of the public, all competent authorities must be able to choose their public service operators freely, taking into account the interests of small and medium-sized enterprises, under the conditions stipulated in this Regulation. In order to guarantee the application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a public service contract between the competent authority and the chosen public service operator defines the nature of the public service obligations and the agreed reward. The form or designation of the contract may vary according to the legal systems of the Member States.
- (10) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to public passenger transport services by inland waterway, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. The organisation of public passenger transport services by inland waterway and, in so far as they are not covered by specific Community law, by national sea water is therefore subject to compliance with the general principles of the Treaty, unless Member States choose to apply this Regulation to those specific sectors. The provisions of this Regulation do not prevent the integration of services by inland waterway and national sea water into a wider urban, suburban or regional public passenger transport network.
- (11) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to freight transport services, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. Three years after the entry into force of this Regulation the organisation of freight transport services should therefore be made subject to compliance with the general principles of the Treaty.
- (12) It is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings. This Regulation is based on the principles of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, of the freedom of Member States to define services of general economic interest, referred to in Article 16 of the Treaty, and of subsidiarity and proportionality referred to in Article 5 of the Treaty.
- (13) Some services, often linked to specific infrastructure, are operated mainly for their historical interest or tourist value. As the purpose of these operations is manifestly different from the provision of public passenger transport, they need not therefore be governed by the rules and procedures applicable to public service requirements.
- (14) Where the competent authorities are responsible for organising the public transport network, apart from the actual operation of the transport service, this may cover a whole range of other activities and duties that the competent authorities must be free either to carry out themselves or entrust, in whole or in part, to a third party.

⁽¹⁾ OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

- (15) Contracts of long duration can lead to market foreclosure for a longer period than is necessary, thus diminishing the benefits of competitive pressure. In order to minimise distortions of competition, while protecting the quality of services, public service contracts should be of limited duration. The extension of such contracts could be subject to positive confirmation from users. In this context, it is necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator must invest in assets for which the depreciation period is exceptional and, because of their special characteristics and constraints, in the case of the outermost regions as specified in Article 299 of the Treaty. In addition, where a public service operator makes investments in infrastructure or in rolling stock and vehicles which are exceptional in the sense that both concern high amounts of funds, and provided the contract is awarded after a fair competitive tendering procedure, an even longer extension should be possible.
- (16) Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses ⁽¹⁾. This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights other than those covered by Directive 2001/23/EC and thereby, if appropriate, taking into account social standards established by national laws, regulations or administrative provisions or collective agreements or agreements concluded between social partners.
- (17) In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.
- (18) Subject to the relevant provisions of national law, any local authority or, in the absence thereof, any national authority may choose to provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering. However, this self-provision option needs to be strictly controlled to ensure a level playing field. The competent authority or group of authorities providing integrated public passenger transport services, collectively or through its members, should exercise the required control. In addition, a competent authority providing its own transport services or an internal operator should be prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory. Restrictions on the activities of an internal operator do not interfere with the possibility of directly awarding public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. Furthermore, the direct award of public service contracts for heavy rail does not preclude the possibility for competent authorities to award public service contracts for public passenger transport services on other track-based modes, such as metro and tramway, to an internal operator.
- (19) Subcontracting can contribute to more efficient public passenger transport and makes it possible for undertakings to participate, other than the public service operator which was granted the public service contract. However, with a view to the best use of public funds, competent authorities should be able to determine the modalities for subcontracting their public passenger transport services, in particular in the case of services performed by an internal operator. Furthermore, a subcontractor should not be prevented from taking part in competitive tenders in the territory of any competent authority. The selection of a subcontractor by the competent authority or its internal operator needs to be carried out in accordance with Community law.
- (20) Where a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with Community law on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment. In particular, the provisions of this Regulation are to be without prejudice to the obligations applicable to public authorities by virtue of the directives on the award of public contracts, where public service contracts fall within their scope.

⁽¹⁾ OJ L 82, 22.3.2001, p. 16.

- (21) Effective legal protection should be guaranteed, not only for awards falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽¹⁾ and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ⁽²⁾, but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ⁽³⁾ and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ⁽⁴⁾.
- (22) Some invitations to tender require the competent authorities to define and describe complex systems. These authorities should therefore have power, when awarding contracts in such cases, to negotiate details with some or all of the potential public service operators once tenders have been submitted.
- (23) Invitations to tender for the award of public service contracts should not be mandatory where the contract relates to modest amounts or distances. In this respect, greater amounts or distances should enable competent authorities to take into account the special interests of small and medium-sized enterprises. Competent authorities should not be permitted to split up contracts or networks in order to avoid tendering.
- (24) Where there is a risk of disruption in the provision of services, the competent authorities should have power to introduce emergency short-term measures pending the award of a new public service contract which is in line with all the conditions for awarding a contract laid down in this Regulation.
- (25) Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004, the Commission presented a proposal to amend Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways ⁽⁵⁾ so as to guarantee access for all Community railway undertakings to the infrastructure of all Member States for the purpose of operating international passenger services. The aim of this Regulation is to establish a legal framework for compensation and/or exclusive rights for public service contracts and not the further opening of the market for railway services.
- (26) In the case of public services, this Regulation allows each competent authority, within the context of a public service contract, to select its operator of public passenger transport services. Given the differences in the way Member States organise their territory in this respect, competent authorities may justifiably be allowed to award public service contracts directly for railway travel.
- (27) The compensation granted by competent authorities to cover the costs incurred in discharging public service obligations should be calculated in a way that prevents overcompensation. Where a competent authority plans to award a public service contract without putting it out to competitive tender, it should also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of service.
- (28) By appropriately considering the effects of complying with the public service obligations on the demand for public passenger transport services in the calculation scheme set out in the Annex, the competent authority and the public service operator can prove that overcompensation has been avoided.
- (29) With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react.
- (30) Directly awarded public service contracts should be subject to greater transparency.

⁽¹⁾ OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

⁽²⁾ OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC.

⁽³⁾ OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

⁽⁴⁾ OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC.

⁽⁵⁾ OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344).

- (31) Given that competent authorities and public service operators will need time to adapt to the provisions of this Regulation, provision should be made for transitional arrangements. With a view to the gradual award of public service contracts in line with this Regulation, Member States should provide the Commission with a progress report within the six months following the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports.
- (32) During the transitional period, the application of the provisions of this Regulation by the competent authorities may take place at different times. It may therefore be possible, during this period, that public service operators from markets not yet affected by the provisions of this Regulation tender for public service contracts in markets that have been opened to controlled competition more rapidly. In order to avoid, by means of proportionate action, any imbalance in the opening of the public transport market, competent authorities should be able to refuse, in the second half of the transitional period, tenders from undertakings, more than half the value of the public transport services performed by which are not granted in accordance with this Regulation, provided that this is applied without discrimination and decided in advance of an invitation to tender.
- (33) In paragraphs 87 to 95 of its judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH* ⁽¹⁾, the Court of Justice of the European Communities ruled that compensation for public service does not constitute an advantage within the meaning of Article 87 of the Treaty, provided that four cumulative conditions are satisfied. Where those conditions are not satisfied and the general conditions for the application of Article 87(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 73, 86, 87 and 88 of the Treaty.
- (34) Compensation for public services may prove necessary in the inland passenger transport sector so that undertakings responsible for public services operate on the basis of principles and under conditions which allow them to carry out their tasks. Such compensation may be compatible with the Treaty pursuant to Article 73 under certain conditions. Firstly, it must be granted to ensure the provision of services which are services of general interest within the meaning of the Treaty. Secondly, in order to avoid unjustified distortions of competition, it may not exceed what is necessary to cover the net costs incurred through discharging the public service obligations, taking account of the revenue generated thereby and a reasonable profit.
- (35) Compensation granted by the competent authorities in accordance with the provisions of this Regulation may therefore be exempted from the prior notification requirement of Article 88(3) of the Treaty.
- (36) This Regulation replaces Regulation (EEC) No 1191/69, which should therefore be repealed. For public freight transport services, a transitional period of three years will assist the phasing out of compensation not authorised by the Commission in accordance with Articles 73, 86, 87 and 88 of the Treaty. Any compensation granted in relation to the provision of public passenger transport services other than those covered by this Regulation which risks involving State aid within the meaning of Article 87(1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in Case C-280/00 *Altmark Trans GmbH*. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest.
- (37) The scope of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ⁽²⁾ is covered by this Regulation. That Regulation is considered obsolete while limiting the application of Article 73 of the Treaty without granting an appropriate legal basis for authorising current investment schemes, in particular in relation to investment in transport infrastructure in a public private partnership. It should therefore be repealed in order for Article 73 of the Treaty to be properly applied to continuing developments in the sector without prejudice to this Regulation or Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings ⁽³⁾. With a view to further facilitating the application of the relevant Community rules, the Commission will propose State aid guidelines for railway investment, including investment in infrastructure in 2007.
- (38) With a view to assessing the implementation of this Regulation and the developments in the provision of public passenger transport in the Community, in particular the quality of public passenger transport services and the effects of granting public service contracts by direct award, the Commission should produce a report. This report may, if necessary, be accompanied by appropriate proposals for the amendment of this Regulation,

⁽²⁾ OJ L 130, 15.6.1970, p. 1. Regulation as last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

⁽³⁾ OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽¹⁾ [2003] ECR I-7747.

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose and scope

1. The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

2. This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) ⁽¹⁾, national sea waters.

3. This Regulation shall not apply to public works concessions within the meaning of Article 1(3)(a) of Directive 2004/17/EC or of Article 1(3) of Directive 2004/18/EC.

Article 2

Definitions

For the purpose of this Regulation:

- (a) 'public passenger transport' means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;
- (b) 'competent authority' means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

- (c) 'competent local authority' means any competent authority whose geographical area of competence is not national;
- (d) 'public service operator' means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services;
- (e) 'public service obligation' means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward;
- (f) 'exclusive right' means a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator;
- (g) 'public service compensation' means any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period;
- (h) 'direct award' means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;
- (i) 'public service contract' means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:
 - taking the form of an individual legislative or regulatory act, or
 - containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;
- (j) 'internal operator' means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

⁽¹⁾ OJ L 364, 12.12.1992, p. 7.

- (k) 'value' means the value of a service, a route, a public service contract, or a compensation scheme for public passenger transport corresponding to the total remuneration, before VAT, of the public service operator or operators, including compensation of whatever kind paid by the public authorities and revenue from the sale of tickets which is not repaid to the competent authority in question;
- (l) 'general rule' means a measure which applies without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible;
- (m) 'integrated public passenger transport services' means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable.
- (b) establish in advance, in an objective and transparent manner,
- (i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and
- (ii) the nature and extent of any exclusive rights granted,
- in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

Article 3

Public service contracts and general rules

1. Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.

2. By way of derogation from paragraph 1, public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passenger may also be the subject of general rules. In accordance with the principles set out in Articles 4 and 6 and in the Annex, the competent authority shall compensate the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This shall be so notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.

3. Without prejudice to the provisions of Articles 73, 86, 87 and 88 of the Treaty, Member States may exclude from the scope of this Regulation general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility. These general rules shall be notified in accordance with Article 88 of the Treaty. Any such notification shall contain complete information on the measure and, in particular, details on the calculation method.

Article 4

Mandatory content of public service contracts and general rules

1. Public service contracts and general rules shall:

- (a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

- (c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.

2. Public service contracts and general rules shall determine the arrangements for the allocation of revenue from the sale of tickets which may be kept by the public service operator, repaid to the competent authority or shared between the two.

3. The duration of public service contracts shall be limited and shall not exceed 10 years for coach and bus services and 15 years for passenger transport services by rail or other track-based modes. The duration of public service contracts relating to several modes of transport shall be limited to 15 years if transport by rail or other track-based modes represents more than 50 % of the value of the services in question.

4. If necessary, having regard to the conditions of asset depreciation, the duration of the public service contract may be extended by a maximum of 50 % if the public service operator provides assets which are both significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract and linked predominantly to the passenger transport services covered by the contract.

If justified by costs deriving from the particular geographical situation, the duration of public service contracts specified in paragraph 3 in the outermost regions may be extended by a maximum of 50 %.

If justified by the amortisation of capital in relation to exceptional infrastructure, rolling stock or vehicular investment and if the public service contract is awarded in a fair competitive tendering procedure, a public service contract may have a longer duration. In order to ensure transparency in this case, the competent authority shall transmit to the Commission within one year of the conclusion of the contract the public service contract and elements justifying its longer duration.

5. Without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC. Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services.

6. Where competent authorities, in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts.

7. Tender documents and public service contracts shall indicate, in a transparent manner, whether, and if so to what extent, subcontracting may be considered. If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. A public service contract covering at the same time design, construction and operation of public passenger transport services may allow full subcontracting for the operation of those services. The public service contract shall, in accordance with national and Community law, determine the conditions applicable to subcontracting.

Article 5

Award of public service contracts

1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

- (a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100 % ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;
- (b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;
- (c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;
- (d) in the absence of a competent local authority, points (a), (b) and (c) shall apply to a national authority for the benefit of a geographical area which is not national, provided that the internal operator does not take part in competitive tenders concerning the provision of public passenger transport services organised outside the area for which the public service contract has been granted;

(e) if subcontracting under Article 4(7) is being considered, the internal operator shall be required to perform the major part of the public passenger transport service itself.

3. Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

4. Unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services.

5. In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take an emergency measure. This emergency measure shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years.

6. Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies.

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law.

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made so that any alleged illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

Article 6

Public service compensation

1. All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex.

2. At the written request of the Commission, Member States shall communicate, within a period of three months or any longer period as may be fixed in that request, all the information that the Commission considers necessary to determine whether the compensation granted is compatible with this Regulation.

Article 7

Publication

1. Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible, the selected public service operators and the compensation payments and exclusive rights granted to the said public service operators by way of reimbursement. This report shall distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted.

2. Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

- (a) the name and address of the competent authority;
- (b) the type of award envisaged;
- (c) the services and areas potentially covered by the award.

Competent authorities may decide not to publish this information where a public service contract concerns an annual provision of less than 50 000 kilometres of public passenger transport services.

Should this information change after its publication, the competent authority shall publish a rectification accordingly as soon as possible. This rectification shall be without prejudice to the launching date of the direct award or of the invitation to tender.

This paragraph shall not apply to Article 5(5).

3. In the case of a direct award of public service contracts for transport by rail, as provided for in Article 5(6), the competent authority shall make public the following information within one year of granting the award:

- (a) name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control;
- (b) duration of the public service contract;
- (c) description of the passenger transport services to be performed;
- (d) description of the parameters of the financial compensation;
- (e) quality targets, such as punctuality and reliability and rewards and penalties applicable;
- (f) conditions relating to essential assets.

4. When so requested by an interested party, a competent authority shall forward to it the reasons for its decision for directly awarding a public service contract.

Article 8

Transition

1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directive 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 4 of this Article shall not apply.

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States' progress reports, the Commission may propose appropriate measures addressed to Member States.

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

- (a) before 26 July 2000 on the basis of a fair competitive tendering procedure;
- (b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;
- (c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;
- (d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

4. Without prejudice to paragraph 3, the competent authorities may opt, in the second half of the transitional period specified in paragraph 2, to exclude from participation in the award of contracts by invitation to tender those public service operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right granted in accordance with this Regulation represents at least half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right. Such exclusion shall not apply to public service operators running the services which are to be tendered. For the application of this criterion, no account shall be taken of public service contracts awarded by emergency measure as referred to in Article 5(5).

Where competent authorities make use of the option referred to in the first subparagraph, they shall do so without discrimination, exclude all potential public service operators meeting this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.

The competent authorities concerned shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender.

Article 9

Compatibility with the Treaty

1. Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the common market. Such compensation shall be exempt from the prior notification requirement laid down in Article 88(3) of the Treaty.

2. Without prejudice to Articles 73, 86, 87 and 88 of the Treaty, Member States may continue to grant aid for the transport sector pursuant to Article 73 of the Treaty which meets transport coordination needs or which represents reimbursement for the discharge of certain obligations inherent in the concept of a public service, other than those covered by this Regulation, and in particular:

- (a) until the entry into force of common rules on the allocation of infrastructure costs, where aid is granted to undertakings which have to bear expenditure relating to the infrastructure used by them, while other undertakings are not subject to a like burden. In determining the amount of aid thus granted, account shall be taken of the infrastructure costs which competing modes of transport do not have to bear;
- (b) where the purpose of the aid is to promote either research into, or development of, transport systems and technologies which are more economic for the Community in general.

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

Done at Strasbourg, 23 October 2007.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
M. LOBO ANTUNES

Such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies.

Article 10

Repeal

1. Regulation (EEC) No 1191/69 is hereby repealed. Its provisions shall however continue to apply to freight transport services for a period of three years after the entry into force of this Regulation.

2. Regulation (EEC) No 1107/70 is hereby repealed.

Article 11

Reports

After the end of the transitional period specified in Article 8(2), the Commission shall present a report on the implementation of this Regulation and on the developments in the provision of public passenger transport in the Community, assessing in particular the development of the quality of public passenger transport services and the effects of direct awards, accompanied, if necessary, by appropriate proposals for the amendment of this Regulation.

Article 12

Entry into force

This Regulation shall enter into force on 3 December 2009.

ANNEX

Rules applicable to compensation in the cases referred to in Article 6(1)

1. The compensation connected with public service contracts awarded directly in accordance with Article 5(2), (4), (5) or (6) or with a general rule must be calculated in accordance with the rules laid down in this Annex.
2. The compensation may not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator. The effects shall be assessed by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect, the competent authority shall be guided by the following scheme:

costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority/authorities, contained in a public service contract and/or in a general rule,

minus any positive financial effects generated within the network operated under the public service obligation(s) in question,

minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,

plus a reasonable profit,

equals net financial effect.
3. Compliance with the public service obligation may have an impact on possible transport activities of an operator beyond the public service obligation(s) in question. In order to avoid overcompensation or lack of compensation, quantifiable financial effects on the operator's networks concerned shall therefore be taken into account when calculating the net financial effect.
4. Costs and revenue must be calculated in accordance with the accounting and tax rules in force.
5. In order to increase transparency and avoid cross-subsidies, where a public service operator not only operates compensated services subject to public transport service obligations, but also engages in other activities, the accounts of the said public services must be separated so as to meet at least the following conditions:
 - the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with the accounting and tax rules in force,
 - all variable costs, an appropriate contribution to the fixed costs and a reasonable profit connected with any other activity of the public service operator may under no circumstances be charged to the public service in question,
 - the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.
6. 'Reasonable profit' must be taken to mean a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention.

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7. The method of compensation must promote the maintenance or development of:
- effective management by the public service operator, which can be the subject of an objective assessment, and
 - the provision of passenger transport services of a sufficiently high standard.
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Communication from the Commission
Community guidelines on State aid for railway undertakings

(2008/C 184/07)

1. INTRODUCTION

1.1. General context: the railway sector

1. The railways have unique advantages: they are a safe and clean mode of transport. Rail transport therefore has great potential for contributing to the development of sustainable transport in Europe.
2. The White Paper 'European transport policy for 2010: time to decide' ⁽¹⁾ and its mid term review ⁽²⁾ underline to what extent a dynamic railway industry is necessary for establishing an efficient, clean and safe goods and passenger transport system that will contribute to the creation of a single European market enjoying lasting prosperity. The road congestion plaguing the towns and certain areas of the European Community, the need to face up to the challenges of climate change, and the increase in fuel prices show how necessary it is to stimulate the development of rail transport. In this respect it should be pointed out that the common transport policy also has to pursue the environmental objectives set by the Treaty ⁽³⁾.
3. However, rail transport in Europe has an image problem, having declined steadily from the 1960s to the end of the 20th century. Both goods and passenger traffic volumes have fallen in relative terms compared with the other transport modes. Rail freight has even shown a decline in absolute terms: loads transported by rail were higher in 1970 than in 2000. The traditional railway undertakings were unable to offer the reliability and good timekeeping their customers expected of them, which led to a shift of traffic from rail to the other modes of transport, chiefly road ⁽⁴⁾. Although passenger transport by rail might have continued to grow in absolute terms, this increase seems very limited compared with that of road and air transport ⁽⁵⁾.
4. This trend seems to have reversed recently ⁽⁶⁾, but there is still a long way to go for rail transport to become sound and competitive. Particularly in the rail freight transport sector there continue to be major difficulties which call for public sector action ⁽⁷⁾.
5. The relative decline in Europe's railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.
6. First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the Member States forced the national railway undertakings into

⁽¹⁾ COM(2001) 370 of 12 September 2001, p. 18.

⁽²⁾ Communication from the Commission 'Keep Europe moving — Sustainable mobility for our continent — Mid term review of the Transport White Paper' (COM(2006) 314, 22 June 2006, p. 21).

⁽³⁾ Article 2 of the Treaty stipulates as one of the main objectives of the Community that of promoting 'sustainable and non inflationary growth' respecting the environment. These provisions are supplemented by specific objectives set out in Article 174, which provides that Community environment policy shall contribute in particular to preserving, protecting and improving the quality of the environment. Article 6 of the Treaty provides that 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

⁽⁴⁾ From 1995 to 2005 rail freight (expressed in tonne km) increased by 0,9 % per year on average, as against + 3,3 % average annual growth for road during the same period (source: Eurostat).

⁽⁵⁾ From 1995 to 2004 passenger rail transport (expressed in passenger km) increased by 0,9 % per year on average, as against + 1,8 % average annual growth for private vehicles during the same period (source: Eurostat).

⁽⁶⁾ Since 2002, particularly in those countries which have opened up their markets to competition. In 2006 there was a 3,7 % growth on the year in rail freight performance and 3 % in the performance of passenger transport. This improvement is likely to continue in 2007.

⁽⁷⁾ Communication from the Commission 'Towards a rail network giving priority to freight' (SEC(2007) 1322, SEC(2007) 1324 and SEC(2007) 1325, 18 October 2007).

making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.

7. Secondly, the development of rail transport in Europe was hamstrung by the lack of standardisation and interoperability on the networks, while road hauliers and air carriers had been able to develop a whole range of international services. The Community has inherited a mosaic of national rail networks characterised by different track gauges and incompatible signalling and safety systems, which do not allow the railway undertakings to benefit from the economies of scale which would result from designing infrastructure and rolling stock for a large single market rather than for 25 ⁽¹⁾ national markets.
8. The Community is conducting a three pronged policy to revitalise the rail industry by:
 - (a) gradually introducing conditions fostering competition on the rail transport services markets;
 - (b) encouraging standardisation and technical harmonisation on the European rail networks, aiming at full interoperability at the European level;
 - (c) granting financial support at Community level (in the TEN T programme and the Structural Funds framework).
9. The Community has thus gradually opened up the rail transport markets to competition. An initial liberalisation package was adopted in 2001 including Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways ⁽²⁾, Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings ⁽³⁾, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification ⁽⁴⁾. That package was followed by a second package in 2004 the main instruments of which were Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency ⁽⁵⁾, Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification ⁽⁶⁾, Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans European high speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans European conventional rail system ⁽⁷⁾ and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways ⁽⁸⁾. A third package was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 ⁽⁹⁾, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations ⁽¹⁰⁾, Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure ⁽¹¹⁾ and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community ⁽¹²⁾. As a result, the rail freight market was opened to competition on 15 March 2003 on the trans European rail freight network, then on 1 January 2006 for international freight

⁽¹⁾ Malta and Cyprus do not have rail transport networks.

⁽²⁾ OJL 75, 15.3.2001, p. 1.

⁽³⁾ OJL 75, 15.3.2001, p. 26.

⁽⁴⁾ OJL 75, 15.3.2001, p. 29. Directive as last amended by Directive 2007/58/EC (OJL 315, 3.12.2007, p. 44).

⁽⁵⁾ OJL 164, 30.4.2004, p. 1.

⁽⁶⁾ OJL 164, 30.4.2004, p. 44.

⁽⁷⁾ OJL 164, 30.4.2004, p. 114.

⁽⁸⁾ OJL 164, 30.4.2004, p. 164.

⁽⁹⁾ OJL 315, 3.12.2007, p. 1.

⁽¹⁰⁾ OJL 315, 3.12.2007, p. 14.

⁽¹¹⁾ OJL 315, 3.12.2007, p. 44.

⁽¹²⁾ OJL 315, 3.12.2007, p. 51.

and finally from 1 January 2007 for rail cabotage. The third railway package sets 1 January 2010 as the date for opening up international passenger transport to competition. Some of the Member States, such as the United Kingdom, Germany, the Netherlands and Italy, have already (partially) opened up their domestic passenger transport markets.

10. The relevant provisions of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways ⁽¹⁾, put in place a new institutional and organisational framework for the players in the railway industry, involving:
 - (a) separating railway undertakings ⁽²⁾ from infrastructure managers ⁽³⁾ as regards accounts and organisation;
 - (b) management independence of railway undertakings;
 - (c) management of railway undertakings according to the principles which apply to commercial companies;
 - (d) financial equilibrium of railway undertakings according to a sound business plan;
 - (e) compatibility of Member States' financial measures with the State aid rules ⁽⁴⁾.
11. Alongside this liberalisation process, the Commission has undertaken, on a second level, to promote the interoperability of European rail networks. This approach has been accompanied by Community initiatives to improve the safety standard of rail transport ⁽⁵⁾.
12. The third level of public intervention in favour of the railway industry lies in the area of financial support. The Commission considers this support to be justified in certain circumstances in view of the substantial adaptation costs necessary in that industry.
13. The Commission notes, furthermore, that there has always been considerable injection of public funds in the rail transport sector. Since 2004 the States of the European Union when it comprised 25 Member States (EU 25) have overall contributed funds totalling some EUR 17 billion to the construction and maintenance of railway infrastructure ⁽⁶⁾. The Member States pay railway undertakings EUR 15 billion annually in compensation for the provision of unprofitable passenger transport services ⁽⁶⁾.
14. The granting of State aid to the railway industry can be authorised only where it contributes to the completion of an integrated European market, open to competition and interoperable and to Community objectives of sustainable mobility. The Commission will accordingly make sure that public sector financial support does not cause distortions of competition contrary to the common interest. Here the Commission will in certain cases be able to ask Member States for commitments on the Community objectives in return for the granting of aid.

1.2. Objective and scope of these guidelines

15. The objective of these guidelines is to provide guidance on the compatibility with the Treaty of State aid to railway undertakings as it is defined in Directive 91/440/EEC and in the context described above. In addition, Chapter 3 also applies to urban, suburban and regional passenger transport undertakings. The guidelines are based in particular on the principles established by the Community legislator in the three successive railway packages. Their aim is to improve the transparency of public

⁽¹⁾ OJL 237, 24.8.1991, p. 25. Directive as last amended by Directive 2007/58/EC.

⁽²⁾ Article 3 of Directive 91/440/EEC defines a railway undertaking as 'any public or private undertaking licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which provide traction only'.

⁽³⁾ Article 3 of Directive 91/440/EEC defines an infrastructure manager as 'any body or undertaking responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. The functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings'.

⁽⁴⁾ Article 9(3) of Directive 91/440/EEC states: 'Aid accorded by Member States to cancel the debts referred to in this Article shall be granted in accordance with Articles 73, 87 and 88 of the Treaty'.

⁽⁵⁾ In particular, Directive 2004/49/EC.

⁽⁶⁾ Source: European Commission, on the basis of the data communicated annually by the Member States. The figures may be even higher in that not all financial support has been notified, in particular co-financing through the Structural and Cohesion Funds.

financing and legal certainty with regard to the Treaty rules in the context of the opening up of the markets. These guidelines do not concern public financing intended for infrastructure managers.

16. Article 87(1) of the Treaty provides that in principle any aid granted by a Member State which threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Nevertheless, such State aid may in certain situations be justified in the light of the common interest of the Community. Some of these situations are mentioned in Article 87(3) of the Treaty, and apply to the transport sector as they do to other sectors of the economy.
17. Also, Article 73 of the Treaty provides that aids are compatible with the common market 'if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'. This Article constitutes a *lex specialis* in the general scheme of the Treaty. On the basis of this Article the Community legislator has adopted two instruments specific to the transport sector: Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway ⁽¹⁾ and Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ⁽²⁾. Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings ⁽³⁾ likewise provides that certain compensation may be granted by Member States to railway undertakings.
18. Article 3 of Regulation (EEC) No 1107/70 provides that Member States are neither to take coordination measures nor to impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 73 of the Treaty except in the cases or circumstances provided for by the Regulation in question, without prejudice, however, to Regulations (EEC) No 1191/69 and (EEC) No 1192/69. According to the judgment of the Court of Justice of the European Communities in *Altmark* ⁽⁴⁾, it follows that State aid which cannot be authorised on the basis of Regulations (EEC) No 1107/70, (EEC) No 1191/69 or (EEC) No 1192/69 cannot be declared compatible on the basis of Article 73 of the Treaty ⁽⁵⁾. In addition, it should be recalled that public service compensation which does not respect provisions stemming from Article 73 of the Treaty cannot be declared compatible with the common market on the basis of Article 86(2) or any other provision of the Treaty ⁽⁶⁾.
19. Regulation (EC) No 1370/2007 ('the PSO Regulation'), which will enter into force on 3 December 2009 and which repeals Regulations (EEC) No 1191/69 and (EEC) No 1107/70, will put in place a new legal framework. The aspects relating to public service compensation are therefore not covered by these guidelines.
20. After the entry into force of Regulation (EC) No 1370/2007, Article 73 of the Treaty will be directly applicable as a legal basis for establishing the compatibility of aid not covered by the PSO Regulation, and in particular aid for the coordination of freight transport. A general interpretation therefore needs to be developed for considering the compatibility of aid for coordination purposes with Article 73 of the Treaty. The aim of these guidelines is in particular to establish criteria for this examination and intensity thresholds. In view of the wording of Article 73, the Commission must nevertheless make it possible for Member States to show, where appropriate, the need for and proportionality of any measures which exceed the thresholds established.
21. These guidelines concern the application of Articles 73 and 87 of the Treaty and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. They deal with the following aspects: public financing of railway undertakings by means of infrastructure funding (Chapter 2), aid for the purchase and renewal of rolling stock (Chapter 3),

⁽¹⁾ OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

⁽²⁾ OJ L 130, 15.6.1970, p. 1.

⁽³⁾ OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽⁴⁾ Judgment of the Court of Justice of 24 July 2003, Case C 280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark') [2003] ECR I 7747.

⁽⁵⁾ Judgement in *Altmark*, paragraph 107.

⁽⁶⁾ See, in that regard, recital 17 of Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67, point 17).

debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4), aid for restructuring railway undertakings (Chapter 5), aid for the needs of transport coordination (Chapter 6), and State guarantees for railway undertakings (Chapter 7). However, these guidelines do not deal with the rules for the application of the PSO Regulation, for which the Commission has not yet developed any decision making practice ⁽¹⁾.

2. PUBLIC FINANCING OF RAILWAY UNDERTAKINGS BY MEANS OF RAILWAY INFRASTRUCTURE FUNDING

22. Railway infrastructure is of major importance for the development of the railway sector in Europe. Whether for interoperability, safety or the development of high speed rail, considerable investments will have to be made in this infrastructure ⁽²⁾.
23. These guidelines apply only to railway undertakings. Their aim is therefore not to define, in the light of State aid rules, the legal framework which applies to the public financing of infrastructure. This Chapter only examines the effects of public financing of infrastructure on railway undertakings.
24. Moreover, public financing of infrastructure development can grant an advantage to railway undertakings indirectly and thereby constitute aid. According to the case law of the Court of Justice, it should be evaluated whether the infrastructure measure has the economic effect of lightening the burden of charges normally encumbering railway undertakings' budgets ⁽³⁾. For that to be the case, a selective advantage would have to be granted to the undertakings concerned, that advantage originating in the financing of the infrastructure in question ⁽⁴⁾.
25. Where infrastructure use is open to all potential users in a fair and non discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation (Directive 2001/14/EC), the Commission normally considers that public financing of the infrastructure does not constitute State aid to railway undertakings ⁽⁵⁾.
26. The Commission also points out that, where public financing of railway infrastructure constitutes aid to one or more railway undertakings, it may be authorised, for example on the basis of Article 73 of the Treaty, if the infrastructure in question meets the needs of transport coordination. In this regard, Chapter 6 of these guidelines is a pertinent reference point for assessing compatibility.

3. AID FOR THE PURCHASE AND RENEWAL OF ROLLING STOCK

3.1. Objective

27. The fleet of locomotives and carriages used for passenger transport is ageing and in some cases worn out, especially in the new Member States. In 2005, 70 % of the locomotives (diesel and electric) and 65 % of the wagons of the EU 25 were more than 20 years old ⁽⁶⁾. Taking only the Member States

⁽¹⁾ Nor do they concern the application of Regulation (EEC) No 1192/69.

⁽²⁾ Communication from the Commission 'Keep Europe moving — Sustainable mobility for our continent — Mid term review of the Transport White Paper'.

⁽³⁾ Judgment of the Court of Justice of 13 June 2002, Case C 382/99, *Netherlands v Commission* [2002] ECR I 5163.

⁽⁴⁾ Judgment of the Court of Justice of 19 September 2000, Case C 156/98, *Germany v Commission* [2000] ECR I 6857.

⁽⁵⁾ Commission Decision of 7 June 2006, N 478/04, Ireland — State guarantee for capital borrowings by Córas Iompair Éireann (CIÉ) for infrastructure investment (OJ C 209, 31.8.2006, p. 8); Decision of 8 March 2006, N 284/05, Ireland — Regional Broadband Programme (OJ C 207, 30.8.2006, p. 3), point 34; and the following Decisions: Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), point 64; Decision of 20 April 2005, N 355/04 PPP, Belgium — Public Private Partnership for tunnelling the Krijgsbaan at Deurne; the development of industrial estates and the operation of Antwerp Airport (OJ C 176, 16.7.2005, p. 11), point 34; Decision of 11 December 2001, N 550/01, Belgium — Public Private Partnership for loading and unloading facilities (OJ C 24, 26.1.2002, p. 2), point 24; Decision of 20 December 2001, N 649/01, United Kingdom — Freight Facilities Grant (OJ C 45, 19.2.2002, p. 2), point 45; Decision of 17 July 2002, N 356/02, United Kingdom — Network Rail (OJ C 232, 28.9.2002, p. 2), point 70; N 511/95, Jaguar Cars Ltd. See also, the Commission Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5), point 12; White Paper: Fair Payment for Infrastructure use (COM(1998) 466 final), point 43; Communication from the Commission to the European Parliament and the Council: 'Reinforcing Quality Service in Sea Ports: A Key for European Transport' (COM(2001) 35 final, p. 11).

⁽⁶⁾ Source: UIC Rolling stock fleet in EU 25 + Norway (2005).

which joined the European Union in 2004, 82 % of locomotives and 62 % of wagons were more than 20 years old in 2005 ⁽¹⁾. According to the information at its disposal, the Commission estimates that the annual rate of renewal of the fleet is around 1 %.

28. This trend of course reflects the difficulties of the railway industry in general, which reduce the incentives for railway undertakings and their capacity to invest in an effort to modernise and/or renew their rolling stock. Such investment is indispensable to keeping rail transport competitive with other modes of transport which cause more pollution or entail higher external costs. It is also necessary to limit the impact of rail transport on the environment, particularly by reducing the noise pollution it causes, and to improve its safety. Finally, improving interoperability between the national networks means it is necessary to adapt the existing rolling stock in order to be able to maintain a coherent system.
29. In the light of the above it seems that under certain circumstances aid for the purchase and renewal of rolling stock can contribute to several types of objectives of common interest and therefore be considered compatible with the common market.
30. This Chapter seeks to define the conditions in which the Commission is to carry out such a compatibility assessment.

3.2. Compatibility

31. The compatibility assessment has to be made according to the common interest objective to which the aid is contributing.
32. The Commission considers that in principle the need to modernise rolling stock can be sufficiently taken into account either in implementing the general State aid rules or by applying Article 73 of the Treaty where such aid is intended for transport coordination (see Chapter 6).
33. In assessing the compatibility of aid for rolling stock the Commission therefore generally applies the criteria defined for each of the following aid categories in these guidelines or in any other relevant document:
 - (a) aid for coordination of transport ⁽²⁾;
 - (b) aid for restructuring railway undertakings ⁽³⁾;
 - (c) aid for small and medium sized enterprises ⁽⁴⁾;
 - (d) aid for environmental protection ⁽⁵⁾;
 - (e) aid to offset costs relating to public service obligations and in the framework of public service contracts ⁽⁶⁾;
 - (f) regional aid ⁽⁷⁾.
34. In the case of regional aid for initial investment, the Guidelines on national regional aid, 'the regional aid guidelines', provide that 'in the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment' (point 50, footnote 48). The Commission considers that a derogation should be made from this rule with regard to rail passenger transport. This is due to the specific characteristics of this mode of transport, and in particular to the

⁽¹⁾ Source: CER (2005).

⁽²⁾ See Chapter 6.

⁽³⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), and Chapter 5.

⁽⁴⁾ 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). Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

⁽⁵⁾ Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

⁽⁶⁾ Regulation (EEC) No 1191/69 cited above; PSO Regulation of the European Parliament and of the Council, cited above, in which attention should be drawn in particular to Article 3(1): 'Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract'.

⁽⁷⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13), point 8.

fact that it is possible that the rolling stock in this sector may be permanently assigned to specific lines or services. Subject to certain conditions, defined below, the costs of acquisition of rolling stock in the rail passenger transport sector (or for other modes such as light rail, underground or tram) are deemed to be admissible expenditure within the meaning of the guidelines in question ⁽¹⁾. However, the costs of acquisition of rolling stock for exclusive use in freight transport are not admissible.

35. In view of the situation described in points 28 and 29, this derogation applies to any kind of investment in rolling stock, whether initial or for replacement purposes, so long as it is assigned to lines regularly serving a region eligible for aid under Article 87(3)(a) of the Treaty, an outermost region or a region of low population density within the meaning of points 80 and 81 of the regional aid guidelines ⁽²⁾. In the other regions, the derogation applies only to aid for initial investment. For aid for investment for replacement purposes, the derogation applies only when all the rolling stock that the aid is used to modernise is more than 15 years old.
36. In order to avoid distortions of competition which would be contrary to the common interest, the Commission does, however, consider that such a derogation has to be made subject to four conditions, which have to be met cumulatively:
- (a) the rolling stock concerned must be exclusively assigned to urban, suburban or regional passenger transport services in a specific region or for a specific line serving several different regions; For the purposes of these guidelines 'urban and suburban transport services' is to be understood as transport services serving an urban centre or conurbation as well as those services between that centre or conurbation and its suburbs. 'Regional transport services' is to be understood as transport services intended to meet the transport needs of one or more regions. Transport services serving several different regions, in one or more Member States, may therefore be covered by the scope of this point if it can be shown that there is an impact on the regional development of the regions served, in particular by the regular nature of the service. In this case, the Commission verifies that the aid does not compromise the effective opening of the international passenger transport market and cabotage following the entry into force of the third railway package;
 - (b) the rolling stock must remain exclusively assigned to the specific region or the specific line passing through several different regions for which it has received aid for at least ten years;
 - (c) the replacement rolling stock must meet the latest interoperability, safety and environmental standards ⁽³⁾ applicable to the network concerned;
 - (d) the Member State must prove that the project contributes to a coherent regional development strategy.
37. The Commission will take care to avoid undue distortions of competition, notably by taking account of the additional revenue that the replaced rolling stock on the line in question could procure for the enterprise aided, for example, through sales to a third party or use on other markets. To this end, the granting of the aid may be made subject to the obligation on the recipient undertaking to sell under normal market conditions all or part of the rolling stock it is no longer using, so as to allow its further use by other operators; in this case the proceeds from the sale of the old rolling stock will be deducted from the eligible costs.

⁽¹⁾ The Commission notes that, depending on the specific circumstances of the case in point, this reasoning may be applied *mutatis mutandis* to vehicles used for the public transport of passengers by road, where such vehicles meet the latest Community standards applicable to new vehicles. Where that is the case, in the interests of equal treatment the Commission will, in such situations, apply the approach described here for railway rolling stock. The Commission encourages the Member State to support the least polluting technologies when awarding this type of aid and will study the extent to which specific financial aid leading to higher aid intensities for such technologies is appropriate.

⁽²⁾ The least populated regions represent or belong to regions at NUTS II level with a population density of no more than 8 inhabitants per km² and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

⁽³⁾ 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 is possible within the Guidelines on State aid for environmental protection.

38. More generally, the Commission will ensure that no improper use is made of the aid. The other conditions provided for in the regional aid guidelines, notably as regards the intensity ceilings and the regional aid maps and the rules on the cumulation of aid, apply. The Commission notes that the specific lines concerned may in certain cases pass through regions where there are different intensity ceilings in accordance with the regional aid maps. In this case the Commission will apply the highest rate of intensity of the regions regularly served by the line concerned in proportion to the regularity of such service ⁽¹⁾.
39. With regard to investment projects with eligible expenditure in excess of EUR 50 million, the Commission considers it appropriate, due to the specificities of the rail passenger transport sector, to derogate from points 60 to 70 of the regional aid guidelines. However, points 64 and 67 of those guidelines remain applicable when the investment project concerns rolling stock assigned to a specific line serving several regions.
40. If the recipient undertaking is entrusted with providing services of general economic interest that necessitate buying and/or renewing rolling stock and it already receives compensation for this, that compensation should be taken into account in the amount of regional aid that may be awarded to this undertaking, in order to avoid overcompensation.

4. DEBT CANCELLATION

4.1. Objective

41. As mentioned in Section 1.1, railway undertakings have in the past experienced a state of imbalance between their revenues and their costs, especially their investment costs. This has led to major indebtedness, the financial servicing of which represents a very heavy burden on railway undertakings and limits their capacity to make the necessary investments in both infrastructure and renewal of rolling stock.
42. Directive 91/440/EEC explicitly took this situation into account. It is stated in the seventh recital thereto that Member States 'should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure' and envisages that a 'financial rearrangement' might be necessary for this purpose. Article 9 of the Directive provides: 'In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation'. Article 9(3) envisages the granting of State aid 'to cancel the debts referred to in this Article', and provides that such aid must be granted in accordance with Articles 73, 87 and 88 of the Treaty.
43. At the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the Member States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:
 - (a) transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;
 - (b) the creation of separate entities for the financing of infrastructure projects (for example, high speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;
 - (c) financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.

⁽¹⁾ Where the line or specific service systematically (that is to say, on every journey) serves the region to which the highest rate applies, this rate is applied to all admissible expenditure. Where the region to which the highest rate applies is only occasionally served, this rate is applied only to the part of the admissible expenditure allocated to serving that region.

44. These three types of action have helped to improve the financial situation of railway undertakings in the short term. Their indebtedness has been reduced compared with total liabilities, as has the share of interest repayments in the operating costs. In general the debt reduction has allowed railway undertakings to improve their financial situation through a reduction in their capital and interest repayments. Such reductions have also helped to lower the rates of interest, which has a substantial impact on the financial servicing of the debt.
45. However, the Commission notes that the level of indebtedness of many railway undertakings continues to give cause for concern. Several of these undertakings have a level of indebtedness higher than is acceptable for a commercial company, are still not capable of self financing, and/or cannot finance their investment needs from the revenue from present and future transport operations. Also, in the Member States which joined the Community after 1 May 2004 the level of indebtedness of the companies in the sector is considerably higher than in the rest of the Community.
46. This fact is reflected in the Community legislator's choice not to amend the provisions of Directive 91/440/EEC when Directives 2001/12/EC and 2004/51/EC were adopted. These provisions therefore fall within the general framework formed by the successive railway packages.
47. This Chapter seeks to define how, in the light of this requirement of secondary legislation, the Commission intends to apply the Treaty rules on State aid to the mechanisms for reducing the indebtedness of railway undertakings.

4.2. Presence of State aid

48. The Commission notes first of all that the principle of incompatibility laid down in Article 87(1) of the Treaty applies only to aid 'which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only 'insofar as it affects trade between Member States'. Under established case law, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra community trade, these undertakings must be regarded as affected by that aid ⁽¹⁾.
49. Any measure attributable to the State which leads to the complete or partial cancellation of debts specifically in favour of one or more railway undertakings and through State resources therefore falls within the scope of Article 87(1) of the Treaty, if the railway undertaking in question is active in markets open to competition and if this debt cancellation strengthens its position in at least one of those markets.
50. The Commission notes that Directive 2001/12/EC opened up the international rail freight services market to competition over the whole trans European rail freight network from 15 March 2003. It therefore considers that, generally, the market was opened up to competition at the latest on 15 March 2003.

4.3. Compatibility

51. When the cancellation of a railway undertaking's debt constitutes State aid covered by Article 87(1) of the Treaty it must be notified to the Commission in accordance with Article 88 of the Treaty.
52. Aid of this kind must generally be examined on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 2004 ('the 2004 guidelines on State aid for restructuring'), subject to Chapter 5 of these Guidelines.
53. In specific cases where the debts cancelled exclusively concern transport coordination, compensation of public service obligations or the setting of accounting standards, the compatibility of this aid will be examined on the basis of Article 73 of the Treaty, the regulations adopted for the implementation thereof and the rules for the normalisation of the accounts ⁽²⁾.

⁽¹⁾ Judgment of the Court of Justice of 17 September 1980, Case 730/79, *Phillip Morris Holland v Commission* [1980] ECR 2671, paragraph 11.

⁽²⁾ Regulation (EEC) No 1192/69.

54. In the light of Article 9 of Directive 91/440/EEC, the Commission also considers that, under certain circumstances, it should be possible to authorise this aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.
55. The Commission takes the view that this type of aid may be compatible in so far as it seeks to ease the transition to an open rail market, as provided for by Article 9 of Directive 91/440/EEC ⁽¹⁾. Thus it considers that such aid may be regarded as compatible with Article 87(3)(c) of the Treaty ⁽²⁾, provided that the following conditions are met.
56. Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. In cases where the Member States joined the Community after 15 March 2001, the relevant date is that of accession to the Community. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at Community level had yet to be taken.
57. Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. Debts incurred for the purpose of investment not directly linked to transport and/or rail infrastructure are not eligible.
58. Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition on the market would not allow them to rectify their financial situation within a foreseeable future. Assessment of this criterion has to take into account any productivity improvements which the undertaking can reasonably be expected to achieve.
59. Fourthly, the aid must not go beyond what is necessary for the purpose. In this regard, account must also be taken of future developments in competition. It should not, at any rate, place the undertaking in a situation more favourable than that of an average well managed undertaking with the same activity profile.
60. Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market, for example by deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators ⁽³⁾.
61. Where these conditions are met, the debt cancellation measures are contributing to the objective set in Article 9 of Directive 91/440/EEC, without unduly distorting competition and trade between Member States. They can thus be considered compatible with the common market.

5. AID FOR RESTRUCTURING RAILWAY UNDERTAKINGS RESTRUCTURING A 'FREIGHT' DIVISION

5.1. Objective

62. Save where specifically provided otherwise, the Commission assesses the compatibility of State aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 guidelines on State aid for restructuring. Those guidelines do not provide for any derogation for railway undertakings.

⁽¹⁾ The Commission applies, by analogy, certain conditions laid down by the Commission communication relating to the methodology for analysing State aid linked to stranded costs of 26 July 2001, SEC(2001) 1238.

⁽²⁾ Without prejudice to the application of Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70.

⁽³⁾ Without prejudice to the application of Directive 2001/14/EC.

63. Generally speaking, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid. The 2004 guidelines on State aid for restructuring apply only to 'firms in difficulty'. They also state, at point 13, that a firm 'belonging to or being taken over by a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'. It should be avoided, *a fortiori*, that artificial subdivision allows a loss making activity within a given company to receive public funds.
64. However, the Commission considers that the European rail freight sector currently finds itself in a very specific situation making it necessary, in the common interest, to envisage that aid granted to a railway undertaking allowing it to overcome difficulties in the freight operations of that undertaking might, under certain circumstances, be considered compatible with the common market.
65. In today's railway industry, the competitive situation of freight transport operations is quite different from that which applies to passenger transport. The national freight markets are open to competition whereas the rail passenger transport markets are not going to be opened up before 1 January 2010.
66. This situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers. The financial equilibrium of passenger transport, on the other hand, may also depend on the public authorities taking action by way of public service compensation.
67. However, several European railway undertakings have not legally separated their passenger and freight transport activities, or have only just done so. Moreover, current Community legislation does not provide for the obligation to make this legal separation.
68. Furthermore, one of the central priorities of European transport policy has, for many years, been to breathe new life into the railway freight industry. The reasons for this are set out in Chapter 1 of these guidelines.
69. This specific characteristic of rail freight activities necessitates an adapted approach, as has been recognised in the Commission's decision making practice ⁽¹⁾ on the basis of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty of 1999 ⁽²⁾.
70. This Chapter is intended to show, in the light of the Commission's decision making practice and taking account of the amendments made by the 2004 guidelines on State aid for restructuring to the corresponding 1999 guidelines, the way in which the Commission intends to implement this approach in future.
71. In view of the risks highlighted above, this approach is justified and will be maintained only for the freight divisions of railway undertakings, and for a transitional period, namely for restructurings notified before 1 January 2010, the date on which the rail passenger transport market will be opened up to competition.
72. Furthermore, the Commission wishes to take account of the fact that, in a growing number of Member States, railway undertakings have adapted their organisation to specific developments in rail freight and passenger transport activities by taking steps to legally separate their freight transport activities. The Commission will therefore require, as part of the restructuring efforts and before awarding any aid, the legal separation of the freight division in question by transforming it into a commercial company under common commercial law. The Commission is of the view that this separation will, with other appropriate measures, help considerably to achieve two goals, namely to exclude all cross subsidisation between the restructured division and the rest of the undertaking and to ensure that all financial relations between these two activities are carried out in a sustainable manner and on a commercial basis.

⁽¹⁾ See Commission Decision of 2 March 2005, N 386/04, Aid for restructuring SNCF Freight — France (OJ C 172, 12.7.2005, p. 3).

⁽²⁾ OJ C 288, 9.10.1999, p. 2.

73. In order to avoid any doubt, the 2004 guidelines on State aid for restructuring will continue to apply in their entirety when examining the aid dealt with in this Chapter, except with regard to the express derogations set out below.

5.2. Eligibility

74. The eligibility criteria must be adapted to include the situation in which a freight division of a railway undertaking constitutes a coherent and permanent economic unit, which will be legally separated from the rest of the undertaking through the restructuring process before aid is granted, and faces difficulties such that, if it had been separated from the railway undertaking, it would be a 'firm in difficulty' within the meaning of the 2004 restructuring guidelines.
75. This means, in particular, that that division of the undertaking would be facing serious difficulties of its own, which are not the result of an arbitrary allocation of costs within the railway undertaking.
76. In order for the division to be restructured to constitute a coherent and permanent economic unit it must comprise all the freight transport activities of the railway undertaking, whether industrial, commercial, accounting or financial. It must be possible to attribute to it a level of losses, as well as a level of own funds or capital, which sufficiently reflects the economic reality of the situation which the division faces in order to evaluate in a coherent manner the criteria fixed in point 10 of the 2004 guidelines on State aid for restructuring ⁽¹⁾.
77. When assessing whether a division is in difficulty as described above, the Commission will also take into account the ability of the rest of the railway undertaking to ensure the recovery of the division to be restructured.
78. The Commission is of the view that, although the situation described is not directly covered by the 2004 guidelines on State aid for restructuring, point 12 of which excludes newly created firms from the scope of the guidelines, restructuring aid may be granted in this context to enable the firm created by this legal separation to operate in viable market conditions. This is intended to apply only in situations where the firm to be created as a result of legal separation includes the entire freight division, as described by the separate accounting established in accordance with Article 9 of Directive 91/440/EEC, and includes all the division's assets, liabilities, capital, off balance sheet commitments and workforce.
79. The Commission considers that, for the same reasons, when a railway undertaking has recently legally separated its freight division, where this division fulfilled the above criteria, the firm in question must not be considered a newly created firm within the meaning of point 12 of the 2004 guidelines on State aid for restructuring, and is therefore not excluded from the scope of these guidelines.

5.3. Return to long-term viability

80. The Commission will make sure not only that the criteria for a return to long term viability as set out in the 2004 guidelines on State aid for restructuring are fulfilled ⁽²⁾, but also that restructuring will ensure the freight activity is transformed from a protected activity enjoying exclusive rights into one which is competitive on the open market. This restructuring should therefore concern all aspects of

⁽¹⁾ Point 10 of the guidelines on State aid for restructuring states: 'In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these guidelines in the following circumstances:

- 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
- 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
- whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings'.

⁽²⁾ See in particular points 34 to 37 of the guidelines on State aid for restructuring.

the freight activity, whether industrial, commercial, or financial. The restructuring plan required by the restructuring guidelines ⁽¹⁾ must make it possible to ensure a standard of quality, reliability and service which meets customers' requirements.

5.4. Prevention of any excessive distortion of competition

81. In analysing the prevention of any excessive distortion of competition, as provided for by the guidelines on State aid for restructuring, the Commission will also base itself on:
- (a) the difference between the economic models for rail and the other modes of transport;
 - (b) the Community objective of shifting the balance between modes of transport;
 - (c) the competitive situation on the market at the time of restructuring (degree of integration, growth potential, presence of competitors, likely trends).

5.5. Aid limited to a minimum

82. The provisions of the 2004 guidelines on State aid for restructuring apply when verifying this criterion. To this end the firm's own contribution will include that of the freight division which will be legally separated from the railway undertaking. However, in the Commission's view, the very specific situation of the European rail freight industry, which is described above, may constitute an exceptional circumstance within the meaning of paragraph 44 of those guidelines. It may therefore accept lower own contributions than those provided for in the 2004 guidelines on State aid for restructuring provided that the freight division's own contribution is as high as possible without jeopardising the viability of the operation.

5.6. 'One time, last time' principle

83. The 'one time, last time' principle applies to the legally separated firm, by taking account of the restructuring aid notified as initial restructuring aid received by the undertaking. However, restructuring aid authorised under the conditions set out in this Chapter does not affect application of the 'one time, last time' principle with regard to the rest of the railway undertaking.
84. To avoid any doubt, if the railway undertaking as a whole has already received restructuring aid, the 'one time, last time' principle means that aid as provided for in this Chapter may not be granted to restructure the freight division of the undertaking.

6. AID FOR COORDINATION OF TRANSPORT

6.1. Objective

85. As already stated, Article 73 of the Treaty was implemented by Regulations (EEC) No 1191/69 and (EEC) No 1107/70, which will be repealed by the PSO Regulation. The PSO Regulation will, however, apply only to land passenger transport. It will not cover rail freight transport, for which aid for coordination of transport will continue to be subject only to Article 73 of the Treaty.
86. In addition to this, Article 9 of the PSO Regulation concerning aid for coordination of transport and aid for research and development applies explicitly without prejudice to Article 73 of the Treaty, so it will be possible to use Article 73 directly for justifying the compatibility of aid for coordination of rail passenger transport.
87. The objective of this Chapter is therefore to establish criteria which will allow the Commission to assess the compatibility, on the basis of Article 73 of the Treaty, of aid for the coordination of transport, both generally (Section 6.2) and as regards certain specific forms of aid (Section 6.3). The Commission notes that, although the general implementing principles of Article 73 of the Treaty are relevant when assessing State aid under the PSO Regulation, these guidelines do not cover the detailed rules for the implementation of the Regulation in question.

⁽¹⁾ See in particular Section 3.2 of the restructuring guidelines.

6.2. General considerations

88. Article 73 of the Treaty provides for compatibility of aid which meets the needs of coordination of transport. The Court of Justice has ruled that this Article 'acknowledges that aid to transport is compatible with the Treaty only in well defined cases which do not jeopardise the general interests of the Community' ⁽¹⁾.
89. The concept of 'coordination of transport' used in Article 73 of the Treaty has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest.
90. The progress made with liberalising the land transport sector has in some respects considerably reduced the need for coordination. In an efficient liberalised sector, coordination can in principle result from the action of market forces. As indicated above, however, the fact remains that investment in infrastructure development continues to be carried out by the public authorities. Moreover, even after the liberalisation of the sector, there may still be various market failures. These in particular are the failures which justify the intervention of the public authorities in this field.
91. Firstly, the transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits to the possibility of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result there may be disparities between the different modes of transport, which ought to be corrected by public authority support for those modes of transport which give rise to the lowest external costs.
92. Secondly, the transport sector may experience 'coordination' difficulties in the economic sense of the term, for example in the adoption of a common interoperability standard for rail, or in the connections between different transport networks.
93. Thirdly, the railway undertakings may not be able to reap the full rewards of their research, development and innovation efforts (positive externalities), which also amounts to a failure of the market.
94. The presence of a specific provision in the Treaty making it possible to authorise aid which meets the needs of transport coordination shows how important these risks of market failures are and the negative impact they have on the development of the Community.
95. In principle, aid which meets the needs of transport coordination has to be considered compatible with the Treaty.
96. Nevertheless, for a given aid measure to be considered to 'meet the needs' of transport coordination, it has to be necessary and proportionate to the intended objective. Furthermore, the distortion of competition which is inherent in aid must not jeopardise the general interests of the Community. By way of illustration, aid likely to shift traffic flows from short sea shipping to rail would fail to meet these criteria.
97. Finally, in view of the rapid development of the transport sector, and hence the need for coordinating it, any aid notified to the Commission for the purpose of obtaining a decision, on the basis of Article 73 of the Treaty, that the aid is compatible with the Treaty has to be limited ⁽²⁾ to a maximum of 5 years, in order to allow the Commission to re examine it in the light of the results obtained and, where necessary, to authorise its renewal ⁽³⁾.

⁽²⁾ Ibidem.

⁽³⁾ This period is increased to 10 years for measures which fall within the scope of Article 15(1)(e) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (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). See in particular Commission Decision of 2 April 2008, NN 46/B/06, Slovakia — Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

98. As regards the railway industry more specifically, aid for the needs of transport coordination can take several forms:
- (a) aid for infrastructure use, that is to say, aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;
 - (b) aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;
 - (c) aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector, hereinafter referred to as 'interoperability aid';
 - (d) aid for research and development in response to the needs of transport coordination.
99. In the following Sections the Commission will specify the conditions which, from the point of view of its decision making practice, make it possible to ensure, for these different types of aid for coordination of transport, that the aid concerned meets the conditions of compatibility mentioned in Article 73 of the Treaty. In view of the specific nature of research and development aid, the criteria applicable to this type of measure are dealt with separately.

6.3. Criteria for aid for rail infrastructure use, reducing external costs and interoperability

100. The assessment of the compatibility of aid for infrastructure use, reducing external costs and interoperability with respect to Article 73 of the Treaty is in keeping with the Commission's decision making practice pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70. In the light of this practice the conditions which follow appear sufficient for determining whether the aid is compatible.

6.3.1. Eligible costs

101. The eligible costs are determined on the basis of the following.
102. As regards **aid for rail infrastructure use**, the eligible costs are the additional costs for infrastructure use paid by rail transport but not by a more polluting competing transport mode.
103. As regards **aid for reducing external costs**, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.
104. In that regard, it should be recalled that Article 10 of Directive 2001/14/EC explicitly allows Member States to put in place a compensation scheme for the demonstrably unpaid environmental, accident related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail. If there is not yet any Community legislation which harmonises methods for calculating infrastructure access charges within or across land transport modes, the Commission will take account of the development of the rules governing the allocation of infrastructure costs and external costs when applying these guidelines ⁽¹⁾.

⁽¹⁾ In this connection the third paragraph of Article 11 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ L 187, 20.7.1999, p. 42), as amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344), provides that 'No later than 10 June 2008, the Commission shall present, after examining all options including environment, noise, congestion and health related costs, a generally applicable, transparent and comprehensible model for the assessment of all external costs to serve as the basis for future calculations of infrastructure charges. This model shall be accompanied by an impact analysis of the internalisation of external costs for all modes of transport and a strategy for a stepwise implementation of the model for all modes of transport'. During the preparation of a communication on the internalisation of external costs to comply with this objective, on 16 January 2008 the Commission published a handbook on the studies carried out so far on external costs in the transport sector (http://ec.europa.eu/transport/costs/handbook/index_en.htm). This handbook, which was compiled jointly by several transport research institutes, can be used, amongst other factors, to determine eligible costs. Furthermore, the Commission has published a White Paper COM(1998) 466, Fair payment for infrastructure use — A phased approach to a common transport infrastructure charging framework in the European Union (Bulletin of the EU — Supplement No 3/98).

105. Both for aid for rail infrastructure use and for aid for reducing external costs, the Member State has to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport ⁽¹⁾. The methodology used and calculations performed must be made publicly available ⁽²⁾.
106. As regards **interoperability aid**, the eligible costs cover, to the extent to which they contribute to the objective of coordinating transport, all investments relating to the installation of safety systems and interoperability ⁽³⁾, or noise reduction both in rail infrastructure and in rolling stock. In particular they cover investment associated with the deployment of ERTMS (European Rail Traffic Management System) and any like measure which can help to remove the technical barriers in the European rail services market ⁽⁴⁾.

6.3.2. Necessity and proportionality of the aid

107. The Commission considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below the following values:
- (a) for aid for rail infrastructure use, 30 % of the total cost of rail transport, up to 100 % of the eligible costs ⁽⁵⁾;
 - (b) for aid for reducing external costs, 30 % ⁽⁶⁾ of the total cost of rail transport, up to 50 % of the eligible costs ⁽⁷⁾;
 - (c) for interoperability aid, 50 % of the eligible costs.
108. For aid above these thresholds, Member States must demonstrate the need and proportionality of the measures in question ⁽⁸⁾.
109. For both aid for rail infrastructure use and aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit chosen corresponds to the highest cost differential among the various options. Where the intensity thresholds referred to in point 108 are adhered to, it may be presumed that the 'no overcompensation' criterion is met.

⁽¹⁾ Member States can find indications of the different methods for evaluating extra costs in Annex 2 to Commission Green Paper Towards fair and efficient pricing in transport — Policy options for internalising the external costs of transport in the European Union (Bulletin of the EU — Supplement No 2/96; COM(1995) 691 final) and in the study which the Commission published on 16 January 2008 (See Article 11 of Directive 1999/62/EC).

⁽²⁾ Article 10 of Directive 2001/14/EC.

⁽³⁾ See, in particular, Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans European high speed rail system (OJ L 235, 17.9.1996, p. 6). Directive as last amended by Directive 2007/32/EC (OJ L 141, 25.6.2007, p. 63) and Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans European conventional rail system (OJ L 110, 20.4.2001, p. 1). Directive as last amended by Directive 2007/32/EC.

⁽⁴⁾ Calculation of the eligible costs will take account of any changes made to charges for infrastructure use based on rolling stock performance (especially sound performance).

⁽⁵⁾ See, by way of illustration, Commission Decision of 22 December 2006, N 574/05, prolongation of existing aid scheme N 335/03, Italy — Friuli Venezia Giulia — Aid for the setting up of rolling motorway services (OJ C 133, 15.6.2007, p. 6); Commission Decision of 12 October 2006, N 427/06, United Kingdom — Rail Environmental Benefit Procurement Scheme (REPS) (OJ C 283, 21.11.2006, p. 10).

⁽⁶⁾ Annex I to Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (OJ L 328, 24.11.2006, p. 1) provides that Community financial assistance for modal shift actions is limited to a maximum of 35 % of the total expenditure necessary to achieve the objectives of the action and incurred as a result of the action. In these guide lines, as regards State aid for transport coordination the criterion is 30 % of the total cost of rail transport.

⁽⁷⁾ See, by way of illustration, Commission Decision of 22 December 2006, N 552/06, Denmark — Prolongation of environmental aid scheme for the transport of goods by rail (OJ C 133, 15.6.2007, p. 5) and Commission Decision of 12 October 2006, N 427/06, United Kingdom — Rail Environmental Benefit Procurement Scheme (REPS), op. cit.

⁽⁸⁾ This could be the case with interoperability measures on the trans European transport network as last defined by Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans European transport network (OJ L 167, 30.4.2004, p. 1).

110. At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road ⁽¹⁾.
111. Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

6.3.3. Conclusion

112. Aid for rail infrastructure use, for reducing external costs or for interoperability that is necessary and proportionate and so does not distort competition contrary to the common interest must be considered compatible under Article 73 of the Treaty.

6.4. Compatibility of aid for research and development

113. In the area of land transport, Article 3(1)(c) of Regulation (EEC) No 1107/70, adopted on the basis of Article 73 of the Treaty, provides for the possibility of granting aid to research and development. The Commission has recently developed a body of practice in the application of this provision ⁽²⁾.
114. Article 9(2)(b) of the PSO Regulation adopts the text of Article 3(1)(c) of Regulation (EEC) No 1107/70. Under that provision, aid which has the purpose of promoting research into or development of rail passenger transport systems and technologies which are more economic for the community in general, which is restricted to the research and development stage and which does not cover the commercial exploitation of such transport systems and technologies, has to be regarded as meeting the needs of transport coordination.
115. Article 9(2)(b) of the PSO Regulation applies without prejudice to Article 87 of the Treaty. Thus, aid for research, development and innovation in the field of passenger transport, if not covered by Article 9 of the PSO Regulation, and aid which only concerns freight, may be considered compatible on the basis of Article 87(3)(c) of the Treaty.
116. In this regard the Commission has defined, in the Community framework for State aid for research and development and innovation ⁽³⁾ (hereinafter the 'Community framework'), the conditions under which it will declare aid of that type compatible with the common market on the basis of Article 87(3)(c) of the Treaty. That framework applies 'to aid to support research and development and innovation in all sectors governed by the Treaty. It also applies to those sectors which are subject to specific Community rules on State aid, unless such rules provide otherwise' ⁽⁴⁾. The framework therefore applies to aid for research, development and innovation in the railway transport sector which does not fall within the scope of Article 3(1)(c) of Regulation (EEC) No 1107/70 or Article 9 of the PSO Regulation (following the entry into force of that Regulation).
117. It is not excluded that the compatibility of aid for research and development may be analysed directly on the basis of Article 73 of the Treaty, if it is aimed at meeting the needs of transport coordination. In this case the abovementioned conditions should be checked, in particular the fact that the aid must

⁽¹⁾ With regard to measures falling under Article 15(1)(e) of Directive 2003/96/EC, an impact on the price of transport may be taken for granted, unless there is proof to the contrary. See in particular the Commission Decision of 2 April 2008, NN 46/B/06, Slovakia — Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

⁽²⁾ Commission Decision of 30 May 2007, N 780/06, The Netherlands — *Onderzoek en ontwikkeling composiet scheepsconstructie en multi purpose laadruim*; het 'CompoCaNord' project (OJ C 227, 27.9.2007, p. 5); Commission Decision of 19 July 2006, N 556/05, The Netherlands — Environmental protection and innovation in public transport in the province of Gelderland (OJ C 207, 30.8.2006); Commission Decision of 20 July 2005, N 63/05, Czech Republic — Programme for energy economics and use of alternative fuels in the transport sector (OJ C 83, 6.4.2006).

⁽³⁾ OJ C 323, 30.12.2006, p. 1.

⁽⁴⁾ *Ibidem*, point 2.1.

be necessary and proportionate to the intended objective, and must not jeopardise the general interests of the Community. The Commission considers that the general principles set out in the Community framework are relevant in analysing these various criteria.

7. STATE GUARANTEES FOR RAILWAY UNDERTAKINGS

118. The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽¹⁾ sets out the legal requirements applicable to State guarantees, including in the rail transport field.
119. This notice states, in point 2.1.3, that the Commission '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'.
120. The Commission's consistent practice has been to consider unlimited guarantees in a sector open to competition to be incompatible with the Treaty. In accordance with the proportionality principle they cannot in particular be justified by tasks of general interest. With an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service ⁽²⁾.
121. When the State guarantees are granted to undertakings with a presence on both competitive and non competitive markets, the Commission's practice is to require the complete removal of the unlimited guarantee granted to the undertaking as a whole ⁽³⁾.
122. Several railway undertakings are enjoying unlimited guarantees. These guarantees are generally a legacy of special cases of historic monopolies set up for railway undertakings before the Treaty entered into force or before the rail transport services market was opened up to competition.
123. According to the information available to the Commission, these guarantees do, to a large extent, constitute existing aid. The Member States concerned are invited to inform the Commission of the conditions for implementing the schemes for existing aid as well as of the measures envisaged for removing them, in accordance with the procedure defined in Section 8.3.

8. FINAL PROVISIONS

8.1. Rules on the cumulation of aid

124. The aid ceilings stipulated in these guidelines are applicable irrespective of whether the aid in question is financed wholly or in part from State resources or from Community resources. Aid authorised under these guidelines may not be combined with other forms of State aid within the meaning of Article 87(1) of the Treaty or with other forms of Community financing if such combination produces a level of aid higher than that laid down in these guidelines.
125. In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

8.2. Date of application

126. The Commission will apply these guidelines from the date of their publication in the *Official Journal of the European Union*.

The Commission will apply these guidelines to all aid, whether or not notified, in respect of which it is called upon to take a decision after the date of their publication.

⁽¹⁾ OJ C 71, 11.3.2000, p. 14.

⁽²⁾ Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9); Commission Decision of 24 April 2007, E 12/05, Poland — Unlimited guarantee for the Polish post office (Poczta Polska) (OJ C 284, 27.11.2007, p. 2); Commission Decision of 27 March 2002, E 10/00, Germany — State guarantees for public credit institutions in Germany (OJ C 150, 22.6.2002, p. 7).

⁽³⁾ Ibidem.

8.3. Appropriate measures

127. In accordance with Article 88(1) of the Treaty, the Commission proposes that the Member States amend their existing aid schemes relating to State aid covered by these guidelines so as to comply with them at the latest two years after their publication in the *Official Journal of the European Union*, subject to the specific provisions in the Chapter on State guarantees. The Member States are invited to confirm that they accept these proposals for appropriate measures in writing at the latest one year after the date of publication in the *Official Journal of the European Union*.
128. Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾ and, if necessary, initiate the proceedings referred to in that provision.

8.4. Period of validity and reporting

129. The Commission reserves the right to amend these guidelines. It will present a report on their application before any amendment and at the latest five years after the date of their publication.

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

Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport

(2004/C 13/03)

1. INTRODUCTION

The White Paper 'European transport policy for 2010: time to decide' stresses the vital importance of maritime transport services for the Community economy. 90 % of all trade between the Community and the rest of the world is transported by sea. Short sea shipping accounts for 69 % of the volume of goods transported between the Member States (this percentage is 41 % if domestic transport is included). Community maritime transport and its related activities remains one of the most important in the world.

The shipping companies of the Member States still manage about a third of the world fleet today. The accession of Cyprus and Malta ⁽¹⁾ in 2004 will increase still further the Union's share of shipping, as the shipping registers of these two countries currently account for about 10 % of world tonnage.

Since the 1970s the European fleet has been faced with competition from vessels registered in third countries which do not take much care to observe social and safety rules in force at international level.

The lack of competitiveness of Community-flagged vessels was recognised at the end of the 1980s and, in the absence of harmonised European measures, several Member States adopted different arrangements for aiding maritime transport. The strategies adopted and the budgets allocated to support measures differ from one Member State to the other in reflection of the attitude of those States to public aid or the importance they attach to the maritime sector.

In addition, to encourage the re-registering of vessels, Member States have relaxed rules concerning crews, notably through the creation of second registers.

Second registers comprise, firstly, 'offshore registers' belonging to territories which have a greater or lesser autonomy in relation to the Member State, and secondly, 'international registers', attached directly to the State which created them.

In spite of the efforts made, a large part of the Community fleet continues to be registered under the flags of third countries. This is because the registers of third countries which apply open registration policies — some of which are

called 'flags of convenience' — have continued and are still continuing to enjoy a significant competitive edge over the registers of Member States.

Aid to the shipping industry since 1989

In the light of the differences between the aid systems adopted by Member States faced with more intense competition from non-Community flagged vessels, in 1989 the Commission defined its first guidelines on this subject to ensure a certain convergence between the actions of the Member States. This method nevertheless proved to be ineffective and the decline of Community fleets continued. The guidelines were accordingly reviewed, leading to a 1997 communication defining new Guidelines on State aid to maritime transport ⁽²⁾.

The major development in recent years concerning support measures from the Member States for maritime transport is the widespread extension in Europe of flat rate tonnage taxation systems ('tonnage tax'). Tonnage tax entered into force very early in Greece and was progressively extended to the Netherlands (1996), to Norway (1996), to Germany (1999), to the United Kingdom (2000), to Denmark, to Spain and to Finland (2002) and to Ireland (2002). Belgium and France also decided to adopt it in 2002, while the Italian Government is envisaging this possibility.

Results of measures proposed by Member States and approved by the Commission compared with the general objectives of the 1997 revised Guidelines

(a) Trends of the Community-flagged fleet (competitiveness of the fleet)

According to the replies provided by the Member States mid-2002 to the Commission's questionnaire and to the most recent statistical data ⁽³⁾, Member States which have introduced aid measures, particularly in the form of tax relief, have obtained re-registration under the national flag of a significant volume of tonnage in all the registers taken together. In percentage terms, the fleet as entered in the registers of the Member States increased as follows: the number of vessels by 0,4 % on average per year, tonnage by 1,5 % and container ships by 12,4 %. Even if, in the case of the first registers, the number of units entered declined practically everywhere in the period 1989 to 2001, these figures can be viewed as a reversal of the trend, observed up to 1997, of abandoning Community flags.

⁽¹⁾ The sixth and the fifth world registers of ships in terms of tonnage respectively (vessels of more than 300 gt. Source: ISL 2001).

⁽²⁾ Community guidelines on State aid to maritime transport (97/C 205/05) (OJ C 205, 5.7.1997, p. 5).

⁽³⁾ ISL, Shipping Statistics 2001.

During the same period, however, the share of Member State registers in total world tonnage fell slightly. While world shipping increased, the growth of the Community-managed fleet registered under third-country flags was faster than that of the fleet registered under the flags of the Member States.

(b) *Employment trends*

According to the most recent estimates, the number of seafarers on board Community-flagged vessels fell from 188 000 in 1996 to approximately 180 000 in 2001 ⁽¹⁾. The total number of Community nationals employed on board vessels flying Community flags is currently about 120 000, a figure which is 40 % lower than that of 1985, while the number of nationals of third countries employed on board Community vessels has gone up from 29 000 in 1983 to approximately 60 000 today. When assessing the drop in the total number of seafarers, the following factors must be taken into account:

- first, productivity per vessel has continued to increase. Accordingly, a smaller crew makes it possible to transport an equal if not higher volume than that carried in the past,
- secondly, the Community-flagged fleet was renewed in the period 1997 to 2001. The average age of vessels went down from 22,9 years to 17,2 years. 35 % of the fleet in service on 1 January 2001 had been built in the period 1996 to 2000. New vessels, of more advanced technology, need better trained but smaller crews.

Notable differences between the Member States in the employment rate of Community seafarers are nevertheless apparent. However, nothing in these figures indicates a reversal of the trend whereby the Community-flagged fleet depends more and more on third-country seafarers. This trend was pointed out by the Commission in 2001 in its Communication on the training and recruitment of seafarers ⁽²⁾.

(c) *Contribution to economic activity as a whole*

Maritime industries are inextricably linked with maritime transport. This association is a strong argument in favour of positive measures whose aim is to maintain a fleet dependent on Community shipping. Since maritime transport is one of the links in the chain of transport in general and in the chain of the maritime industries in particular, measures seeking to maintain the competitiveness of the European fleet also have repercussions on

investments on land in maritime-related industries ⁽³⁾ and on the contribution of maritime transport to the economy of the Community as a whole and to jobs in general.

The significance of shipping and the whole maritime cluster varies considerably with the countries under consideration. However, the importance of the European maritime cluster and its direct economic impact can be clearly illustrated by the following figures: 1,550 million direct employees, a turnover of EUR 160 billion in 1997 (about 2 % of GDP in the Community) ⁽⁴⁾. Data on Denmark (3 % of the GDP generated by the maritime cluster), Greece (2,3 %) and the Netherlands (2 %) can be taken as a valid example.

In this context, therefore, it is not insignificant to note that the fleet managed by European operators based in the Community has stayed at a level of around 34 % of world tonnage, while the latter increased by 10 % during the period. Given the mobility of the maritime industry and the facilities offered by third countries, one may conclude that support measures for maritime transport may contribute to avoiding widespread displacement of allied industries.

To sum up, it can be affirmed that, where measures in line with the 1997 Guidelines have been adopted, the structural decline of the Community registers and the Community's fleet has been halted and the objectives set by the Commission have been attained, at least in part.

The share of open registers in world tonnage continued, however, to increase during the period, rising from 43 % in 1996 to 54 % in 2001, and nothing indicates any significant reversal of the trend whereby the fleet had, and is continuing to have, increasing recourse to seafarers from third countries. The campaign undertaken in recent years must be pursued but it must be better targeted. Measures to promote Community seafarers must in particular be the subject of more active monitoring.

The results of the measures taken by the Member States and authorised by the Commission will have to be systematically analysed.

As a consequence, and even though as a matter of principle operating aid should be exceptional, temporary, and degressive, the Commission estimates that State aid to the European shipping industry is still justified and that the approach followed by the 1997 Guidelines was correct. This communication is therefore based on the same basic approach.

⁽¹⁾ Total combined number of Community and non-Community seafarers.

⁽²⁾ Communication from the Commission on the training and recruitment of seafarers of 6 April 2001, COM(2001) 188 final.

⁽³⁾ These activities include port services, logistics, the construction, repair, maintenance, inspection and classification of vessels, ship management and brokerage, banking activities and international financial services, insurance, advice and professional services.

⁽⁴⁾ Study undertaken by the European Commission, DG Enterprise (published in the Europa internet site).

2. SCOPE AND GENERAL OBJECTIVES OF THE REVISED STATE AID GUIDELINES

This communication — replacing the 1997 Guidelines — aims at setting the parameters within which State aid to maritime transport will be approved, pursuant to Community State aid rules and procedures, by the Commission under Article 87(3)(c) and/or Article 86(2) of the Treaty.

Aid schemes should not be conducted at the expense of other Member States' economies and must be shown not to risk distortion of competition between Member States to an extent contrary to the common interest. State aid must always be restricted to what is necessary to achieve its purpose and be granted in a transparent manner. The cumulative effect of all aid granted by State authorities (including national, regional and local levels) must always be taken into account.

These Guidelines are applicable to 'maritime transport' activities as defined in Regulation (EEC) No 4055/86 ⁽¹⁾ and in Regulation (EEC) No 3577/92 ⁽²⁾, that is to say, to the 'transport of goods and persons by sea'. They also, in specific parts, relate to towage and dredging.

2.1. Scope of revised State aid guidelines

These Guidelines cover any aid granted by Member States or through State resources in favour of maritime transport. This includes any financial advantage, conferred in any form whatsoever, funded by public authorities (whether at national, regional, provincial, departmental or local level). For these purposes, 'public authorities' may include public undertakings and State-controlled banks. Arrangements whereby the State guarantees loans or other funding by commercial banks may also fall within the definition of aid. The Guidelines draw no distinction between types of beneficiary in terms of their legal structure (whether companies, partnerships or individuals), nor between public or private ownership, and any reference to companies shall be taken to include all other types of legal entity.

These guidelines do not cover aid to shipbuilding (within the meaning of Council Regulation (EC) No 1540/98 ⁽³⁾ or any subsequent instrument). Investments in infrastructure are not normally considered to involve State aid within the meaning of Article 87(1) of the Treaty if the State provides free and equal

⁽¹⁾ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

⁽²⁾ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

⁽³⁾ OJ L 202, 18.7.1998, p. 1.

access to the infrastructure for the benefit of all operators concerned. However, the Commission may examine such investments if they could directly or indirectly benefit particular shipowners. Finally, the Commission has established the principle that no State aid is involved where public authorities contribute to a company on a basis that would be acceptable to a private investor operating under normal market-economy conditions.

2.2. General objectives of revised State aid guidelines

The Commission has stressed that increased transparency of State aid is necessary so that not only national authorities in the broad sense but also companies and individuals are aware of their rights and obligations. These Guidelines are intended to contribute to this and to clarify what State aid schemes may be introduced in order to support the Community maritime interest, with the aim of:

- improving a safe, efficient, secure and environment friendly maritime transport,
- encouraging the flagging or re-flagging to Member States' registers,
- contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets,
- maintaining and improving maritime know-how and protecting and promoting employment for European seafarers, and
- contributing to the promotion of new services in the field of short sea shipping following the White Paper on Community transport policy.

State aid may generally be granted only in respect of ships entered in Member States' registers. In certain exceptional cases, however, aid may be granted in respect of ships entered in registers under point (3) of the Annex, provided that:

- they comply with the international standards and Community law, including those relating to security, safety, environmental performance and on-board working conditions,
- they are operated from the Community,

— their shipowner is established in the Community and the Member State concerned demonstrates that the register contributes directly to the objectives mentioned above.

Additionally, flag-neutral aid measures may be approved in certain exceptional cases where a benefit to the Community is clearly demonstrated.

3. FISCAL AND SOCIAL MEASURES TO IMPROVE COMPETITIVENESS

3.1. Fiscal treatment of shipowning companies

Many third countries have developed significant shipping registers, sometimes supported by an efficient international services infrastructure, attracting shipowners through a fiscal climate which is considerably milder than within Member States. The low-tax environment has resulted in there being an incentive for companies not only to flag out their vessels but also to consider corporate relocation. It should be emphasised that there are no effective international rules at present to curb such tax competition and few administrative, legal or technical barriers to moving a ship's registration from a Member State's register. In this context, the creation of conditions allowing fairer competition with flags of convenience seems the best way forward.

The question of fiscal competition between Member States should be addressed. At this stage, there is no evidence of schemes distorting competition in trade between Member States to an extent contrary to the common interest. In fact, there appears to be an increasing degree of convergence in Member States' approaches to shipping aid. Flagging out between Member States is a rare phenomenon. Fiscal competition is mainly an issue between Member States on the one hand and third countries on the other, since the cost savings available to shipowners through third country registers are considerable in comparison to the options available within the Community.

For this reason, many Member States have taken special measures to improve the fiscal climate for shipowning companies, including, for instance, accelerated depreciation on investment in ships or the right to reserve profits made on the sale of ships for a number of years on a tax-free basis, provided that these profits are reinvested in ships.

These tax relief measures which apply in a special way to shipping are considered to be State aid. Equally, the system of replacing the normal corporate tax system by a tonnage tax is a State aid. 'Tonnage tax' means that the shipowner pays an amount of tax linked directly to the tonnage

operated. The tonnage tax will be payable irrespective of the company's actual profits or losses.

Such measures have been shown to safeguard high quality employment in the on-shore maritime sector, such as management directly related to shipping and also in associated activities (insurance, brokerage and finance). In view of the importance of such activities to the economy of the Community and in support of the objectives stated earlier, these types of fiscal incentive can generally be endorsed. Further, safeguarding quality employment and stimulating a competitive shipping industry established in a Member State through fiscal incentives, taken together with other initiatives on training and enhancement of safety, will facilitate the development of Community shipping in the global market.

The Commission is aware that the income of shipowners today is often obtained from the operation of ships under different flags — for instance, when making use of chartered vessels under foreign flags or by making use of partner vessels within alliances. It is also recognised that the incentive for expatriation of management and ancillary activities would continue if the shipowner obtained a significant financial benefit from maintaining different establishments and accounting separately for Community flag earnings and other earnings. This would be the case, for example, if the non-Community flag earnings were liable either to the full rate of corporate taxation in a Member State or to a low rate of tax overseas if overseas management could be demonstrated.

The objective of State aid within the common maritime transport policy is to promote the competitiveness of the Community fleets in the global shipping market. Consequently, tax relief schemes should, as a rule, require a link with a Community flag. However, they may also, exceptionally, be approved where they apply to the entire fleet operated by a shipowner established within a Member State's territory liable to corporate tax, provided that it is demonstrated that the strategic and commercial management of all ships concerned is actually carried out from within the territory and that this activity contributes substantially to economic activity and employment within the Community. The evidence furnished by the Member State concerned to demonstrate this economic link should include details of vessels owned and operated under Community registers, Community nationals employed on ships and in land-based activities and investments in fixed assets. It must be stressed that the aid must be necessary to promote the repatriation of the strategic and commercial management of all ships concerned in the Community and, in addition, that the beneficiaries of the schemes must be liable to corporate tax in the Community. In addition, the Commission would request any available evidence to show that all vessels operated by companies benefiting from these measures comply with the relevant international and Community safety standards, including those relating to onboard working conditions.

As was argued in the above paragraph, it should not be forgotten that, as a matter of principle, tax relief schemes require a link with the flag of one of the Member States. Before aid is exceptionally granted (or confirmed) to fleets which also comprise vessels flying other flags, Member States should ensure that beneficiary companies commit themselves to increasing or at least maintaining under the flag of one of the Member States the share of tonnage that they will be operating under such flags when this Communication becomes applicable. Whenever a company controls ship operating companies within the meaning of the Seventh Council Directive 83/349/EEC⁽¹⁾ (Article 1), the abovementioned tonnage share requirement will have to apply to the parent company and subsidiary companies taken together on a consolidated basis. Should a company (or group) fail to respect that requirement, the relevant Member State should not grant further tax relief with respect to additional non-Community flagged vessels operated by that company, unless the Community-flagged share of the global tonnage eligible for tax relief in that Member State has not decreased on average during the reporting period referred to in the next paragraph. The Member State must inform the Commission of the application of the derogation. The Community-tonnage share requirement set out in this paragraph does not apply to undertakings operating at least 60 % of their tonnage under a Community flag.

In all cases, where fiscal schemes have been approved on the above exceptional basis and in order to allow the Member State concerned to prepare, every three years, the report required under Chapter 12 ('Final Remarks'), recipients must provide the Member State concerned with proof that all the conditions for the derogation from the flag link have been fulfilled during the period. Furthermore, evidence must be provided that, in the case of the beneficiary fleet, the tonnage share requirement laid down in the previous paragraph has been observed and that each vessel of that fleet complies with the relevant international and Community standards, including those relating to security, safety, environmental performance and on-board working conditions. Should recipients fail to provide such evidence, they will not be allowed to continue to benefit from the tax scheme.

It is also of interest to stipulate that whereas Community-based shipping companies are the natural recipients of the above tax schemes, certain ship management companies established in the Community may also qualify under the same provisions. Ship management companies are entities providing different kind of services to shipowners, such as technical survey, crew recruiting and training, crew management, and vessel operation. In some cases ship managers are assigned both technical and crewing management of vessels. In this case they act as classic 'shipowners' as far as transport operations are concerned. Moreover, as in the case of the shipping industry, this sector is experiencing strong and increasing competition at an international level. For these reasons, it seems appropriate to extend the possibility of tax relief to that category of ship managers.

⁽¹⁾ OJ L 193, 18.7.1983, p. 1.

Ship management companies may qualify for aid only in respect of vessels for which they have been assigned the entire crew and technical management. In particular, in order to be eligible, ship managers have to assume from the owner the full responsibility for the vessel's operation, as well as take over from the owner all the duties and responsibilities imposed by the ISM Code⁽²⁾. Should ship managers also provide other specialised services, even related to vessel operation, separate accounting for such activities, which do not qualify for the tax relief schemes, should be ensured. The requirement regarding Member States' flag share described above also applies to ship management companies⁽³⁾.

These guidelines apply only to maritime transport. The Commission can accept that the towing at sea of other vessels, oil platforms, etc. falls under that definition.

The Commission has, however, become aware that in certain cases Member States allow tugboats which are designed for work at sea to benefit from aid even though they are not active at sea, or rarely so. Thus it is useful to state in these guidelines which line the Commission has taken and will take on this point.

'Towage' is covered by the scope of the Guidelines only if more than 50 % of the towage activity effectively carried out by a tug during a given year constitutes 'maritime transport'. Waiting time may be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes 'maritime transport'. It should be emphasised that towage activities which are carried out *inter alia* in ports, or which consist in assisting a self-propelled vessel to reach port do not constitute 'maritime transport' for the purposes of this communication. No derogation from the flag link is possible in the case of towage.

Similarly in the case of dredging, the experience gained during the recent years suggests that some points should be made.

'Dredging' activities are, in principle, not eligible for aid to maritime transport. However, fiscal arrangements for companies (such as tonnage tax) may be applied to those dredgers whose activity consists in 'maritime transport' — that is, the transport at deep sea of extracted materials — for more than 50 % of their annual operational time and only in respect of such transport activities. Eligible dredgers are only those registered in a Member State (no derogation from the flag link is possible). In such cases, separate accounting for maritime transport activities is required⁽⁴⁾.

⁽²⁾ 'ISM Code', International Management Code for the Safe Operation of Ships and for Pollution Prevention, adopted by the International Maritime Organization (IMO) by resolution A.741(18).

⁽³⁾ The Commission will examine the effects of these provisions on ship management after three years of implementation of this communication.

⁽⁴⁾ The ships used by these operators also extract or dredge materials which they carry afterwards. Extraction or dredging as such do not qualify for State aid to maritime transport.

Finally, the method of assessing tonnage tax systems notified up to now has consisted of the following steps: a virtual profit for shipowners has been calculated by applying a notional profit rate to their tonnage; national corporate tax has been applied to the amount so determined. The resulting amount is the 'tonnage tax' to be paid.

The notional profit rates provided for by Member States have been homogeneous up to now. However, since corporate tax rates may vary significantly across the Community, the tonnage taxes to be paid for the same tonnage might be very uneven in the different Member States. In order to keep the present equitable balance, the Commission will only approve schemes giving rise to a tax-load for the same tonnage fairly in line with the schemes already approved.

In all cases, the benefits of schemes must facilitate the development of the shipping sector and employment in the Community interest. Consequently, the fiscal advantages mentioned above must be restricted to shipping activities; hence, in cases where a shipowning company is also engaged in other commercial activities, transparent accounting will be required in order to prevent 'spill-over' into non-shipping activities. This approach would help Community shipping to be competitive, with tax liabilities comparable to levels applying elsewhere in the world, but would preserve a Member State's normal tax levels for other activities and personal remuneration of shareholders and directors.

3.2. Labour-related costs

As was mentioned earlier, maritime transport is a sector experiencing fierce international competition. Support measures for the maritime sector should, therefore, aim primarily at reducing fiscal and other costs and burdens borne by Community shipowners and Community seafarers towards levels in line with world norms. They should directly stimulate the development of the sector and employment, rather than provide general financial assistance.

In keeping with these objectives, the following action on employment costs should be allowed for Community shipping:

- reduced rates of contributions for the social protection of Community seafarers employed on board ships registered in a Member State,
- reduced rates of income tax for Community seafarers on board ships registered in a Member State.

For the purposes of this point, 'Community seafarers' is defined as:

- Community/EEA citizens, in the case of seafarers working on board vessels (including ro-ro ferries ⁽¹⁾) providing scheduled passenger services between ports of the Community,
- all seafarers liable to taxation and/or social security contributions in a Member State, in all other cases.

The previous 1997 Guidelines allowed such reductions for all seafarers working on board vessels registered in a Member State and subject to tax and or social security contributions in a Member State. However, since then it has become clear that pressure by international competition on European shipowners is very strong in the case of international freight transport, while it is lighter in the case of intra-Community scheduled passenger transport. Boosting the competitiveness of European shipping industry is therefore a prior objective of aid in the former case. Preventing Member States from granting tax relief to all seafarers in this case would have very negative effects on the competitiveness of European shipowners, which could be encouraged to flag-out. At the same time it has been noticed that employment of European citizens is significant, in percentage terms and in numbers, in intra-Community scheduled passenger transport. Protection of employment in the Community is therefore a priority for aid in this case. For internal fiscal reasons some Member States prefer not to apply reduced rates as mentioned above, but instead may reimburse shipowners — partially or wholly — for the costs arising from these levies. Such an approach may generally be considered equivalent to the reduced-rate system as described above, provided that there is a clear link to these levies, no element of overcompensation, and that the system is transparent and not open to abuse.

For the maritime part of towage and dredging activities (maritime transport of materials), aid in favour of the employment of Community seafarers may be granted by analogy to the rules contained in this point, but only if the aid relates to Community seafarers working on board seagoing, self-propelled tugs and dredgers, registered in a Member State, carrying out maritime transport at sea for at least 50 % of their operational time ⁽²⁾.

Finally, it should be recalled that aid to employment is covered by the block exemption provided for by 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 ⁽³⁾, which also applies to maritime transport.

⁽¹⁾ See Article 2, point (a), of Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services (OJ L 138, 1.6.1999, p. 1).

⁽²⁾ Thus dredging activities carried out, *inter alia*, mainly in ports will not qualify for aid in favour of employment of Community seafarers.

⁽³⁾ OJ L 337, 13.12.2002, p. 3.

4. CREW RELIEF

Aid for crew relief tends to reduce the costs of employing Community seafarers, especially those on ships operating in distant waters. Aid, which is subject to the ceiling (as set out in Chapter 11), may, therefore, be granted in the form of payment or reimbursement of the costs of repatriation of Community seafarers working on board ships entered in Member States' registers.

5. INVESTMENT AID

Subsidies for fleet renewal are not common in other transport modes such as road haulage and aviation. Since they tend to distort competition, the Commission has been reluctant to approve such schemes, except where they form part of a structural reform leading to reductions in overall fleet capacity.

Investment must comply with Regulation (EC) No 1540/98 or any other Community legislation that may replace it.

Within the framework of these guidelines, other investment aid may, however, be permitted, in line with the Community safe seas policy, in certain restricted circumstances to improve equipment on board vessels entered in a Member State's registers or to promote the use of safe and clean ships. Thus aid may be permitted which provides incentives to upgrade Community-registered ships to standards which exceed the mandatory safety and environmental standards laid down in international conventions and anticipating agreed higher standards, thereby enhancing safety and environmental controls. Such aid must comply with the applicable Community provisions on shipbuilding.

Since shipping is essentially very mobile, regional aid for maritime companies in disadvantaged regions, which often take the form of investment aid to companies investing in the regions, may only be permitted where it is clear that the benefits will accrue to the region over a reasonable time period. This would, for example, be the case of investment related to the construction of dedicated warehouses or to the purchase of fixed transshipment equipment. Investment aid for maritime companies in disadvantaged regions may then only be permitted where it also complies with the regional aid rules (see Chapter 6).

6. REGIONAL AID ON THE BASIS OF ARTICLE 87(3)(a) AND (c)

In the context of regional aid schemes, the Commission will apply the general rules set out in its communications or other provisions on national regional aid or future amendments thereto.

7. TRAINING

It should be recalled, firstly, that aid to training is covered by the block exemption provided for by 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 ⁽¹⁾, which also applies to maritime transport.

Moreover, many training schemes followed by seafarers and supported by the State are not considered to be State aid because they are of a general nature (whether vocational or academic). These are, therefore, not subject to notification and examination by the Commission.

If a scheme is to be regarded as including State aid, notification is, however, required. This may be the case if, for example, a particular scheme is specifically related to on-board training and the benefit of State financial support is received by the training organisation, the cadet, seafarer or shipowner. The Commission takes a favourable attitude towards aid, granted on a non-discriminatory basis, to training carried out on board ships registered in a Member State. Exceptionally, training on board other vessels may be supported where justified by objective criteria, such as the lack of available places on vessels in a Member State's register.

Where financial contributions are paid for on-board training, the trainee may not, in principle, be an active member of the crew but must be supernumerary. This provision is to ensure that net wage subsidies cannot be paid for seafarers occupied in normal crewing activities.

Similarly, to safeguard and develop maritime expertise in the Community and the competitive edge of the Community maritime industries, further extensive research and development efforts are necessary, with a focus on quality, productivity, safety and environmental protection. For such projects, State support may also be authorised within the limits set by the Treaty.

Aid aimed at enhancing and updating Community officers' skills may be allowed during their whole career. The aid may consist of a contribution to the cost of the training and/or compensation for the wage paid to the officer during the training period. The schemes must, however, be designed in a way which prevents the aid for training from being directly or indirectly diverted into a subsidy to officers' wages.

Aid aimed at professional retraining of high-sea fishermen willing to work as seafarers may also be allowed.

⁽¹⁾ OJ L 10, 13.1.2001, p. 20.

8. RESTRUCTURING AID

Although the Community guidelines on restructuring and rescuing firms in difficulty⁽¹⁾ apply to transport only to the extent that the specific nature of the sector is taken into account, the Commission will apply those guidelines or any other Community instrument replacing them in considering restructuring aid for maritime companies.

9. PUBLIC SERVICE OBLIGATIONS AND CONTRACTS

In the field of maritime cabotage, public service obligations (PSOs) may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92. For those services, PSOs and PSCs as well as their compensation must fulfil the conditions of that provision and the Treaty rules and procedures governing State aid, as interpreted by the Court of Justice.

The Commission accepts that if an international transport service is necessary to meet imperative public transport needs, PSOs may be imposed or PSCs may be concluded, provided that any compensation is subject to the above-mentioned Treaty rules and procedures.

The duration of public service contracts should be limited to a reasonable and not overlong period, normally in the order of six years, since contracts for significantly longer periods could entail the danger of creating a (private) monopoly.

10. AID TO SHORT SEA SHIPPING

There is no legal definition of 'Short Sea Shipping'. However, the communication from the Commission on the development of Short Sea Shipping in Europe of 29 June 1999⁽²⁾ has provided a working definition of Short Sea Shipping, to be understood as 'the movement of cargo and passenger by sea between ports situated in geographical Europe or between those ports and ports situated in non European countries having a coastline on the enclosed seas bordering Europe'⁽³⁾. In this communication the Commission underscored the role of this transport mode to promote sustainable and safe mobility, to strengthen cohesion within the Community and to improve transport efficiency as part of an intermodal approach. The Commission also recognises that the promotion of short-sea shipping must be carried out at all levels, whether Community, national or regional.

Since aid to Short Sea Shipping aims to improve the intermodal chain and to decongest roads in the Member

States, the definition of Short Sea Shipping such as provided by the 1999 communication should, for the purposes of this communication, be restricted to transport between ports in the territory of the Member States.

The Commission recognises that launching short-sea shipping services may be accompanied by substantial financial difficulties which the Member States may wish to attenuate in order to ensure the promotion of such services.

When such is the case, the Commission will be able to approve aid of this kind, on condition that it is intended for shipowners within the meaning of Article 1 of Regulation (EEC) No 4055/86 in respect of ships flying the flag of one of the Member States. Aid of this kind will have to be notified and to fulfil the following conditions:

- the aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member States,
- the service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest,
- the aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several shipowners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question,
- the purpose of the aid must be to cover, either up to 30 % of the operational costs of the service in question⁽⁴⁾, or to finance the purchase of trans-shipment equipment to supply the planned service, up to a level of 10 % in such investment,
- the aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way to shipowners established in the Community. The aid should normally be granted for a project selected by the authorities of the Member State through a tender procedure in compliance with applicable Community rules,
- the service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding,

⁽¹⁾ OJ C 288, 9.10.1999, p. 2.

⁽²⁾ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, 'The development of Short Sea Shipping in Europe: a dynamic alternative in a sustainable transport chain — Second two-yearly report', COM(1999) 317 final.

⁽³⁾ Communication, p. 2.

⁽⁴⁾ In case of Community financing or eligibility under different aid schemes, the ceiling of 30 % applies to the combined total of aid/financial support. It should be noticed that the aid intensity is the same as that provided for modal shift actions within the Marco Polo Community initiative: cf. Article 5(2) of Regulation (EC) No 1382/2003 (OJ L 196, 2.8.2003, p. 1).

— such aid must not be cumulated with public service compensation (obligations or contracts).

11. CEILING

As was explained above, certain Member States support their maritime sectors through tax reduction whilst other Member States prefer to make direct payments — for instance, by providing reimbursement of seafarers' income tax. In view of the current lack of harmonisation between the fiscal systems of the Member States, it is felt that the two alternatives should remain possible. Obviously, those two approaches may, in some instances, be combined. However, this risks causing a cumulation of aid to levels which are disproportionate to the objectives of the Community common interest and could lead to a subsidy race between Member States.

A reduction to zero of taxation and social charges for seafarers and a reduction of corporate taxation of shipping activities such as is described in point 3.1 (penultimate paragraph) is the maximum level of aid which may be permitted. To avoid distortion of competition, other systems of aid may not provide any greater benefit than this. Moreover, although each aid scheme notified by a Member State will be examined on its own merits, it is considered that the total amount of aid granted under Chapters 3 to 6 should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers.

12. FINAL REMARKS

The Commission will continue to monitor regularly and closely the market conditions for shipping. Should the latter change, and should consequently the need for State aid be reduced or overcome, the Commission will take the necessary measures in good time.

All new proposals for measures notified to the Commission must include a calendar indicating, for the next six years, the expected quantified effects for each objective of point 2.2. In particular, the expected macro-economic return on the corresponding maritime cluster, together with an estimation of the

number of jobs saved or created, is to be presented in such proposals.

For all the aid schemes — whether existing or new — falling within the scope of this Communication, Member States are to communicate to the Commission an assessment of their effects during their sixth year of implementation.

When aid has been approved and granted to a beneficiary, under the derogation from the flag link referred to in point 3.1, the relevant Member State must report to the Commission every three years starting from the date when the grant was granted. In its report, the Member State will quantify the effects produced and compare the results with the expected effects. The reporting requirements set out in this communication will enter into force upon its publication.

Furthermore, should it prove necessary, for example following a justified complaint, the Member State concerned must provide the Commission with evidence that the assistance granted to the respective beneficiary under an agreed scheme has been limited to the strict definition therein and has also produced the effects expected.

13. APPROPRIATE MEASURES

These guidelines will apply from the date of their publication in the *Official Journal of the European Union*. In accordance with Article 88(1) of the Treaty, the Commission proposes that Member States amend their existing aid schemes relating to State aid covered by these guidelines so as to comply with them by 30 June 2005 at the latest. Member States are invited to confirm that they accept these proposals for appropriate measures in writing by 30 June 2004 at the latest.

Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings referred to in that provision.

These guidelines will be reviewed within seven years of their date of application.

ANNEX

DEFINITION OF MEMBER STATES' REGISTERS

'Member States' registers' should be understood as meaning registers governed by the law of a Member State applying to their territories forming part of the European Community.

1. All the first registers of Member States are Member States' registers.
 2. In addition, the following registers, located in Member States and subject to their laws, are Member States' registers:
 - the Danish International Register of Shipping (DIS),
 - the German International Shipping Register (ISR),
 - the Italian International Shipping Register,
 - the Madeira International Ship Register (MAR),
 - the Canary Islands register.
 3. Other registers are not considered to be Member States' registers even if they serve in practice as a first alternative for shipowners based in that Member State. This is because they are located in and subject to the law of territories where the Treaty does not, in whole or in substantial part, apply. Hence, the following registers are not Member States' registers:
 - the Kerguelen register (the Treaty does not apply to this territory),
 - the Dutch Antilles' register (this territory is associated with the Community; and only Part IV of the Treaty applies to it; it is responsible for its own fiscal regime),
 - the registers of:
 - Isle of Man (only specific parts of the Treaty apply to the Isle — see Article 299(6)(c) of the Treaty; the Isle of Man parliament has sole right to legislate on fiscal matters),
 - Bermuda and Cayman (they are part of the territories associated to the Community, and only Part IV of the Treaty applies to them; they enjoy a fiscal autonomy).
 4. In the case of Gibraltar, the Treaty applies fully and the Gibraltar register is, for the purposes of these Guidelines, considered to be a Member State's register.
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Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea

(Text with EEA relevance)

(2008/C 317/08)

INTRODUCTION

1. The White Paper 'European transport policy for 2010: time to decide' of 2001 ⁽¹⁾ introduced the concept of 'motorways of the sea' as high quality transport services based on short sea shipping. Motorways of the sea are composed of infrastructure, facilities and services spanning at least two Member States. The motorways of the sea aim to shift significant shares of freight transport from road to sea. Their successful implementation will help achieving two main objectives of the European transport policy, that is, reduction of congestion on the roads and a reduced environmental impact of freight transport. The mid term review of the White Paper ⁽²⁾ points to the increasing problem of road congestion, costing the Community about 1 % of GDP, and to the threat of greenhouse gasses emissions from transport with respect to Kyoto targets and reconfirms the importance of the motorways of the sea.

COMPLEMENTARY STATE AID FOR MARCO POLO II 'MOTORWAYS OF THE SEA' PROJECTS

2. Chapter 10 of the Community Guidelines on State aid to maritime transport ⁽³⁾ allow, under certain conditions, for start up aid to new or improved short sea shipping services with a maximum duration of three years and a maximum intensity of 30 % of operational cost and 10 % of investments costs.
3. The second 'Marco Polo' programme (further referred to as Marco Polo II) established by Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second 'Marco Polo' programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 ⁽⁴⁾ is one of the two Community funding instruments directly and explicitly supporting the motorways of the sea, as one out of the five actions that are supported for avoiding traffic or shifting traffic away from road. Marco Polo II provides support mainly to the services part of the motorways of the sea. That support is attributed through yearly calls for proposals directed to the industry players. The allocated financial support is constrained by the grants available under the Marco Polo programme. Funding to the motorways of the sea can also be provided through the Regional Policy.
4. Under Article 5(1)(b) of Regulation (EC) No 1692/2006, in the framework of Marco Polo II programme 'Motorways of the Sea Actions' are, under certain conditions, eligible to Community financial assistance with a maximum intensity of 35 % of the total cost for establishing and operating the transport service and a maximum duration of 60 months, as fixed by Annex I, points 1(a) and 2(a) of column B.
5. Article 7 of Regulation (EC) No 1692/2006 reads: *Community financial assistance for the actions covered by the Programme shall not prevent those actions from being granted State aid at national, regional or local level, insofar as such aid is compatible with the State aid arrangements laid down in the Treaty and within the cumulative limits established for each type of action set out in Annex I.*
6. According to Article 7 of Regulation (EC) No 1692/2006, therefore, Member States' authorities may complement Community financing by allocating their own financial resources to projects selected according to the criteria and procedures laid down in that Regulation, within the ceilings set out in the Regulation. The objective of Article 7 of Regulation (EC) No 1692/2006 is to make it possible for undertakings interested in a project to count on a predetermined amount of public funding irrespective

⁽¹⁾ COM(2001) 370.

⁽²⁾ COM(2006) 314 final: Communication from the Commission to the Council and the European Parliament 'Keep Europe moving — Sustainable mobility for our continent — Mid term review of the European Commission's 2001 Transport White Paper'.

⁽³⁾ Commission Communication C(2004) 43 (OJ C 13, 17.1.2004, p. 3).

⁽⁴⁾ OJL 328, 24.11.2006, p. 1.

of its origin. As a matter of fact, it may be the case that the Community financial resources allocated by the Regulation (EC) No 1692/2006 are not sufficient to provide all the selected projects with the maximum possible support. Actually, if a large number of valid projects are presented in a given year, some projects may be granted limited amounts of Community funding. While the fact of having a large number of selected projects would be a sign of success for Marco Polo II, this success would be jeopardised if the involved undertakings were to withdraw their submission or were discouraged from future submissions because of the lack of public funding, necessary for the start up of the relevant services. Moreover, fixing a pre determined amount of public funding that can be relied on is essential for potential bidders.

7. Against this background, the Commission has noticed that amongst stakeholders and Member States' authorities there are doubts about the possibility for the latter to grant complementary State aid to Marco Polo II projects going beyond what is allowed for short sea shipping under Chapter 10 of the Community Guidelines on State aid to maritime transport. Actually, the eligibility conditions for schemes under the Guidelines on State aid to maritime transport are slightly different from those of Marco Polo II. The Guidelines provide for a maximum intensity of 30 % of operational costs (35 % of the total expenditure in Marco Polo II) and a maximum duration of three years (in comparison to five years under Marco Polo II). Such differences have probably confused potential bidders for motorways of the sea actions.
8. For the above reasons, the Commission considers that maximum duration and intensity of State aid and Community funding for projects which have been selected under the Regulation should be the same. Therefore, on the basis of Article 87(3)(c) of the Treaty, in the absence of Community funding, or to the extent not covered by Community funding, the Commission will authorise State aid to the start up of Marco Polo II 'Motorways of the Sea' projects with a maximum intensity of 35 % of operational costs and a maximum duration of five years ⁽¹⁾. The same will apply to projects selected under Marco Polo II but for which funding is finally provided through the European Regional Development Fund (ERDF) ⁽²⁾ or the Cohesion Fund ⁽³⁾.
9. Start up aid to operational costs may not exceed the above mentioned duration and intensity, irrespective of the source of funding. Aid can not be cumulated with public service compensation. The Commission also recalls that the same eligible costs cannot benefit from two Community financial instruments.
10. Member States will have to notify to the Commission State aid that they intend to grant on the basis of the present communication to projects selected under Regulation (EC) No 1692/2006.

COMPLEMENTARY STATE AID FOR TEN T 'MOTORWAYS OF THE SEA' PROJECTS

11. Article 12a of Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans European transport network ⁽⁴⁾ provides for the setting up of 'Motorways of the Sea' concentrating flows of freight on sea based logistical routes in such a way as to improve existing maritime links or to establish new viable regular and frequent maritime links for the transport of goods between Member States so as to reduce road congestion and/or to improve access to peripheral and islands regions and State. The trans European network of motorways of the sea must consist of facilities and infrastructure concerning at least two ports in two different Member States.
12. The Community guidelines for the development of the trans European transport network concern Community support for the development of infrastructure, including in the case of the motorways of the sea. However, second indent of Article 12a(5) of Decision No 1692/96/EC, includes a possibility of

⁽¹⁾ It should be noticed that the clause contained in Annex I(2)(b) of the Marco Polo II Regulation (about the limits to funding based on freight actually shifted from road) applies to Community funding, but not to complementary State aid addressed in the present communication.

⁽²⁾ Regulation (EC) No 1080/2006 of 5 July 2006 (OJ L 210, 31.7.2006, p. 1).

⁽³⁾ Regulation (EC) No 1084/2006 of 11 July 2006 (OJ L 210, 31.7.2006, p. 79).

⁽⁴⁾ OJ L 228, 9.9.1996, p. 1.

granting Community support for start up aid to a project, without prejudice to Articles 87 and 88 of the Treaty. This support may be granted to the extent it is *deemed necessary for the financial viability of the project*. In fact, the case may arise that the proposing consortium of ports and operators incurs start up losses within the launching period of the motorways of the sea services.

13. Start up support under the Community guidelines for the development of the trans European transport network is limited to 'duly justified capital costs', to be understood as investment support. This may include the depreciation of ships allocated to the service ⁽¹⁾. Under the Community guidelines for the development of the trans European transport network, start up support is limited to two years with a maximum intensity of 30 %.
14. In the framework of TEN T projects, financial resources may be provided by Member States to the extent that Community funding is not available. In the case of start up aid to shipping services, however, the second indent of Article 12a(5) of Decision No 1692/96/EC makes a reference to the provisions on State aid of the Treaty. Therefore, Member States may provide complementary aid to the extent that Community funding is not available, but they have to respect the rules on State aid while doing so. Since in the matter of aid to short sea shipping, guidance on the application of State aid rules has been provided by Chapter 10 of the Guidelines on State aid to maritime transport, the latter applies to complementary State aid. The Community Guidelines on State aid to maritime transport, however, allow for aid to investment with a maximum intensity of 10 % during three years. As a result, if a motorway of the sea project is selected as a TEN T project, but it is not granted the maximum Community support to investment, i.e. 30 % during two years, it may happen that public support will not achieve the maximum possible amount, if national State aid may not go beyond the 10 % over three years authorised by the Community Guidelines on State aid to maritime transport. Furthermore, the difference in the maximum duration of the two schemes (two years under Decision No 1692/96/EC and three years under the Community Guidelines on State aid to maritime transport) is capable of generating uncertainty and confusion. For the sake of clarity and in order to allow for a pre determined public support to undertakings taking part in a motorway of the sea TEN T project, the maximum intensity and duration of complementary State aid to be provided by Member States should be the same as the maximum intensity and duration of Community funding.
15. For the above reasons, on the basis of Article 87(3)(c) of the Treaty, in the absence of Community funding for start up aid or for the part not covered by Community funding, the Commission will authorise State aid to investment with a maximum intensity of 30 % and a maximum duration of two years to projects corresponding to Article 12a of Decision 1692/96/EC and selected in accordance with the procedure laid down in Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans European transport and energy networks ⁽²⁾. The same will apply where the Member States decide to fund the project through the European regional development Fund or the Cohesion Fund.
16. Start up aid to investment may not exceed the duration and intensity referred to in this point, irrespective of the source of funding. It can not be cumulated with public service compensation. Also for this case, the Commission recalls that the same eligible costs cannot benefit from two Community financial instruments.
17. Member States will have to notify to the Commission State aid that they intend to grant on the basis of the present communication to projects selected under Regulation (EC) No 680/2007.

APPLICATION

18. The Commission will apply the guidance provided for in this communication from the day following that of its publication in the Official Journal.

⁽¹⁾ Vademecum of 28 February 2005 issued in conjunction with the call for proposals for the TEN T 2005; paragraph 4.3 (Start up aid related to capital costs).

⁽²⁾ OJ L 162, 22.6.2007, p. 1.

Communication from the Commission providing guidance on State aid to shipmanagement companies

(Text with EEA relevance)

(2009/C 132/06)

1. SCOPE

This Communication deals with the eligibility of crew and technical managers of ships for the reduction of corporate tax or the application of the tonnage tax under Section 3.1 of Commission Communication C(2004) 43 — Community guidelines on State aid to maritime transport ⁽¹⁾ ('the Guidelines'). It does not deal with State aid to commercial managers of ships. This Communication applies to crew and technical management irrespectively of whether they are individually provided or jointly provided to the same ship.

2. INTRODUCTION

2.1. General context

The Guidelines provide for the possibility that ship management companies qualify for the tonnage tax or other tax arrangements for shipping companies (Section 3.1). However, eligibility is limited to the joint provision of both technical and crew management for a same vessel ('full management'), while those activities are not eligible to the tonnage tax or other tax arrangements when provided individually.

The Guidelines stipulate that the Commission will examine the effects of the Guidelines on ship management after three years ⁽²⁾. This Communication sets out the results of that fresh assessment and draws conclusions on the eligibility of ship management companies for State aid.

2.2. Ship management

Ship management companies are entities providing different services to shipowners, such as technical survey, crew recruiting and training, crew management and vessel operation. There are three main categories of ship management services: crew management, technical management and commercial management.

Crew management consists, in particular, in dealing with all the matters relating to crew, such as selecting and engaging suitably qualified seafarers, issuing payrolls, ensuring the appropriateness of the manning level of ships, checking the certifications of seafarers, providing for seafarers' accident and disability insurance coverage, taking care of travel and visa arrangements, handling medical claims, assessing the performance of the seafarers and, in some cases, training them. Crew management represents by far the largest part of the ship management industry worldwide.

Technical management consists in ensuring the seaworthiness of the vessel and its full compliance with technical, safety and security requirements. In particular, the technical manager is responsible for making decisions on the repair and maintenance of a ship. Technical management represents a significant part of the ship management industry, although much smaller than crew management.

Commercial management consists in promoting and ensuring the sale of ships' capacity, by means of chartering the ships, taking bookings for cargo or passengers, ensuring marketing and appointing agents. Commercial management represents a very small part of the ship management industry. To date the Commission does not have complete information about commercial management at its disposal. Commercial management is therefore not addressed by this Communication.

Like any maritime activity, ship management is a global business by nature. In the absence of international law regulating third party ship management, the standards in this field have been settled within the framework of private law agreements ⁽³⁾.

⁽¹⁾ OJ C 13, 17.1.2004, p. 3.

⁽²⁾ See footnote 3 on page 7 of OJ C 13, 17.1.2004.

⁽³⁾ An example is the 'BIMCO's Standard Ship Management Agreement SHIPMAN 98' which is frequently used in relations between ship management companies and shipowners.

In the Community, ship management is mainly carried out in Cyprus. There are, however, ship management companies in the United Kingdom, Germany, Denmark, Belgium and the Netherlands. Outside the Community, ship management companies are mainly established in Hong Kong, Singapore, India, United Arab Emirates and the USA.

2.3. Review of the eligibility conditions for ship management companies

Since the publication of the Guidelines in January 2004, several maritime countries have entered the Community, amongst them Cyprus, which features the largest ship management industry in the world.

The accession of Cyprus and its preliminary work for complying with the Guidelines, as well as a study realised by a consortium for the administration of that Member State ⁽¹⁾, allowed for a more complete understanding of this activity and of its evolution. More awareness has been acquired in particular in respect of the link between technical and crew management on the one hand, and shipping on the other, as well as the possibility that crew and/or technical managers can help achieving the objectives of the Guidelines.

3. ASSESSMENT OF ELIGIBILITY OF SHIP MANAGEMENT COMPANIES

Unlike other maritime-related services, ship management is a standard core-activity of maritime carriers, normally provided in-house. Ship management is one of the most characteristic activities of ship operators. Nowadays, however, it is outsourced to third-party ship management companies in some cases. It is because of this link between ship management and shipping that third-party ship management companies are professional operators with the same background as shipowners, although segmented according to their specialisation, operating in their same business environment. Shipowners are the only customers of ship management companies.

Against this background the Commission considers that outsourcing of ship management should not be fiscally penalised with respect to in-house ship management, provided that the ship management companies meet the same requirements as are applicable to shipowners and that the provision of the aid to the former contributes to the achievement of the objectives of the Guidelines in the same way as the provision of aid to shipowners.

In particular the Commission considers that, precisely because of their specialisation and the nature of their core-business, ship management companies may substantially contribute to the achievement of the objectives of the Guidelines, in particular the achievement of an 'efficient, secure and environment friendly maritime transport' and of the 'consolidation of the maritime cluster established in the Member States' ⁽²⁾.

4. EXTENSION TO SHIP MANAGEMENT COMPANIES OF ELIGIBILITY TO STATE AID

On the basis of what has been explained in Section 3 above, the Commission will authorise under Article 87(3)(c) of the Treaty establishing the European Community, tax relief for ship management companies, as referred to in Section 3.1 of the Guidelines, with respect to joint or separate crew and technical management of ships, provided that the conditions set out in Sections 5 and 6 of this Communication are fulfilled.

5. CONDITIONS FOR ELIGIBILITY APPLICABLE TO BOTH TECHNICAL AND CREW MANAGERS

In order to qualify for aid ship management companies should present a clear link with the Community and its economy, in line with Section 3.1 of the Guidelines. Moreover, they should contribute to the objectives of the Guidelines, such as those laid down in Section 2.2 of the Guidelines. Technical and crew managers are eligible to State aid, provided that the ships they manage comply with all the requirements set out in Sections 5.1 to 5.4 of this Communication. Eligible activities must be entirely carried out from the territory of the Community.

⁽¹⁾ *Study on Ship Management in Cyprus and in the European Union* of 31 May 2008, carried out for the Cypriot government by a consortium under the direction of the Vienna University of Economics and Business Administration.

⁽²⁾ Section 2.2 of the Guidelines.

5.1. Contribution to the economy and employment within the Community

The economic link with the Community is proven by the fact that ship management is carried out in the territory of one or more Member States and that mainly Community nationals are employed in land-based activities or on ships.

5.2. Economic link between the managed ships and the Community

Ship management companies may benefit from State aid with respect to ships entirely managed from the territory of the Community, irrespective of whether management is provided in-house or whether it is partially or totally outsourced to one or more ship management companies.

However, since ship management companies do not have full control of their customers, the above requirement is deemed to be fulfilled if at least two thirds of the tonnage of the managed ships is managed from the territory of the Community. Tonnage in excess of that percentage which is not entirely managed from the Community is not eligible ⁽¹⁾.

5.3. Compliance with international and Community standards

Ship management companies are eligible if all the ships and crews they manage comply with international standards and Community law requirements are fulfilled, in particular those relating to security, safety, training and certification of seafarers, environmental performance and on-board working conditions.

5.4. Flag-share requirement (flag link)

The flag-share requirement, as laid down in the eighth paragraph of Section 3.1 of the Guidelines applies to ship management companies. The share of Community flags to be considered as the benchmark is that of the day on which this Communication is published in the *Official Journal of the European Union*. For new companies the benchmark is to be calculated one year after the date on which they started activity.

6. ADDITIONAL REQUIREMENTS FOR CREW MANAGERS

6.1. Training of seafarers

Crew managers are eligible for State aid as long as all seafarers working onboard managed ships are educated, trained and hold a certificate of competency in accordance with the Convention of the International Maritime Organisation on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW), and have successfully completed training for personal safety on board ship. Moreover, crew managers are eligible if they fulfil the STCW and Community law requirements regarding responsibilities of companies.

6.2. Social conditions

In order to be eligible for State aid, crew managers must ensure that on all managed ships the provisions of the Maritime Labour Convention, 2006, of the International Labour Organisation ('MLC') ⁽²⁾, are fully implemented by the seafarer's employer, be it the shipowner or the ship management companies. The ship management companies must ensure, in particular, that the provisions of the MLC concerning the seafarer's employment agreement ⁽³⁾, ship's loss or foundering ⁽⁴⁾ medical care ⁽⁵⁾, shipowner's liability including payment of wages in case of accident or sickness ⁽⁶⁾, and repatriation ⁽⁷⁾ are properly applied.

⁽¹⁾ While the fact of not complying with the 2/3 rule does not affect the eligibility of the ship management company as such.

⁽²⁾ It should be recalled that the European social partners adopted an agreement taking up the relevant part of the Maritime Labour Convention 2006 which has been integrated into Community law by Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (OJ L 124, 20.5.2009, p. 30).

⁽³⁾ Regulation 2.1 and Standard A2.1 (Seafarers' employment agreement) of Title 2 of MLC.

⁽⁴⁾ Ibid. Regulation 2.6 and Standard A2.6 (Seafarer compensation for the ship's loss or foundering) of Title 2.

⁽⁵⁾ Ibid. Regulation 4.1 and Standard A4.1 (Medical care on board ship and ashore Shipowners' liability); Regulation 4.3 and A4.3 (Health and safety protection and accident prevention); Regulation 4.4 (Access to shore-based welfare facilities) of Title 4.

⁽⁶⁾ Ibid. Regulation 4.2 and Standard A4.2 (Shipowners' liability) of Title 4.

⁽⁷⁾ Ibid. Regulation 2.5 and Standard A2.5 (Repatriation) of Title 2.

Crew managers must also ensure that the international standards regarding hours of work and hours of rest provided for by the MLC are fully complied with.

Finally, in order to be eligible, crew managers must also provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard.

7. CALCULATION OF TAX

Also in the case of ship management companies the Commission will apply the principle contained in the Guidelines, according to which, in order to avoid distortion, it will only authorise schemes giving rise to a homogeneous tax-load across the Member States for the same activity or the same tonnage. This means that total exemption or equivalent schemes will not be authorised ⁽¹⁾.

The tax base to be used for ship management companies can obviously not be the same as that applied to shipowners since, with respect to a given ship, the turnover of the ship management companies is much lower than that of the shipowner. According to the study mentioned in Section 2.3, as well as to notifications received in the past, the tax-base to be applied to ship management companies should be approximately 25 % (in terms of tonnage or notional profit) of that which would apply to the shipowner for the same ship or tonnage. The Commission, therefore, requires that a percentage of no less than 25 % is applied under ship management tonnage tax schemes ⁽²⁾.

If ship management companies engage in activities which are not eligible for State aid under the present Communication, they must keep separate accounts for those activities.

In case ship management companies subcontract part of their activity to third parties, the latter are not eligible to State aid.

8. APPLICATION AND REVIEW

The Commission will apply the guidance provided for in this Communication from the day following that of its publication in the *Official Journal of the European Union*.

State aid to ship management companies will be included in the general revision of the Guidelines such as foreseen in Section 13 of the latter.

⁽¹⁾ The Commission takes this opportunity within the present Communication to emphasise that the mechanism used to calculate the tax to be paid by both ship management companies and ship owners is irrelevant as such; in particular, it is irrelevant whether or not a system based on notional profit is applied.

⁽²⁾ The shipowner, if eligible, remains liable for the whole tonnage tax.

I

(Information)

COMMISSION

COMMUNICATION FROM THE COMMISSION

COMMUNITY GUIDELINES ON FINANCING OF AIRPORTS AND START-UP AID TO AIRLINES DEPARTING FROM REGIONAL AIRPORTS

(2005/C 312/01)

(Text with EEA relevance)

1. INTRODUCTION

1.1. General context

(1) These guidelines form part of the general plan to create a single European airspace, a subject on which the Commission has been working for over 10 years. The set of liberalisation measures known as the 'third air package', in force since 1993, has enabled all air carriers holding a Community licence to have unrestricted access to the intra-Community market, with freedom of tariffs, since April 1997 ⁽¹⁾. As a corollary, to guarantee citizens continuous quality service at affordable prices throughout their territory, those Member States that wish to do so have established public service obligations relating to frequency, service punctuality, availability of seats or preferential rates for certain categories of users within a clear legal framework. These public service obligations have enabled air transport to make a significant contribution to economic and social cohesion and to balanced development in the regions.

(2) In addition, a number of measures have been taken in areas such as allocation of slots ⁽²⁾, groundhandling services ⁽³⁾ and computerised reservation systems ⁽⁴⁾, in order to underpin this market liberalisation and allow businesses to compete on a level playing field. New targeted proposals will shortly be made in relation to slots (for the first time, a market mechanism for allocation of slots will be proposed to increase mobility in saturated airports), equal access to computerised reservation systems and groundhandling services. The latter proposal is aimed at boosting competition between service providers by increasing their access to the market.

(3) At the same time, the opening-up of the industry, which has obviously had a major impact on the activities and behaviour of traditional airlines or flag carriers, has been accompanied by strict control of State aid. The application of the principle of single aid for restructuring (one time-last time) has thus allowed the more adaptable airlines to make the transition from a relatively protected

⁽¹⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

⁽²⁾ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

⁽³⁾ Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36).

⁽⁴⁾ Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ L 220, 29.7.1989, p. 1).

operating regime to competing as normal players in the market. This has led to a significant restructuring of the whole air industry, a measure that became even more necessary after the events of 11 September 2001, the consequences of which on air transport were significant. Examples of consolidation in the industry are the recent alliances such as Air France/Alitalia, Lufthansa/Austrian Airlines and Iberia/British Airways, and the recent merger of Air France and KLM.

- (4) The *Open Skies* ⁽¹⁾ judgments of the Court of Justice have also given a new impetus to the air industry by confirming that the Community has international negotiating powers in the field of civil aviation. The importance of these judgments is considerable, since they will promote consolidation among European airlines and enhance their ability to face competition from third-country airlines on a Community basis.
- (5) There have been two other major developments on the European air transport market in recent years. One of these is the emergence of a number of new Community-wide companies offering promotional rates supported by a *low-cost* structure. The other development is the drive by airports in recent years to secure new air links.

1.2. Developments in the airport sector

- (6) The initial development of airports was often determined by purely territorial considerations or, in some cases, military requirements. These land-use planning considerations may still persist in some cases, but in many others airports have been transferred from State to regional control, in some cases to be operated by public companies, or even to the private sector. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital.
- (7) The Community's airport industry has therefore undergone fundamental organisational changes that reflect not only the active interest of private investors in the airport sector but also a change of attitude on the part of the public authorities regarding the contribution of private investment to airport development. This development has led to greater diversification and complexity of the functions undertaken by airports.

- (8) However, this development affects the EU's airports differently. The seven largest EU airports account for over a third of all EU traffic, and the 23 largest account for more than two thirds ⁽²⁾. Although they are primarily providers of infrastructure to the air transport industry, these airports have become highly efficient commercial operators. On the other hand, most small airports in the EU are still owned and operated by public authorities in the public interest. As a result, the influence of one airport's activity on that of other airports and on trade between Member States varies greatly according to the category it belongs to (see *Types of Airport*, section 1.2.1 below).
- (9) Moreover, it is generally accepted that airports can have an impact on the success of local economies and on maintaining local services such as education and health. They also play a major role in the integration of the outermost regions of Europe. Passenger and freight services can be crucial for competitiveness and development in some regions. Airports that provide good services can act as a magnet for airlines and thus promote business activity as well as economic, social and regional cohesion within the EU.
- (10) However, the Commission notes that air transport is not the only driver of development in terms of regional accessibility. High-speed train connections also make a significant contribution to social and economic cohesion in the EU, particularly between large regional cities. As emphasised in the 2001 White Paper ⁽³⁾, rail/air intermodality, with rail and air travel complementing rather than competing with each other and high-speed trains connecting cities, is bound to boost capacity significantly.

1.2.1. Types of airport

- (11) In the airport industry there are currently several different levels of competition between the different types of airport. This is a key factor when investigating State aid, and makes it necessary to examine the extent to which competition could be distorted and the single market affected. Competition scenarios are evaluated case by case, based on the markets in question. However, research ⁽⁴⁾ has shown that, generally, *major international hubs* are competing with similar airports in all the

⁽¹⁾ Cases C 466/98 to C 469/98, C 471/98 and C 472/98 *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium and Luxembourg respectively* [2002] ECR I 9427 to 9741.

⁽²⁾ Based on data for EU 25 in 2004 from the Airports Council International.

⁽³⁾ European Transport Policy for 2010: time to decide, COM (2001) 370, 12.9.2001.

⁽⁴⁾ 'Study on competition between airports and the application of State aid rules' — Cranfield University, June 2002.

transport markets concerned, with the level of competition depending on factors such as congestion and the existence of alternative transport, or, in certain cases (see below), with large regional airports. *Large regional airports* may be competing not only with other large regional airports but also with the major Community hubs and land transport, especially if there is high-quality land access to the airport. This research has also shown that *small airports* do not generally compete with other airports except, in some cases, with neighbouring airports of a similar size whose markets overlap.

(12) In practical terms, the Decision of the Council and of the European Parliament on Community guidelines for the development of the trans-European transport network ⁽¹⁾ defined three categories of airport:

- international connecting points (generally with an annual passenger volume of no less than 5 000 000),
- Community connecting points (generally with an annual passenger volume of between 1 000 000 and 4 999 999), and
- regional connecting points and accessibility points (generally with an annual passenger volume of between 250 000 and 999 999).

(13) The Committee of the Regions, for its part, proposed five categories of European airports in its Outlook opinion of 2 July 2003 on regional airport capacities ⁽²⁾:

- major hub airports (over 25 million passengers, four airports), accounting for approximately 30 % of European air traffic,
- national airports (10 to 25 million passengers, 16 airports), accounting for approximately 35 % of European air traffic,
- 15 airports of 5 to 10 million passengers accounting for approximately 14 % of European air traffic,

- 57 airports of 1 to 5 million passengers accounting for approximately 17 % of European air traffic,
- 67 airports of 200 000 to 1 million passengers accounting for approximately 4 % of European air traffic ⁽³⁾.

(14) According to the Committee of the Regions, regional airports generally fall into the latter two categories, but some airports in the intermediate category may also be considered regional airports.

(15) The Commission considers that there is a broad overlap between these two classification schemes, and for the purposes of these guidelines has defined the following four categories:

- category A, hereinafter 'large Community airports', with more than 10 million passengers a year,
- category B comprises 'national airports', with an annual passenger volume of between 5 and 10 million,
- category C comprises 'large regional airports', with an annual passenger volume of between 1 and 5 million,
- category D, hereinafter 'small regional airports', with an annual passenger volume of less than 1 million.

1.3. Low-cost companies

(16) Compared with traditional air carriers, the market share of low-cost airlines has risen from just 4,0 % in 1998 to 20,8 % in 2004, although this share varies considerably between Member States ⁽⁴⁾. In 2004, the three main low-cost airlines transported over 62 million passengers in the EU ⁽⁵⁾.

⁽¹⁾ Decision of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans European transport network (OJ L 228, 9.9.1996, Annex II, section 6).

⁽²⁾ Outlook opinion of the Committee of the Regions of 2 July 2003 on the capacity of regional airports (CdR 393/2002 fin).

⁽³⁾ NB: There are approximately 200 airports with fewer than 200 000 passengers per year.

⁽⁴⁾ Over 40 % in the United Kingdom, Ireland and Slovakia, 38 % in Spain, over 25 % in Belgium, Germany, Italy, Austria, Hungary and Sweden, 19 % in France and Greece, 18 % in the Czech Republic and less than 15 % in the other Member States. Source: OAG Summer Schedules 2004, seats available on intra EU flights.

⁽⁵⁾ Ryanair, Easyjet, AirBerlin. Source: Airclaims.

(17) The Commission welcomes this development and appreciates the contribution made by these companies to the general reduction in the price of air travel in Europe, the wider range of services available, and the accessibility of air travel to a wider public. As the guardian of the Treaty, it must nevertheless ensure that internal market rules are complied with, in particular competition rules, especially concerning State aid. The negotiating methods used by the low-cost airlines to obtain aid from public authorities, whether directly or through the airport operator, have raised a number of questions regarding the application of competition rules under the EC Treaty and have been the subject of several complaints to the Commission. This led the Commission to adopt its recent decision on the establishment of Ryanair at Charleroi⁽¹⁾. This has led to expectations within the market of a clear legal framework defining the rules applicable to these new practices.

2. OBJECTIVES OF THESE GUIDELINES AND CHANGES COMPARED WITH THE 1994 GUIDELINES

(18) The Commission's 1994 guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid to the aviation sector⁽²⁾ (hereinafter the aviation sector guidelines) do not cover all the new aspects relating to the financing of airports and start-up aid for new routes.

(19) They relate almost exclusively to the conditions for granting State aid to airlines, by limiting direct operating aid to airlines solely to public service obligations and aid of a social nature. Part II.3 of the guidelines relates to public investment in airport infrastructure. It states that 'the construction of (airport) infrastructure projects... represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid. This general principle applies only to the construction of infrastructures by Member States, and does not apply to aid resulting from preferential treatment of certain companies for the use of the infrastructures.' These guidelines therefore add to, rather than replace, those from 1994 by specifying how the competition rules must be applied to the various

means of financing airports (see section 4), and start-up aid for airlines leaving from regional airports (see section 5).

(20) To this end, the Commission takes account of the contribution that developing regional airports makes to numerous Union policies. Thus:

- increased use of regional airports is an asset in combating air traffic congestion at the major European hubs. In its White Paper 'European transport policy for 2010: time to decide'⁽³⁾, the Commission explains that 'there is already a specific action plan on congestion of the sky, but congestion on the ground is not yet receiving the necessary attention or commitment. However, almost half of Europe's fifty largest airports have already reached or are close to reaching saturation point in terms of ground capacity.'

- more access points for intra-European flights increase the mobility of European citizens;

- developing these airports also helps develop the regional economies concerned.

However, regional airports often face a less favourable situation when developing their services than the major European hubs such as London, Paris or Frankfurt. They do not have a large reference airline that focuses its operations on that airport in order to offer passengers as many connections as possible and to take advantage of the significant economies of scale that such a structure allows. They may not have reached the critical size needed to be sufficiently attractive. In addition, regional airports often have to overcome a poor image and low profile due to their location in the outermost regions of the Community (e.g. the Azores) or in areas affected by economic crisis (e.g. Charleroi, the site of a former coalfield).

(21) This is why in these guidelines the Commission has taken a positive approach to developing regional airports, while at the same time ensuring strict compliance with the principles of transparency, non-discrimination and proportionality so as to prevent any distortion of competition which would not be in the common interest in terms of public funding to regional airports and State aid to airlines.

⁽¹⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

⁽²⁾ Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽³⁾ White Paper, European Transport Policy for 2010: time to decide. COM(2001) 370 final.

- (22) This approach must also fit in with the general aims of transport policy, in particular intermodality with railways. In recent years the Community has made a significant contribution, in terms of both policy and financing, to the pursuit of ambitious programmes to develop a high-speed rail network. High-speed rail offers a highly attractive alternative to air travel in terms of time, price, comfort and sustainable development. Notwithstanding the work that remains to be done to extend the high-speed rail network to the whole territory of the EU, we should therefore seek to benefit from the capacity of high-speed rail travel to provide efficient, high-quality connections, and encourage rail and air operators to cooperate in accordance with Article 81 of the EC Treaty in order to develop complementarity between the two modes in the interest of users.
- (23) In so far as these guidelines take a stand on issues such as the absence or presence of aid, they set out, for information purposes, the Commission's general interpretation of these issues at the time of drafting. This is purely indicative, and without prejudice to the interpretation of this concept by the Court of Justice and the Court of First Instance.
- (27) In its communications and other measures on regional aid, the Commission has indicated the conditions under which regional aid can be considered compatible with the common market in accordance with Article 87(3)(a) and (c). Operating aid ⁽¹⁾ granted to airports or airlines (such as start-up aid) can only be declared compatible under exceptional circumstances and under strict conditions in underprivileged regions, i.e. regions covered by the derogation set out in Article 87(3)(a) of the EC Treaty, the most remote regions and sparsely populated areas ⁽²⁾.
- (28) In accordance with Article 87(3)(b), aid to promote the execution of an important project of common European interest may be considered to be compatible with the common market. Particular reference is made to projects relating to trans-European networks, which may include airport projects.
- (29) When the above provisions are not applicable, the Commission will evaluate the compatibility of the aid given to airports and start-up aid under Article 87(3)(c). The following provisions set out the principles the Commission will follow in carrying out its assessment.

3. SCOPE AND COMMON COMPATIBILITY RULES

3.2. Existence of State aid

3.1. Scope and legal basis

3.2.1. Airports' economic activity

- (24) This framework specifies to what extent and how public financing of airports and State aid for starting up air routes will be assessed by the Commission in the light of Community rules and procedures on State aid. The Commission will base its assessment on Article 86(2) or Article 87(3)(a), (b) or (c) of the Treaty.
- (25) Article 86(2) of the Treaty allows Member States to derogate from the Community rules on State aid in respect of undertakings entrusted with the operation of services of general economic interest if the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them and provided the development of trade is not affected to such an extent as would be contrary to the interests of the Community.
- (26) Article 87(3) of the Treaty lists the aid that may be declared to be compatible with the common market. Article 87(3)(a) and (c) provide for derogations for aid granted to promote or facilitate the development of certain areas and/or certain economic activities.
- (30) The Treaty adopts a neutral stance on the question of whether a State opts for public or private ownership of airports. As regards the existence of State aid, the essential point is whether the beneficiary is engaged in an economic activity ⁽³⁾. There can be no doubt that airlines are engaged in an economic activity. Likewise, once an

⁽¹⁾ In the guidelines on State aid for the regions, operating aid is defined as aid 'intended to reduce the undertaking's current expenditure' (point 4.15), while initial investment aid relates to 'an investment in fixed capital relating to the creation of a new establishment, the extension of an existing establishment, or the commencement of an activity that involves a fundamental change in the product or procedure provided by an existing establishment' (point 4.4).

⁽²⁾ See point 4.15 et seq. of the guidelines on State aid for the regions.

⁽³⁾ According to Court of Justice case law, any activity consisting in offering goods and services on a given market is an economic activity. See Case C 35/96 *Commission v Italy* [1998] ECR I 3851 and Cases C 180/98 to C 184/98 *Pavlov* [2000] ECR I 6451.

airport engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 87(1) of the EC Treaty, and the Treaty rules on State aid therefore apply ⁽¹⁾.

(31) In the 'Aéroports de Paris' case ⁽²⁾, the Court of Justice ruled that airport management and operation activities consisting in the provision of airport services to airlines and to the various service providers within airports are economic activities because they consist in the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by the manager, and do not fall within the exercise of its official powers as a public authority and are separable from its activities in the exercise of such powers. Thus, the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) of the EC Treaty, to which the rules on State aid apply.

(32) However, not all the activities of an airport operator are necessarily of an economic nature. It is necessary to distinguish between its activities and to establish to what extent its activities are of an economic nature ⁽³⁾.

(33) The Court of Justice has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include safety, air traffic control, police, customs, etc. Generally speaking, the financing of these activities must be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities ⁽⁴⁾. As explained by the Commission in its Communication of 10 October 2001 following the attacks of 11 September 2001, 'It goes without saying that, if certain measures are imposed directly on airlines and other operators in the sector such as airports, suppliers of groundhandling services and providers of air navigation services, the financing of such measures by the public authorities must not give rise to operating aid incompatible with the Treaty.'

3.2.2. Airport activities constituting services of general economic interest

(34) Certain economic activities carried out by airports can be considered by the public authority as constituting a service of general economic interest. In this case, the authority imposes on the airport operator certain public service obligations in order to ensure that the general public interest is appropriately served. In such circumstances, the airport operator may be compensated by the public authorities for the additional costs deriving from the public service obligation. It is not impossible for the overall management of an airport, in exceptional cases, to be considered a service of general economic interest. In this case, the public authority might impose public service obligations on an airport, for example, an airport located in an isolated region, and might decide to pay compensation for these obligations. However, it should be noted that the overall management of an airport as a service of general economic interest should not cover activities which are not directly linked to its basic activities and listed in paragraph 53(iv).

(35) In this connection, the Commission draws attention to the Court judgment in the *Altmark* case ⁽⁵⁾, which established case-law in this regard. The Court ruled that compensation for public service does not constitute State aid within the meaning of Article 87 of the EC Treaty provided that the following four criteria are met:

1. the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined;
2. the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and

⁽¹⁾ Cases C 159/91 and C 160/91, *Poucet v AGF and Pistre v Cancava* [1993] ECR I 637.

⁽²⁾ Case T 128/98, *Aéroports de Paris v Commission of the European Communities* [2000] ECR II 3929, confirmed by Case C 82/01 [2002] ECR I 9297, points 75-79.

⁽³⁾ Case C 364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I 43.

⁽⁴⁾ Case C 343/95 *Calì & Figli v Servizi ecologici porto di Genova* [1997] ECR I 1547. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the port sector.

⁽⁵⁾ Case C 280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I 7747.

4. where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.

(36) When it complies with the conditions established by the Altmark judgment, compensation for public service obligations imposed on an airport operator does not constitute State aid.

(37) Public financing of airports other than those referred to above may constitute State aid within the meaning of Article 87(1) if it has an effect on intra-Community competition and trade.

3.2.3. Effects of financing given to airports on competition and trade between Member States

(38) Competition between airports can be assessed in the light of airlines' criteria of choice, and in particular by comparing factors such as the type of airport services provided and the clients concerned, population or economic activity, congestion, whether there is access by land, and also the level of charges for use of the airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract traffic and may significantly distort competition.

(39) However, on the basis of these guidelines, the Commission considers that the categories identified in section 1.2.1 can provide an indication of the extent to which airports are competing with one another and therefore also the extent to which public funding granted to an airport may distort competition.

Thus, public financing granted to national and Community airports (categories A and B) will normally be considered to distort or threaten to distort competition and to affect trade between Member States. Conversely, funding granted to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest.

(40) However, beyond these general indications, it is not possible to establish rules covering every possible case, particularly for airports in categories C and D.

For this reason any measure which may constitute State aid to an airport must be notified so that its impact on competition and trade between Member States can be examined, and, where appropriate, its compatibility.

(41) By way of exception, when airports in category D are entrusted with a mission of general economic interest, the Commission has decided to exempt the public service compensation constituting State aid granted to them from the prior notification obligation and declare them compatible, as long as they comply with certain conditions ⁽¹⁾.

3.2.4. The principle of private investor in a market economy

(42) Article 295 of the Treaty of Rome states that the Treaty in no way prejudices the rules in Member States governing the system of property ownership. Member States can accordingly own and manage undertakings, and can purchase shares or other interests in public or private undertakings.

(43) This principle means that the Commission's action cannot penalise or give more favourable treatment to public authorities which subscribe to the capital of certain companies. Similarly, it is not for the Commission to make any judgment on the choices made by undertakings between different types of financing.

(44) Consequently, these guidelines make no distinction between the different types of beneficiaries in terms of their legal structure or whether they belong to the public or private sector, and all references to airports or the companies which manage them include all types of legal entity.

(45) Moreover, these principles of non-discrimination and equality do not exempt public authorities or public companies from applying competition rules.

(46) In general, whether the public funding benefits airports or is granted directly or indirectly by the public authorities to airlines, the Commission will assess whether it constitutes aid by considering whether 'in

⁽¹⁾ Commission Decision of 13 July 2005 on the application of Article 86 of the Treaty to State aid granted in the form of public service compensation to certain undertakings entrusted with management of services in the general economic interest.

similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ⁽¹⁾.

(47) The Court has ruled that 'the principle of equality, to which the Governments refer in connection with the relationship between public and private undertakings in general, presupposes that the two are in comparable situations. (...) private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions.' ⁽²⁾ Thus the concept of foreseeable profitability for the operator who effectively provides the funds as a market player is of central importance.

(48) The Court has also ruled that the conduct of a public investor must be compared with that of a private investor pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term ⁽³⁾. These considerations are particularly pertinent to investment in infrastructure.

(49) All State resources used by Member States or public authorities to benefit airport operators or airlines must therefore be assessed with regard to these principles. In cases where Member States or public authorities act as private economic operators would, these advantages will not constitute State aid.

(50) If, on the other hand, public resources are made available to a company under more favourable conditions (i.e., in economic terms, at a lower cost) than would be provided by a private economic operator to a company in a comparable financial situation and facing similar competition, that company is receiving assistance which constitutes State aid.

(51) In terms of start-up aid, it is possible that a public airport gives an airline financial advantages from its own resources generated by its business activity, which would not constitute State aid if it proves to be acting as a private investor, for example by providing a business plan setting out the profitability forecasts for its airport economic activity. Conversely, if a private airport gives funding which in fact is no more than a redistribution of public resources given to it for this purpose by a public body, these subsidies must be considered as State aid if the decision to redistribute public resources is taken by the public authorities.

(52) Applying the principle of the private investor, and therefore that there is no aid, presupposes the reliability of the whole economic model of the operator acting as an investor: an airport which does not finance its investments or does not pay the corresponding fees, or whose operating costs are partly covered by public funds, over and above a task undertaken in the general interest, cannot usually be considered as a private operator in a market economy, subject to a case-by-case assessment; it is therefore extremely difficult to apply this reasoning to such an operator.

4. FINANCING AIRPORTS

(53) Airport activities can be categorised as follows:

- (i) construction of airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security or safety equipment);
- (ii) operation of the infrastructure, comprising the maintenance and management of airport infrastructure;
- (iii) provision of airport services ancillary to air transport, such as groundhandling services and the use of related infrastructure, fire-fighting services, emergency services, security services, etc; and
- (iv) pursuit of commercial activities not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks. As these are not transport activities, public financing of them is not covered by these guidelines and will be assessed on the basis of the relevant sectoral and general rules.

⁽¹⁾ Case 40/85 *Kingdom of Belgium v Commission* [1986] ECR I 2321.

⁽²⁾ Joined Cases 188/80 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1982] ECR 2571, point 21 of the Grounds.

⁽³⁾ Case C 305/89 *Italy v Commission (Alfa Romeo)* [1991] ECR I 1603, point 20. Case T 228/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II 435, points 250-270.

(54) These guidelines apply to all airport activities, with the exception of safety, air traffic control and any other activities for which a Member State is responsible as part of its official powers as a public authority ⁽¹⁾.

4.1. Financing of airport infrastructure

(55) This section concerns aid for the construction of airport infrastructure and equipment or facilities that directly support them as defined in paragraphs 53(i) and 54 above.

(56) Infrastructure is the basis for the economic activities carried out by the airport operator. However, it also represents one of the ways in which the State can affect regional economic development, land-use planning policy, transport policy, etc.

(57) Any airport operator engaging in an economic activity within the meaning of the Court judgment referred to in paragraph 30 should finance the costs of using or building the infrastructure it manages from its own resources. Consequently, the provision of airport infrastructure to an operator by a Member State (including regional or local authorities) not acting as a private investor without adequate financial consideration or the granting to an airport operator of public subsidies intended to finance infrastructure can give that airport operator an economic advantage over its competitors and must therefore be notified and examined in the light of the rules on State aid.

(58) The Commission has already had occasion to spell out the conditions under which operations such as the sale of land or buildings ⁽²⁾ or the privatisation of an undertaking ⁽³⁾ does not, in its opinion, involve the possibility of State aid. This is generally the case if these operations are made at market prices, in particular where the price is the outcome of a sufficiently well-publicised, open, unconditional and non-discriminatory bidding procedure which ensures that potential applicants are treated equally. Without prejudice to the obligations deriving from the rules and principles applicable to public procurement and concessions, when these are applicable, the same kind of reasoning applies in principle, *mutatis*

mutandis, to the sale or provision of infrastructure by public authorities.

(59) In any case, it is not possible to rule out the possibility that particular cases may contain elements of aid. For example, there might be aid if the infrastructure in question were allotted to a predetermined manager which gained undue advantage therefrom, or if an unjustifiable difference between the sale price and a recent construction price were to give the purchaser an undue advantage.

(60) In particular, when additional infrastructure, which was not planned when the existing infrastructure was allotted, is made available to the airport operator, the operator must pay rent at market values commensurate with the costs of the new infrastructure and the duration of its use. Moreover, if further development of the infrastructure was not provided for in the original contract, the additional infrastructure must be closely linked to use of the existing infrastructure and the subject of the manager's initial contract must stay the same.

(61) If it is not possible to rule out the possibility of State aid, the measure in question must be notified. If it is confirmed that the measure involves aid, such aid may be declared compatible, in particular pursuant to Articles 87 (3)(a), (b) or (c) or 86(2) and, where applicable, their implementing provisions. To that end, the Commission will in particular examine whether:

- construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),

- the infrastructure is necessary and proportional to the objective which has been set,

- the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure,

- all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,

- the development of trade is not affected to an extent contrary to the Community interest.

⁽¹⁾ See Commission Decision N 309/2002 — France: Air Safety — compensation for costs following the attacks of 11 September 2002.

⁽²⁾ Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10 July 1997, pp 3 5.

⁽³⁾ European Commission report on competition policy, 1993, paragraphs 402 and 403.

4.2. Aid for operation of airport infrastructure

(62) In principle, the Commission considers that an airport operator, like any other business, should meet the normal costs of running and maintaining the airport infrastructure from its own resources. Any public financing of these services would reduce the expenses normally borne by the airport operator in carrying out its current operations.

(63) Such funding does not constitute State aid if it is compensation for public services allocated for management of the airport in accordance with the conditions established by the Altmark judgment ⁽¹⁾. In other cases, operating subsidies are State operating aid. As stated in part 3.1 of these guidelines, such aid may be declared compatible only on the basis of Articles 87(3)(a) or (c), under certain conditions, in disadvantaged regions, or on the basis of Article 86(2) if it meets certain conditions which ensure that it is necessary for the operation of a service of general economic interest and does not affect trade to an extent contrary to the Community interest.

(64) As regards the application of Article 86(2), as stated in paragraph 40 of these guidelines, the Commission has decided to consider compensation for public services constituting State aid granted to category D airports to be compatible, subject to certain conditions. Any compensation for public services constituting State aid granted to larger airports (categories A, B or C) or failing to meet the criteria and conditions of this Decision should be notified and examined on a case-by-case basis.

(65) To that end, the Commission will verify that the airport really has been entrusted with the operation of a service of general interest and that the compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit.

(66) The award of public service missions to the airport must be recorded in one or more official documents, the form of which may be determined by each Member State. These documents should contain all the information needed to identify the specific costs of the public service, and must in particular specify:

- the precise nature of the public service obligation,

⁽¹⁾ See footnote 3, page 8.

- the operators and the territory in question,

- the nature of any special or exclusive rights granted to the airport,

- the arrangements for calculating, monitoring and reviewing compensation,

- the means of preventing and correcting any over or under-compensation.

(67) When calculating the amount of compensation, the costs and revenue to be taken into consideration must include all costs and revenue linked to performance of the service of general economic interest. If the airport operator in question has other special or exclusive rights associated with this service of general economic interest, the associated revenues must also be taken into account. Consequently, there must be a transparent accounting system and separation of the accounts for the operator's different activities ⁽²⁾.

4.3. Aid for airport services

(68) Groundhandling services are a commercial activity open to competition over a threshold of two million passengers annually pursuant to Directive 96/67/EC ⁽³⁾.

An airport operator acting as a provider of groundhandling services may charge different rates for the groundhandling charges invoiced to airlines if these different rates reflect cost differences linked to the nature or scale of the services provided ⁽⁴⁾.

(69) Up to the threshold of two million passengers, the airport operator acting as service provider may offset its various sources of revenue and losses between purely

⁽²⁾ Although not applicable to the transport sector, the Community framework for state aid in the form of public service compensation of 13 July 2005 can provide indications of how paragraphs 65 to 67 apply.

⁽³⁾ See footnote 3, page 1.

⁽⁴⁾ Paragraph 85 of the decision to initiate the proceeding concerning the case of Ryanair at Charleroi: 'With regard to groundhandling tariffs, the Commission believes that economies of scale could be applied when an airport user makes significant use of a company's assistance services. It comes as no great shock that the tariff applied to some companies will be lower than the general tariff, in so far as the service requested by these companies will be less than for other clients'.

commercial activities (such as its groundhandling activities or the management of a car park), with the exclusion of public resources granted to it as airport authority or operator of a service of general economic interest. However, in the absence of competition in the provision of groundhandling services, it must take particular care not to infringe national or Community provisions, and in particular not to abuse its dominant market position, thereby infringing Article 82 of the Treaty (which prohibits undertakings in a dominant position within the common market or in a substantial part of it from applying dissimilar conditions to equivalent transactions with different airlines, thereby placing them at a competitive disadvantage).

- (70) Above the threshold of two million passengers, ground-handling services must be self-financing and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest.

5. START-UP AID

5.1. Objectives

- (71) Small airports often do not have the passenger volumes necessary for them to reach critical mass and the break-even point.
- (72) There are no absolute figures with regard to the break-even point. The Committee of the Regions evaluates it at one and a half million passengers per year, while the University of Cranfield study mentioned above, which cites two different figures ((500 000 and one million passengers per year), shows that there are variations according to the country and the way in which the airports are organised ⁽¹⁾.
- (73) While certain regional airports can perform well when sufficient numbers of passengers are brought in by airlines carrying out public service obligations ⁽²⁾, or when social aid schemes are established by the public authorities, airlines prefer tried and tested hubs in good locations which provide rapid connections, have an established passenger base, and where they have slots

⁽¹⁾ Report 'Study on Competition between airports and the application of State Aid Rules', Cranfield University, September 2002, points 5.33 and 6.11.

⁽²⁾ Ibid. points 5 27: 'To some extent, subsidisation of air services within the PSO framework can be interpreted, as an indirect subsidy to an airport. In relation to some remote airports in Scotland and Ireland, they are almost exclusively reliant on subsidised PSO air services.'

which they do not wish to lose. Furthermore, in many cases, airport and air traffic policies and investment have for years concentrated traffic at major national cities.

- (74) As a result, airlines are not always prepared, without appropriate incentives, to run the risk of opening routes from unknown and untested airports. This is why the Commission can accept that public aid be paid temporarily to airlines under certain conditions, if this provides them with the necessary incentive to create new routes or new schedules from regional airports and to attract the passenger numbers which will enable them to break even within a limited period. The Commission will ensure that such aid does give any advantage to large airports already largely open to international traffic and competition.
- (75) However, in the light of the general objective of intermodality and optimising the use of infrastructure described above, it will not be acceptable to grant start-up aid for a new air route corresponding to a high-speed train link.
- (76) Finally, in accordance with the Commission's constant practice in this area, some special arrangements will be accepted for the outermost regions which are penalised by their poor accessibility.

The Commission has laid down guidelines for the harmonious development of such regions ⁽³⁾. Their development strategy is based on three main principles: helping to make them more accessible, increasing their competitiveness and bolstering their regional integration in order to reduce the impact of their remoteness from the European economy, as they are closer to the geographical markets of the Caribbean, America and Africa.

For these reasons the Commission accepts that start-up aid for routes from the outermost regions is subject to more flexible compatibility criteria, in particular in terms of intensity and duration, and will not raise any objection to such aid for services to neighbouring non-member countries. Similar provisions in terms of intensity and duration will also be accepted for the regions referred to in Article 87(3) and for sparsely populated regions.

⁽³⁾ Commission communications of 26 May 2004 (COM(2004) 343 final) and 6 August 2004 (SEC(2004) 1030) on a stronger partnership for the outermost regions.

5.2. Compatibility criteria

(77) Financial start-up incentives, except in cases where the public authorities act as would a private investor working in a market economy (see section 3.2.4), advantage beneficiary undertakings and can therefore directly create distortions between companies as they reduce the beneficiary's operating costs.

(78) They can also indirectly affect competition between airports by helping airports to develop or by encouraging a company to 'relocate' from one airport to another and transfer a route from a Community airport to a regional one. For these reasons they usually constitute State aid and must be notified to the Commission.

(79) In view of the above objectives and the significant difficulties which can result from launching a new route, the Commission may approve such aid if it fulfils the following conditions:

- (a) Recipients: the aid is paid to air carriers with a valid operating licence issued by a Member State pursuant to Council Regulation (EEC) No 2407/92 on licensing of air carriers.
- (b) Regional airports: the aid is paid for routes linking a regional airport in category C or D to another EU airport. Aid for routes between national airports (category B) can be considered only in duly substantiated exceptional cases, in particular where one of the airports is located in a disadvantaged region. These conditions may not apply to routes departing from airports located in outermost regions and bound for neighbouring third countries, subject to a case-by-case assessment.
- (c) New routes: aid will apply only to the opening of new routes or new schedules, as defined below, which will lead to an increase in the net volume of passengers ⁽¹⁾.

This aid must not encourage traffic simply to be transferred from one airline or company to another. In particular, it must not lead to a relocation of traffic which is unjustified with regard to the frequency and viability of existing services leaving from another airport in the same city, the same conurbation ⁽²⁾ or the same airport system ⁽³⁾, which serve the same or a similar destination under the same criteria.

Also, start-up aid must not be paid when the new air route is already being operated by a high-speed rail service under the same criteria.

The Commission will not accept cases of abuse in which a company seeks to circumvent the temporary nature of start-up aid by replacing a line receiving aid with a supposedly new line offering a similar service. In particular, aid will not be able to be granted to an airline which, having used up all the aid for a given route, applies for aid for a competing route departing from another airport in the same city or conurbation or the same airport system and serving the same or a similar destination. However, the mere substitution, during the aid period, of one route for another leaving from the same airport and expected to generate at least an equivalent number of passengers, will not call into question the continuation of payment of aid for the complete period, as long as this substitution does not affect the other criteria under which the aid was initially granted.

- (d) Long-term viability and degressiveness: the route receiving the aid must ultimately prove profitable, i. e. it must at least cover its costs, without public funding. For this reason start-up aid must be depressive and of limited duration.
- (e) Compensation for additional start-up costs: the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running. Examples of such costs are the marketing and advertising costs incurred at the outset for publicising the new link; they may include the installation costs incurred by the airline at the regional airport in question in order to launch the route, provided the airport falls within category C or D and aid has not already been received in respect of the same costs. Conversely, aid cannot be granted in relation to standard operating costs such as hire or depreciation of aircraft, fuel, crew salaries, airport

⁽¹⁾ This concerns in particular a seasonal route being made permanent or a non daily frequency becoming at least daily.

⁽²⁾ Council Regulation (EEC) No 2408/92.

⁽³⁾ As defined under Article 2(m) of Regulation (EEC) No 2408/92.

charges or catering costs. The remaining eligible costs must correspond to real costs obtained in normal market conditions.

- (f) Intensity and duration: degressive aid may be granted for a maximum period of three years. The amount of aid in any one year may not exceed 50 % of total eligible costs for that year and total aid may not exceed an average of 30 % of eligible costs.

For routes from disadvantaged regions, i.e. the outermost regions, the regions referred to in Article 87(3)(a), and sparsely populated regions, degressive aid may be granted for a maximum period of five years. The amount of aid in any one year may not exceed 50 % of total eligible costs for that year and total aid may not exceed an average of 40 % of eligible costs. If the aid is granted for five years, it may be maintained at 50 % of total eligible costs for the initial three years.

In any event, the period during which start-up aid is granted to an airline must be substantially less than the period during which the airline undertakes to operate from the airport in question, as indicated in the business plan required in paragraph 79(i). Furthermore, the aid should be stopped once the objectives in terms of passengers have been reached or when the line breaks even, even if this is achieved before the end of the period initially foreseen.

- (g) Link with the development of the route: aid payments must be linked to the net development of the number of passengers transported. The amount per passenger must, for example, decrease with the net increase in traffic for the aid to remain an incentive and to avoid adjusting ceilings.
- (h) Non-discriminatory allocation: any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services. The notification must in particular include the description of the route as well as the objective criteria in terms of the amount and the duration of the aid. The rules and principles relating to public procurement and concessions must be respected where applicable.

- (i) Impact on other routes and business plan: when submitting its application, any airline which proposes a service to a public body offering to grant start-up aid must provide a business plan showing, over a substantial period, the viability of the route after the aid has expired. The public body should also carry out an analysis of the impact of the new route on competing routes prior to granting start-up aid.
- (j) Publicity: States must ensure that the list of routes receiving aid is published annually for each airport, in each instance indicating the source of public funding, the recipient company, the amount of aid paid and the number of passengers concerned.
- (k) Appeals: in addition to the appeal procedures provided for by the 'Public Procurement' Directives 89/665/EEC and 92/13/EEC ⁽¹⁾, where applicable, appeal procedures must be provided for at Member State level to ensure that there is no discrimination in the granting of aid.
- (l) Penalties: penalty mechanisms must be implemented in the event that a carrier fails to keep to the undertakings that it gave in relation to an airport when the aid was paid. A system for recovering aid or for seizing a guarantee initially deposited by the carrier will allow the airport to ensure that the airline honours its commitments.
- (80) Cumulation: start-up aid cannot be combined with other types of aid granted for the operation of a route, such as aid of a social nature granted to certain categories of passengers and compensation for discharging public services. In addition, such aid cannot be granted when access to a route has been reserved for a single carrier under Article 4 of Regulation (EEC) No 2408/92, and in particular paragraph 1(d) of that Article. Also, in accordance with the rules of proportionality, such aid cannot be combined with other aid granted to cover the same costs, including aid paid in another State.
- (81) Start-up aid must be notified to the Commission. The Commission calls on the Member States to notify start-up aid schemes rather than individual cases since this results in greater coherence across the Community. The Commission may carry out a case-by-case assessment of

⁽¹⁾ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33). Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

aid or a scheme which fails to fully comply with these criteria, but the end result of which would be comparable.

6. RECIPIENTS OF PREVIOUS UNLAWFUL AID

(82) When unlawful aid, on which the Commission has adopted a negative decision involving a recovery order, has been granted to a company and the aid has not been recovered in accordance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, the assessment of all airport infrastructure aid or start-up aid should take account of both the cumulative effect of the earlier and the new aid and the fact that the earlier aid has not been repaid ⁽²⁾.

7. APPROPRIATE MEASURES WITHIN THE MEANING OF ARTICLE 88(1)

(83) In accordance with Article 88(1) of the Treaty, the Commission proposes that Member States amend their existing schemes relating to State aid covered by these guidelines to conform to these guidelines by 1 June 2007 at the latest. Member States are asked to confirm in writing that they accept these proposals by 1 June 2006 at the latest.

(84) Should a Member State fail to confirm its acceptance in writing before that date, the Commission will apply Article 19(2) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings provided for in that Article.

8. DATE OF APPLICATION

(85) The Commission will apply these guidelines from the date of their publication in the *Official Journal of the European Union*. Notifications registered by the Commission prior to that date will be examined in the light of the rules in force at the time of notification.

The Commission will assess the compatibility of all aid to finance airport infrastructure, or start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty, on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*. In other cases, the Commission will carry out an assessment based on the rules applicable when the aid started to be paid.

(86) The Commission informs the Member States and interested parties that it intends to undertake a detailed assessment of the application of these guidelines four years after the date of their implementation. The results of that study may lead the Commission to revise these guidelines.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation amended by the 2003 Act of Accession.

⁽²⁾ Case C 355/95 P *Textilwerke Deggendorf v Commission* [1997] ECR I 2549.

**APPLICATION OF ARTICLES 92 AND 93 OF THE EC TREATY AND ARTICLE 61 OF
THE EEA AGREEMENT TO STATE AIDS IN THE AVIATION SECTOR**

(94/C 350/07)

(Text within EEA relevance)

I. INTRODUCTION

I.1. Liberalization of the Community's air transport

1. Community air transport has been characterized by a high level of State intervention and bilateralism. Although a certain measure of competition between air carriers was not excluded, the potentially distorting effects of State aids were, in the past, outweighed by the economically more important rules on control of fares, market access and in particular capacity sharing which were enshrined in restrictive bilateral agreements between Member States.

The Council has, however, now completed its liberalization programme for Community air transport⁽¹⁾. Therefore, in a situation of increased competition within the Community there is a clear need for a stricter application of State aid rules.

2. The measures on market liberalization and competition, which are now in force, have fundamentally changed the economic environment of air transport. They are stimulating competition and have, to some degree, reduced the discretionary powers of national authorities as well as extended the possibilities for air carriers to decide, on the basis of their own economic and financial considerations, fares, new routes and capacities to be put on the market.

All these factors combined with increasingly aggressive competition on extra-Community markets have led several air carriers to undertake major structural changes which, in some instances, have involved State intervention.

In some cases, these changes have resulted in concentrations and strategic agreements with other airlines. In this respect it should be recalled that Articles 85 and 86 of the Treaty and Articles 53 and 54 of the EEA Agreement are fully enforceable in the aviation sector by virtue of Council Regulations (EEC) No 3975/87 and (EEC) No 3976/87 of 14 December 1987. Moreover, since 1990 the Commission has had at its disposal Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings to scrutinize such operations.

In the more competitive environment State aids might be of substantially increased strategic importance for governments looking for measures to protect the economic interest of their 'own' airlines. This could lead to a subsidy race which would jeopardize both the common interest and the basic objectives of the liberalization process.

I.2. The 1992 State aids report

3. In order to have an accurate view of the situation, the Commission undertook an inquiry in 1991 to 1992 which resulted in an inventory of existing State aids⁽²⁾ in the air transport sector. This report was published in March 1992.

The report revealed that several airlines were benefiting from State intervention, often direct operating aids or aids aimed at improving the airline's financial structure. Several potential State aids in the form of exclusive rights concessions were also revealed.

⁽¹⁾ The so-called 'first package', adopted in December 1987, introduced new rules on air fares, capacity sharing and market access for intra-Community scheduled services between main airports. The 'second package', adopted in July 1990, allowed access to third and fourth freedom services between virtually all Community airports and significantly extended fifth freedom rights. It also contained important provisions on capacity sharing. Air cargo services were liberalized by regulation in February 1991. In July 1992 the Council adopted the third, and final, package of liberalization measures which allows free exercise of the freedoms of the air within the Community as of 1 January 1993; remaining restrictions on domestic air transport will be eliminated as of 1 April 1997. The package also abolishes passenger capacity sharing and allows the airlines freedom to set fares. In addition, the competition rules have been implemented in the air transport sector to keep pace with these developments and the relevant regulations (Regulations (EEC) No 3975/87 and (EEC) No 3976/87) have been amended in order to include competition within a Member State.

⁽²⁾ See, Commission of the European Communities, 'Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers', Doc. SEC(92) 431 final, 19 March 1992.

It is the Commission's opinion that transparency requirements are not being satisfactorily implemented. In the course of the enquiry the Commission criticized in several cases the gaps in the information communicated. This situation has necessitated the Commission to request additional information in some cases to arrive at definite conclusions.

I.3. The 1994 Report of the Comité des Sages

4. In summer 1993, the Commission set up a committee of experts in the air transport sector ('Comité des Sages') for the purpose of analysing the situation of Community civil aviation and making recommendations for future policy initiatives. The final report was published on 1 February 1994. On State aids the recommendations of the Comité des Sages are as follows:

'Recommendations:

- In the interest of consumers and of the industry itself, financial injections to air carriers (or to airport handling services) in whatever form, should as a rule, be disapproved if they are incompatible with normal commercial practices.
- The European Commission is urged to strictly enforce Treaty provisions concerning State aids and to elaborate clear guidelines for evaluating any exceptional application of State aid.
- For a brief period, however, approval of State aids may be considered when this aid serves the Community's interest in a restructuring that leads to competitiveness in this context, support for the transition of an air carrier (or airport handling services) to commercial viability may be in the Community's interest if the position of competitors is safeguarded.

The conditions of such approvals should include, though not necessarily be limited to the following:

- (a) a clear and genuine "one time, last time" condition;
- (b) the submission of a restructuring plan leading to economic and commercial viability within a specified time frame, proven by access to

commercial capital markets. The plan must attract significant interest from the private sector and ultimately lead to privatization;

- (c) the validity of such a plan and its chances of success being assessed by independent professionals hired by the European Commission to take part in the Commission's assessment procedure. Results of this assessment should be made public in conjunction with any eventual Commission decision;
 - (d) the undertaking on the part of the government concerned to refrain from interfering financially or otherwise, in commercial decision making by the carriers concerned;
 - (e) the prohibition of the airline using public money to buy or to extend its own capacities beyond overall market development. Instead, reduction of capacity should be envisaged;
 - (f) acceptable proof that the competitive interests of other airlines are not negatively affected;
 - (g) careful monitoring, assisted by independent professional experts, of the implementation of such a restructuring plan.'
5. In general the Commission welcomes the Comité's assessment which in fact confirms in many issues its current policy. On some other issues the Commission is ready to follow the Comité's recommendations as described in the present guidelines. The Commission, for example, may decide in difficult cases whether it is necessary to seek expert advice and has published a call for tender to draw up a list of suitable aviation experts. The Commission has referred as much as possible to the Comité's recommendations in the individual chapters of these guidelines.

The Commission in executing its responsibilities pursuant to Article 92 and 93 of the Treaty already applies some of the principles recommended by the Comité des Sages. The Commission has for example always examined the impact of the aid on competition within the Community and has also followed the idea that State aids might only be acceptable if they are linked to a comprehensive restructuring programme. The Commission has in recent cases imposed conditions aimed at restraining

the Government's interference in the management of the airline⁽³⁾, and has forbidden the use of the State aid for buying shareholdings in other Community carriers⁽⁴⁾. Some ideas of the Comité, however, cannot be accepted by the Commission. It is not possible for the Commission to change or disregard the EC Treaty. This means, in particular, that the conditions that the aid is the last one has, of course, to be interpreted in conformity with Community law. This implies that such a condition does not prevent a Member State from notifying a further aid to a company which has already been granted aid. According to the Court of Justice case law, in such a case the Commission will take all the relevant elements into account⁽⁵⁾. An important element in the Commission's judgement will be the fact that the company has already been granted State aid (see Chapter V). Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company. Moreover, given the fact that Article 222 of the Treaty is neutral with regard to property ownership, the Commission cannot impose the privatization of the airline as a condition of the State aid. However, the participation of private risk sharing capital will be taken into account in the Commission's analysis.

I.4. Objectives of the present guidelines

6. In 1984, the Commission, when outlining its liberalization programme for the air transport sector in the Civil Aviation Memorandum No 2, established a set of guidelines and criteria for the evaluation of State aids in favour of air carriers on the basis of Article 92 and 93 of the EC Treaty (Annex IV of Memorandum No 2)⁽⁶⁾.

The assessment of the State aids described in the 1992 report (see Chapter I.2) was based on the State aid rules of the Treaty and on the evaluation criteria of Annex IV of Memorandum No 2. One of the purposes of the report was to provide the Commission with updated data that can be used for establishing revised guidelines adapted to the new situation of the European air transport sector.

⁽³⁾ Commission decision of 24 July 1991, Case C-21/91, ex N 204/91, Sabena (1991), OJ No L 300, 31. 10. 1991, p. 48.

Commission decision of 21 December 1993 — Case C-34/93, ex NN 557/93, Aer Lingus, OJ No L 54, 25. 2. 1994, p. 30.

⁽⁴⁾ Commission decision of 22 July 1992 Case N 294/92, Iberia. Commission decision, Case C-34/93, ex NN 557/93, Aer Lingus. Commission decision, Case C-21/91, ex N 204/91, Sabena (1991).

⁽⁵⁾ See Court of Justice, Case C-261/89, Italy v. Commission (Comsal), (1991) ECR, p. 4437, grounds 20 to 21.

⁽⁶⁾ Commission of the European Communities, 'Memorandum No 2 on civil aviation: progress towards the development of a Community air transport policy', Doc. COM(84) 72 final, 15 March 1994.

7. The present new guidelines, which replace the guidelines set out in Memorandum No 2, respond to two main concerns:

- to reflect the completion of the internal market for air transport,
- to increase transparency, at different levels, of the evaluation process, in relation to, first, the data to be provided in the notification by the Member States and, second, to the criteria and procedures applied by the Commission.

8. In order to increase the competitiveness of European airlines, which remains the final goal of the Community⁽⁷⁾, the Commission stresses that more commercial management is the only way to achieve better financial performance, taking fully into account in this context the employment dimension. State aids should be the exception rather than the rule as they are in principle excluded by Article 92 (1). The Commission is well aware that the Community air carriers are, for structural and other reasons, for the time being, in a difficult situation, and will take these factors into account. However, the present crisis requires serious efforts from carriers who need to adapt to a changing market. The Commission cannot know with certainty what the futures 'aviation landscape' will look like, nor does it have the intention to determine what should essentially be left to the market. The Commission wishes to establish a level playing field on which the Community air carriers can effectively compete. With these objectives in mind, the present guidelines should help to clarify the Commission's position on State aids to air carriers.

II. SCOPE OF THESE GUIDELINES

II.1. State aid for air carriers

9. On 1 January 1994 the Agreement on the European Economic Area (hereinafter the Agreement), concluded by EC and EFTA States, entered into force. The Agreement contains provisions on State aids (Articles 61) which essentially reproduce Article 92 of the Treaty. According to Article 62 of the Agreement the task of applying the State aid rules in the participating EFTA countries is attributed to the EFTA Surveillance Authority (ESA), while the Commission is competent to apply State aid rules in the EC Member States. In this communication the Commission will refer to the European Economic

⁽⁷⁾ Commission communication of 1 June 1994. The way forward for civil aviation in Europe, COM(94) 218 final. Commission decision of 27 July 1994, Case C-23/94, Air France, OJ No L 254, 30. 9. 1994.

Area as to the EEA and to airlines established in the EC and EFTA States as to the European airlines or European competitors.

10. These guidelines cover aid granted by EC Member States in favour of air carriers.

These may include any activities accessory to air transport, direct or indirect subsidization of which could benefit airlines such as flight schools^(*), duty free shops, airport facilities, franchises, airport charges, within the limits which will be defined in the following chapters.

However, this communication does not intend to deal with subsidization of aircraft production^(*). On the other hand, aids granted to airlines in order to promote acquisition or operation of certain aircraft are included in the scope of these guidelines.

Whether and on what conditions exclusive rights should be treated pursuant to Article 92 of the Treaty and 61 of the Agreement is discussed in some detail in Chapter VII.

II.2. Relations with third countries

11. The present communication applies to State aids granted by the Member States in the aviation sector. The Commission is aware that State aids granted by third countries to non-Community airlines may affect the Community carriers' competitive position on the routes upon which they compete. However, the fact that non-Community carriers may benefit from State aids cannot be brought forward as a reason for not applying the binding provisions of the Treaty on State aids. These provisions apply irrespective of whether third countries grant aid or not.

Moreover, the conditions for market access and limitation of competition as laid down in most bilateral agreements with third countries appear to be economically far more important than possible State aids.

Therefore, it is not the intention of the Commission to deal with State aids to third country airlines in this communication. If very low tariffs are made possible through State aid by third countries, such cases of tariff dumping must be addressed in the

(*) Commission decision opening the Article 92 (2) procedure with regard to the acquisition by KLM of a pilot school, Case C-31/93, OJ No C 293, 29. 10. 1993.

(*) In this context, it should be mentioned that in the recent past, aircraft manufacturers have taken over from reluctant banks, the financing of a considerable part of aircraft investments. This source of financing has been of great value in particular for some new entrants who had particular problems to obtain access to financing through the banking system. In case aircraft manufacturers had received State aid, one might conclude that this aid has indirectly been of benefit to the aviation industry. The possible effects of State aid to the manufacturing sector on other sectors is, however, outside the scope of these guidelines and will be taken into account while examining these specific aids.

context of the Community's external policy towards third countries in the aviation sector.

II.3. State infrastructure investments

12. The construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids⁽¹⁰⁾. Infrastructure development decisions fall outside the scope of application of this communication in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.

This general principle is only valid for the construction of infrastructures by Member States, and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure. The Commission, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines.

II.4. Fiscal privileges and social aids

13. Article 92 of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims, but defines them in relation to their effects. Consequently, the alleged fiscal or social aim of a particular measure cannot shield it from the application of Article 92⁽¹¹⁾ of the Treaty and Article 61 of the Agreement.

In principle, the reduction or the deferral of fiscal or social contributions does not constitute State aid within the meaning of Article 92 (1) of the Treaty and Article 61 (1) of the Agreement but a general measure, unless it confers a competitive advantage to specific undertakings to avoid having to bear costs which would normally have had to be met out of the undertakings' own financial resources, and thereby prevent market forces from having their normal effect⁽¹²⁾.

The Commission has a positive approach towards social aid, for it brings economic benefits above and beyond the interest of the firm concerned, facilitating structural changes and reducing hardship and often only evens out differences in the obligations placed on companies by national legislations.

(10) Reply of the Commission to written question No 28 of Mr Dehousse of 10 April 1967, OJ No 118, 20. 6. 1967, p. 2311/67.

(11) Court of Justice, Case 173/73, Italy v. Commission, [1974] ECR, p. 709, ground 27 and 28 at 718 to 719.

(12) Court of Justice, Case 301/87, France v. Commission, [1990] ECR, p. 307 (Boussac case), ground 41 at 362.

III. OPERATIONAL SUBSIDIZATION OF AIR ROUTES

III.1. Operating aids

14. The report on State aids in the aviation sector prepared by the Commission in 1991 to 1992 ⁽¹³⁾, revealed several direct aids aimed at supporting air services, mostly domestic, by covering their operating losses.

The introduction of consecutive cabotage from 1 January 1993 and the authorization of unrestricted cabotage from 1 April 1997 ⁽¹⁴⁾ has led the Council to clarify its position on subsidization of domestic routes. Such subsidization could be detrimental to the implementation of cabotage traffic rights as defined above. Direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption. However, the Commission must also take into account the concern of Member States to promote regional links with disadvantaged areas.

With regard to regional aids, the main concern of the Commission is to preclude that the compensation received could allow the beneficiary companies to cross-subsidize between the subsidized regional routes and the other routes in which they are in competition with EEA air carriers. That is why the Commission considers that direct operational subsidization of air routes can, in principle, only be accepted in the following two cases.

III.2. Public service obligations

15. In the context of air transportation, 'public service obligation' is defined in Council Regulation (EEC) No 2408/92 on access for air carriers to intra-Community air routes ⁽¹⁵⁾ as 'any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air

carrier would not assume if it were solely considering its economic interest'.

Council Regulation (EEC) No 2408/92 provides that such public service obligations may be imposed on scheduled air services to an airport serving peripheral or development regions in its territory or on a thin route to any regional airport in its territory provided that any such route is considered vital for the economic development of the region in which the airport is located. The Regulation also describes the procedure to be followed when a Member State decides to impose a public service obligation.

16. If no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the public service obligations which have been imposed on that route, the Member State may limit access to that route to only one carrier for a period of up to three years after which the situation must be reviewed ⁽¹⁶⁾. The right to operate shall be offered to any Community air carrier entitled to operate such air services by the public tender procedure described in Article 4 of Regulation (EEC) No 2408/92 ⁽¹⁷⁾. When the capacity offered exceeds 30 000 seats per year it has to be noted that access to a route may be restricted to one carrier only if other forms of transport are unable to ensure an adequate and uninterrupted service (Article 4 (2)). The objective of this provision is to guarantee that adequate transport links to certain regions can be maintained particularly if the traffic volume is small and other transport modes cannot provide that service.

A Member State may thus reimburse the air carrier selected for carrying out the imposed public service obligation, according to Article 4 (1) (h) of the Regulation. Such reimbursement shall take into account the costs and revenue (that is the deficit) generated by the service. The development and the implementation of these schemes must be transparent. In this respect the Commission would expect the selected company to have an analytical

⁽¹³⁾ See Doc. SEC(92) 431 final.

⁽¹⁴⁾ Article 3 of Council Regulation (EEC) No 2408/92 of 23 June 1992 on access for Community air carriers to intra-Community air routes, OJ No L 240, 24. 8. 1992, p. 8.

⁽¹⁵⁾ Article 2 (o) of Regulation (EEC) No 2408/92.

⁽¹⁶⁾ Article 4 (1) (d) of Regulation (EEC) No 2408/92.

⁽¹⁷⁾ Community rules on public procurement contracts do not apply to the awarding by law or contract of exclusive concessions, which are exclusively ruled by the procedure provided for pursuant to Article 4 (1) of Regulation (EEC) No 2408/92.

accounting system sophisticated enough to apportion the relevant costs (including fixed costs) and revenues.

17. Article 77 of the Treaty and Article 49 of the Agreement, which provide that aids shall be compatible with the Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service, do not apply to air transport. Article 84 of the Treaty expressly excludes the application of these provisions to air transport and Article 47 of the Agreement provides that Article 49 applies to transport by rail, road and inland waterway. Therefore, the reimbursement of airlines' losses for fulfilling public service obligation requirements must be assessed on the basis of the general rules of the Treaty which apply to air transport⁽¹⁸⁾. The acceptability of the reimbursement shall be considered in the light of the State aid principles as interpreted in the Court of Justice's case law.

18. In this context it is important that the airline which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender.

This bidding procedure enables the Member State to value the offer for that route, and make its choice by taking into consideration both the users' interest and cost of the compensation. In Regulation (EEC) No 2408/92 the Council has set out uniform and non-discriminatory rules for the distribution of air traffic rights on routes upon which public service obligations have been imposed. Furthermore, the criteria for calculation of the compensation have been clearly established. A reimbursement which is calculated pursuant to Article 4 (1) (h) of the Regulation, on the basis of the operating deficit incurred on a route, cannot involve any overcompensation of the air carrier. The new system set up by the third package, if correctly applied, excludes that reimbursement for public service obligations include aid elements. A compensation of the mere deficit incurred on a specific route (including a reasonable remuneration for capital employed) by an airline which has been fairly selected following an open bidding procedure, is a neutral commercial operation between the relevant State and the selected airline which cannot be considered as aid. The essence

of an aid lies in the benefit for the recipient⁽¹⁹⁾; a reimbursement limited solely to losses sustained because of the operation of a specific route does not bring about any special benefit for the company, which has been selected on the basis of the objective criteria provided for pursuant to Article 4 (1) of the Regulation.

Therefore, the Commission considers that compensation for public service obligations does not involve aid provided that: the carrier has been correctly selected through a call for tender, on the basis of the limitation of access to the route to one single carrier, and the maximum level of compensation does not exceed the amount of deficit as laid down in the bid, in conformity with the relevant provisions of Community law and, in particular, with those of the third package.

19. Moreover, Article 4 (1) (i) of Regulation (EEC) No 2408/92 obliges the Member States to take the measures necessary to ensure that any decision pursuant to this Article can be reviewed effectively and speedily for an infringement of Community law or national implementing rules. It follows from this provision, as well as from the general distribution of tasks between the Community and its Member States, that it is in the first instance for the authorities of the Member States and, in particular, the national courts to ensure the proper application of Article 4 of the Regulation in individual cases. This is particularly true for a Member State which chooses, in the framework of a public tender, the carrier to serve the route which is subject to the public service obligation. It must also be stressed that the Commission may carry out an investigation and take a decision in case the development of a route is being unduly restricted (Article 4 (3) of the Regulation).

However, this last power as well as the rights and obligations of the national authority pursuant to the abovementioned Article 4 (1) (i) are without prejudice to the Commission's exclusive powers under the State aid rules of the Treaty itself (see also paragraph 15), which cannot be changed by provisions established in the Community's secondary legislation. In case there is clear evidence that the Member State has not selected the best offer, the Commission may request information from the Member State in order to be able to verify whether the award includes State aid elements. In fact, such elements are likely to occur where the Member State

⁽¹⁸⁾ See Court of Justice, Case 156/77, *Commission v. Belgium*, [1978] ECR, p. 1881.

⁽¹⁹⁾ See Case 173/73, *Italian Government v. Commission*, [1974] ECR, p. 709.

engages itself to pay more financial compensation to the selected carriers than it would have paid to the carrier which submitted the best (not necessarily cheapest) offer.

20. Article 4 (1) (f) of Regulation (EEC) No 2408/92 refers to the compensation required as just one of the criteria to be taken into consideration for the selection of submissions. The Commission considers however, that the level of compensation is the main selection criterion. Indeed, other criteria such as adequacy, prices and standards required are generally already included in the public service obligations themselves. Consequently, it is only in exceptional cases, duly justified, that the selected carrier could be other than the one which requires the lowest financial compensation.
21. It must be stressed that should the Commission receive complaints on alleged lack of fairness of the awarding procedure it would promptly request information from the Member State concerned. If the Commission concludes that the Member State concerned has not selected the best offer it will most likely consider that the chosen carrier has received aid pursuant to Article 92 of the Treaty and Article 61 of the Agreement. Should the Member State not have notified the aid pursuant to Article 93 (3) of the Treaty, the Commission would consider the aid, in the case that compensation has already been paid, as illegally granted and would open the procedure pursuant to Article 93 (2) of the Treaty. The Commission may issue an interim order suspending the payment of the aid until the outcome of the procedure⁽²⁰⁾. Within the context of the procedure the Commission may hire or may request the Member State concerned to hire an independent consultant to evaluate the different tenders.
22. Article 5 of Regulation (EEC) No 2408/92 allows for exclusive concessions on domestic routes granted by law or contract, to remain in force, under certain conditions, until their expiry or for three years, whichever deadline comes first. Possible reimbursement given to the carriers benefitting from these exclusive concessions may well involve aid elements, particularly as the carriers have not been selected by an open tender (as foreseen in the case of Article 4 (1) of Regulation (EEC) No 2408/92). The Commission stresses that such reimbursements must be notified in order to allow the Commission to examine whether they include State aid elements.
23. Compensation of losses incurred by a carrier which has not been selected according to Article 4 of

Regulation (EEC) No 2408/92 will continue to be assessed under the general State aid rules. The same rule applies to compensations which are not calculated on the basis of the criteria of Article 4 (1) (h) of the Regulation.

This means that reimbursements for public services to the Greek islands and the Atlantic islands (Azores)⁽²¹⁾ which, for the time being, are excluded from the scope of Regulation (EEC) No 2408/92, are nevertheless subject to Articles 92 and 93 of the Treaty and Article 61 of the Agreement. In its assessment of these compensations, the Commission will verify whether or not the aid diverts significant volumes of traffic or allows carriers to cross-subsidize routes — whether intra-Community, regional or domestic routes — on which they compete with other Community air carriers. This will not be considered to be the case if the reimbursement is based on the costs and the revenues (i.e. the deficit) generated by the service. Again, the Commission underline that such compensation must be notified.

III.3. Aid of a social character

24. Article 92 (2) (a) of the Treaty and 61 (2) (a) of the Agreement exempt aid of a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned. This provision which up to now has only rarely been used, may be of certain relevance in the case of direct operational subsidization of air routes provided the aid is effectively for the benefit of final consumers.

The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.

The aid has to be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operating the services. This also implies the absence of any barrier to entry on the route concerned for all Community air carriers.

⁽²⁰⁾ See Cases C-301/87 France v. Commission, [1990] ECR I, p. 307; Case C-142/87 Belgium v. Commission [1990] ECR I, p. 959.

⁽²¹⁾ See Commission decision of 6 July 1994, Case C-7/93. Reimbursement of the deficit sustained by TAP on the routes to the Atlantic islands, OJ No C 178, 30. 6. 1993.

IV. DISTINCTION BETWEEN THE STATE'S ROLE AS OWNER OF AN ENTERPRISE AND AS PROVIDER OF STATE AID TO THAT ENTERPRISE

25. The Treaty establishes both the principle of neutrality with regard to the system of property ownership⁽²²⁾ and the principle of equality⁽²³⁾ between public and private undertakings.

There are two stages in the Commission's assessment. To determine whether aid is involved, the Commission, according to the market economy investor principle (see Chapter IV.1), evaluates in the first stage the circumstances of the financial transaction, as the same measure may constitute an aid or a normal commercial transaction. In case the Commission considers that the measure involves aid elements, the Commission will, in a second stage determine whether the aid is compatible with the common market under the derogations of Article 92 (3) of the Treaty and Article 61 (3) of the Agreement (see Chapter V).

The Commission shall come to a reasoned conclusion on the State aid character of the financial transaction. The Commission shall check the validity and coherence of the financial transaction and verify whether it is commercially reasonable.

26. It is not the Commission's task to prove that the programme financed by the State will be profitable beyond all reasonable doubt before accepting it as a normal commercial transaction. The Commission cannot replace the judgement of the investor, but must establish with reasonable certainty that the programme financed by the State would be acceptable to the market economy investor. If there are characteristics of the operation indicating that an owner would not risk his own capital in similar circumstances, such operations shall be considered as State aid.

In deciding whether any public funds to public undertakings constitute aid, the Commission will

take into account the factors discussed below for each type of intervention covered by this communication. These factors are given as a guide to Member States on the Commission's attitude in individual cases. In conformity with the principle of neutrality, as a general rule the aid will be assessed as the difference between the terms on which the funds were made available by the State to the airline, and the terms which a private investor operating under normal market conditions would find acceptable in providing funds to a comparable private undertaking⁽²⁴⁾.

If the aid is used to write off part losses any tax credits attaching to the losses must be added to the amount of the aid. If those tax credits were retained to offset against future profits or sold or transferred to third parties the firm would be receiving the aid twice.

IV.1. Capital injections

27. Capital injections do not involve State aid when the public holding in a company is to be increased, provided the capital injected is proportionated to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance⁽²⁵⁾.
28. The market economy investor principle will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.

The Commission will accordingly analyse the past, present and future commercial and financial situation of the company.

In its assessment, the Commission will normally not limit itself to the short term profitability of the company. The behaviour of a private investor, with which the intervention of the public investor

⁽²²⁾ Article 222 of the Treaty: 'This Treaty shall in no way prejudice the rules in Member States governing the systems of property ownership'.

⁽²³⁾ See Court of Justice, 21 March 1991, Case 305/89, Italy v. Commission (Alfa Romeo case), [1991] ECR, p. 1603, ground 24 at 1641; Court of Justice, 21 March 1991, Case 303/88, Italy v. Commission (ENI-Lanerossi case), [1991] ECR, p. 1433, ground 20 at 1476; 'Commission communication to the Member States concerning public authorities holdings in company capital', 17 September 1984, Bulletin EC, 9-1984, point 1.

⁽²⁴⁾ See Commission communication to the Member States on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ No C 307, 13. 11. 1993, p. 7, point 11.

⁽²⁵⁾ 'Commission communication to the Member States' of 17 September 1984, see point 3.2.

has to be compared, is not necessarily that of an investor who is placing his capital with a view to more or less short-term profitability. The correct analogy is a private company pursuing a structural policy and guided by profitability perspectives in the longer term according to its sector of operations ⁽²⁶⁾.

A holding company may inject new capital to ensure the survival of a subsidiary temporary difficulties, but which, after a restructuring, if necessary, will become profitable again in the longer term. Such decisions can be motivated not only by the possibility of securing a profit, but also by other concerns such as maintaining the standing of a whole group or redirecting its activities ⁽²⁷⁾.

In any case the State, in common with any other market economy investor, should expect within a reasonable time a normal rate of return on capital investments. If the normal return is neither forthcoming in the short term nor likely to be forthcoming in the long term, then it can be assumed that the company is being aided and the State is forgoing the benefit which a market economy investor would expect from a similar investment.

A market economy investor would normally provide equity finance if the present value ⁽²⁸⁾ of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay.

29. To assess whether such a normal return on investment may be expected within a reasonable time, the Commission will need to examine the financial projections of the airline concerned. In examining if the financial projections are realistic, the Commission may assess the airline's situation in the following areas:

(a) Financial performance. Different indicators may be taken into account, for example:

— gearing ratios (debt/equity) and cashflow are important indicators for the standing of an individual company, as they permit an assessment of the company's ability to finance investments and ongoing operations, from its own resources ⁽²⁹⁾,

— operating and net results may be analysed over a period of several years. Profitability ratios may be determined and the trends originated therein may be assessed,

— future capital values and future dividend payments.

(b) Economic and technical efficiency. The indicators which may be considered are, for example:

— operating costs and labour productivity,

— fleet age could be an important element of the assessment. An airline whose fleet age is higher than the European average will certainly be handicapped due to the substantial investment required for fleet renewal. Furthermore, this situation is usually associated with a lack of investment or with previous inopportune investment and would be considered as a negative factor under the market economy investor principle.

(c) Commercial strategy for different markets

The trends of the different markets on which the company competes (the past, present and future situation), the market share held by the company over a sufficient period and the company's market potential may be evaluated and the projections carefully assessed.

⁽²⁶⁾ Court of Justice Case 305/89, Alfa Romeo, see ground 20; Case 303/88, ENI-Lanerossi, see ground 22; 'Report on the evaluation of aid schemes established in favour of Community air carriers', Doc. SEC(92) 431 final, see Annex 2 at 50.

⁽²⁷⁾ Court of Justice Case 303/88, ENI-Lanerossi, see ground 21; judgement of 14 September 1994, Joined Cases C-278/92, C-279/92 and C-280/92, Spain v. Commission (Imepiel), ground 25, not yet published.

⁽²⁸⁾ Future cash flows discounted at the company's marginal cost of borrowing or cost of capital.

⁽²⁹⁾ Case 301/87, Boussac, see ground 40 at 361.

undertakings (e.g. importance of the freight transport). It will bear this in mind when choosing the appropriate reference points to be used as a comparison with the public undertakings receiving funds.

30. In applying the market economy investor principle, the Commission will take into account the general economic environment of the airline industry.

Following a short-term crisis, operating results of a company may deteriorate considerably. However, during normal periods with macroeconomic stability, the air transport industry has, like many other service sectors, always shown considerable growth. Consequently, despite short-term problems, a company whose structure is basically sound may have good prospects for the future despite a general down-turn in the performance of the industry.

31. In the case of loss-making undertakings, necessary improvements and restructuring measures are fundamental in the Commission's assessment. These measures must form a coherent restructuring programme. The Commission particularly appreciates situations where restructuring plans are established by external and independent financial advisers after a study. Following the Comité des Sages' recommendation (see Chapter I.3) the Commission may if necessary, seek the advice of an independent expert on the validity of the plan.

IV.2. Loan financing

32. The Commission will apply the market economy investor principle to assess whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission will take into account in particular both the interest rate charged and the security sought to cover the loan. The Commission will examine whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time the loan is made.

The aid element will amount to the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such.

IV.3. Guarantees

33. As regards guarantees, these guidelines fully reflect the general Commission position. The Commission has communicated to the Member States its position *vis-a-vis* loan guarantees⁽³⁰⁾. According to this letter, all guarantees given by the State directly or by way of delegation through financial institutions, fall within the scope of Article 92 (1) of the EC Treaty. It is only if the guarantees are assessed at the granting stage that all the distortions or potential distortions of competition may be detected. The Commission will accept the guarantees only if they are contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting undertaking or any similar procedure. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation (see Chapter IV.1). The aid element of this guarantee would be the difference between the rate which the borrower would pay in a free market and that actually obtained because of the guarantee net of any premium paid. If no financial institution, taking into consideration the airline's poor financial situation, would lend money without a State guarantee, the entire amount of the borrowing will be considered aid⁽³¹⁾.
34. Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee, when such status allows the enterprise in question to obtain credit on terms more favourable than would otherwise be available⁽³²⁾.

In the same context, the Commission considers that when a public authority takes a holding in an ailing company as a consequence of which, according to national law, it is exposed to unlimited liability instead of the normal limited liability, this is equivalent to giving an open-ended guarantee which artificially keeps the undertaking in operation. Such a situation has therefore to be regarded as an aid⁽³³⁾.

⁽³⁰⁾ Letter to all Member States of 5 April 1989, as amended by letter of 12 October 1989.

⁽³¹⁾ Commission decision of 7 October 1994, Case C-14/94, Olympic Airways in OJ No L 273, 25. 10. 1994, p. 22.

⁽³²⁾ 'Commission communication to the Member States on the application of Article 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector', see point 38.1.

⁽³³⁾ 'Commission communication to the Member States on the application of Article 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector', see point 38.2.

V. EXEMPTIONS UNDER ARTICLE 92 (3) (a) AND (c) OF THE TREATY AND ARTICLE 61 (3) (a) AND (c) OF THE AGREEMENT

35. As mentioned under Chapter II.1 above, in cases where the Commission considers that the measures involve aid elements, the Commission shall determine if any of the exceptions provided by Article 92 (3) of the Treaty could apply in order to exempt the aid.

V.1. Regional aids on the basis of Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement

36. The Commission has set out its guidelines for the evaluation of regional aids mainly in its communication of 1988 which applies to air transport ⁽³⁴⁾.

Regional aid for companies established in a disadvantaged region is the normal case which the above-mentioned communications refer to. Pursuant to Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement an exemption may be granted for investment aid to companies investing in certain disadvantaged areas, (e.g. the building of an hangar in an assisted region). Article 92 (3) (c) of the Treaty and Article 61 (3) (c) of the Agreement cannot be invoked to exempt any kind of operating aids, while subparagraph (a) may be used to grant exemptions in favour of companies established or having invested in the eligible regions in order to counterbalance particular difficulties. However, it should be noted that, in principle, Article 92 (3) (a) of the Treaty and Article 61 (3) (a) of the Agreement cannot be invoked to exempt operating aids in the transport sector (in exceptional cases, such as for example the reimbursement for public service obligations to the Portuguese islands which are for the time being not covered by the Third Package, the Commission may use these Articles to exempt operating regional aid; other forms of operating subsidization are also covered in Chapter III above).

The eligibility of regions for regional aid is made following the method and the principles which have been clearly established by the Commission. In its communication of 1988, the Commission has selected the eligible geographic areas according to the level of income per inhabitant and the level of

unemployment. In function of this classification, a ceiling between 0 and 75 % applies to the net grant equivalent of the investment aid.

V.2. Exemptions for the development of certain economic activities under Article 92 (3) (c)

37. If, in assessing recapitalization programmes under the market economy investor principle, the Commission reaches the conclusion that aid is involved, it will, in particular, assess whether the aid may be considered as compatible with the common market under Article 92 (3) (c).

Article 92 (3) (c) which provides that aid may be considered compatible with the common market if it facilitates the development of certain economic activities is of particular interest in the evaluation of the relevant aids. Under this provision, the Commission may consider some restructuring aid as compatible with the common market if they meet the requirement that the aid does not adversely affect trading conditions to an extent contrary to the common interest ⁽³⁵⁾. It is in the light of this latter requirement, to be interpreted in the context of the air transport industry, that the Commission has to determine the conditions ⁽³⁶⁾ which will usually need to be met in order to be able to grant an exception.

38. The Commission, in line with the recommendations of the Comité des Sages, (see Chapter I.3 above), will continue with its policy to allow, in exceptional cases, State aid given in connection with a restructuring programme; and in particular, if the aid is given, at least partly, for social purposes facilitating the adaptation of the work force to a higher level of productivity, (e.g. early retirement schemes). However, the Commission's approval is subject to a number of conditions:

(1) aid must form part of a comprehensive restructuring programme ⁽³⁷⁾, to be approved by the

⁽³⁵⁾ Case 730/79, Philip Morris Holland, [1980] ECR 2671, at 2691 to 2692, grounds 22 to 26; Case 323/82, Intermills, see ground 39 at 3832; Case 301/87, Boussac, see ground 50 at 364.

⁽³⁶⁾ Eighth report on Competition policy, point 176.

⁽³⁷⁾ Cases 296 and 318/82, Leeuwarder, see ground 26 at 825; Case 305/89, Alfa Romeo, see ground 22; Case 303/88, ENI-Lanerossi, see ground 21; Case 323/82, Intermills, see ground 39 at 3832; Commission decision, Case C-21/91, Sabena.

⁽³⁴⁾ Commission's communication OJ No C 212, 12. 8. 1988; as modified by Commission communication, OJ No C 163, 4. 7. 1990, p. 6.

Commission, to restore the airline's health, so that it can, within a reasonable period, be expected to operate viably, normally without further aid. Thus the aid must be of limited duration;

When evaluating the programme the Commission will be particularly attentive to market analysis and projection for developments in the different market segments, planned cost reductions, closing down of unprofitable routes, efficiency and productivity improvements, expected financial development of the company, expected rates of return, profits, dividends, etc.;

- (2) the programme must be self-contained in the sense that no further aid will be necessary for the duration of the programme and that, given the objectives of the programme to return to profitability, no aid is envisaged or likely to be required in the future. The Commission normally requests the written assurance from the Government that the present aid will be the last cash injection from public funds or any other aid, in whatever form, in conformity with Community law ⁽³⁸⁾. Therefore, restructuring aid should normally need only to be granted once;

The Commission is obliged, also in the future, to assess any possible aid and its compatibility with the common market. As stated above, in evaluating a second application for State aid, the Commission has to take into account all relevant elements, including the fact that the company has already received State aid ⁽³⁹⁾. Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company.

Furthermore, the full completion of the common aviation market in 1997 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid unless under very stringent conditions;

- (3) if restoration to financial viability and/or the situation of the market require capacity reductions ⁽⁴⁰⁾, this must be included in the programme;

- (4) Aid granted in the aviation sector affects trading conditions between Member States. In order to avoid that the aid affects competition to an unacceptable extent, the difficulties of the airline receiving the aid must not be transferred to its competitors. Therefore, the programme to be financed by the State aid can only be considered not contrary to the common interest (Article 92 (3) (c)) if it is not expansive; that means that its objective must not be to increase the capacity and the offer of the airline concerned, to the detriment of its direct European competitors. In any case, the programme must not lead to an increase beyond market growth, in the number of aeroplanes, or the capacity (seats) offered in the relevant markets. In this context the geographic market to be considered may be the EEA as a whole, or specific regional markets particularly characterized by competition ⁽⁴¹⁾;

- (5) the Government must not interfere in the management of the company for reasons other than those stemming from its ownership rights and must allow the company to be run according to commercial principles. The Commission may in specific cases require that the company's statute must be based on private commercial law ⁽⁴²⁾;

- (6) the aid must only be used for the purposes of the restructuring programme and must not be disproportionate to its needs. The company must for the period of the restructuring refrain from acquiring shareholdings in other air carriers ⁽⁴³⁾;

- (7) the modalities of an aid which conflict with specific provision of the Treaty, other than Articles 92 to 93, may be incontrovertibly linked

⁽³⁸⁾ See Commission decision, Case C-23/94, Air France.

⁽³⁹⁾ See Court of Justice, Case C-261/89, Comsal, grounds 20 to 21.

⁽⁴⁰⁾ See Case 305/89, Alfa Romeo, see ground 22; Case 323/82, Intermills, see ground 36 at 3832; Joined Cases C-296/82 and 318/82, Leeuwarder, see ground 26 at 825.

⁽⁴¹⁾ See Commission decision, Case C-34/93, Aer Lingus.

⁽⁴²⁾ See Commission decision, Case C-21/91, ex N 204/91, Sabena.

⁽⁴³⁾ See Commission decision, Case C-23/94, Air France, OJ No L 254, 30. 9. 1994.

to the object of the aid such that it would not be possible to consider them in isolation⁽⁴⁴⁾. The aid must neither be used for anti-competitive behaviour or purposes, (e.g. violation of rules of the Treaty), nor be detrimental to the implementation of the Community liberalization rules in the air transport sector. A restrictive application of the freedoms guaranteed through the Third Package could create or increase substantial distortions of competition which might further reinforce the anti-competitive effects of the State aid;

- (8) any such aids must be structured so that they are transparent and can be controlled.

39. As mentioned above (see Chapter I.3), the Commission cannot follow the recommendation of the Comité des Sages that the restructuring has to lead to privatization. This would be contrary to Article 222 of the EC Treaty which is neutral with regard to property ownership. However, the participation of private risk sharing capital will be taken into account (see also Chapter VI below).

40. The Commission will verify how the restructuring programme, which is financed with the help of the State aid, is realized. It will in particular check that the commitments and conditions, which are part of the Commission's, approval are fulfilled. Their verification is of particular interest if the aid is paid in instalments. The Commission will normally request that a progress report is submitted at regular intervals and, in any case, in sufficient time before the next payments are being made, in order to allow the Commission to make comments. The Commission may request the assistance of external consultants for this verification.

41. With the creation of the common aviation market as of 1 January 1993 the negative effects of State aids may seriously distort competition in the aviation sector of the EEA to a larger extent than in the past. Through the application of the abovementioned criteria, the Commission seeks to limit as far as possible these distortive effects, while acknowledging that there might be a need for State owned carriers, in particular, to become competitive with the help of a State financed restructuring programme. However, phasing out aids for restructuring over time is necessary to create a more level playing field

for competition in the aviation sector. The full completion of the common aviation market in 1977 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid, unless in very exceptional cases and under very stringent conditions.

42. As regards rescue aid, these guidelines follows the general Commission policy⁽⁴⁵⁾. Rescue aid for airlines may be justified for the development of a comprehensive restructuring programme in so far as this programme is acceptable under the present guidelines.

VI. PRIVATIZATIONS IN ACCORDANCE WITH ARTICLES 92 TO 93 OF THE TREATY AND 61 OF THE EEA AGREEMENT

43. As the EC Treaty is neutral on public or private ownership of companies, Member States are at liberty to sell their shareholdings in public companies. However, if the sales involve State aid elements, the Commission may become involved.

Following a number of decisions in the area of State aid and privatization, the Commission has developed a number of principles to be applied, to identify aid being paid, when the State shareholder disposes of its shareholding. These are set out below:

- (1) Aid is excluded, and therefore notification is not required, if, upon privatization, the following conditions are fulfilled:

- the disposal is made by way of an unconditional public invitation to tender on the basis of transparent and non-discriminatory terms,
- the undertaking is sold to the highest bidder,

⁽⁴⁴⁾ See Court of Justice, Case C-225/91, *Matra v. Commission*, ground 41.

⁽⁴⁵⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to the Member States), of 27 July 1994, not yet published.

- the interested parties have a sufficient period in which to prepare their offer and receive all the necessary information to enable them to undertake a proper evaluation.

(2) On the other hand, the following sales are subject to the pre-notification requirements of Article 93 (3) of the EC Treaty because there is a presumption that they contain aid:

- all sales by way of restricted methods or where the sale takes the form of a direct trade sale,
- all sales which are preceded by a cancellation of debts by the State, public undertakings or any other public body,
- all sales preceded by a conversion of debt into capital or by a recapitalization,
- all sales that are realized in conditions that would not be acceptable for a transaction between market economy investors.

Companies that are sold on the basis of the conditions under subparagraph 2 above must be valued by an independent expert who must indicate, under normal circumstances, a going concern value for the company and, if the Commission believes it necessary, a liquidation value. A report specifying the sales value, or values, and the sales proceeds raised must be provided to the Commission to enable it to establish the actual amount of aid.

In any case it should be noted that the sale of shares in companies being privatized must be effected on the basis of a non-discriminatory procedure having regard to the freedom of establishment of physical and legal persons and to the free movement of capital.

The Commission may find compatible an aid arising from a privatization under the criteria developed in Article 92 (3) of the Treaty and Article 61 (3) of the EEA Agreement ⁽⁴⁶⁾.

VII. CONCESSION OF EXCLUSIVE RIGHTS FOR ACTIVITIES ACCESSORY TO AIR TRANSPORT

44. The grant of exclusive rights for activities which are accessory to air transport may involve considerable financial advantages for the exclusive grantee. A State or the entity entrusted with the operation of an airport infrastructure may grant such an exclusive concession to an airline for a price lower than the actual market value of the concession. In the case the grantee pays no rent for the exclusivity or pays a rent which is lower than the price that the grantor would demand under normal commercial conditions aid element is involved.
45. The accessory activities for which the granting of exclusive rights may bring about aids in favour of air carriers are mainly those related to duty free shops. In its inventory on State aids in the aviation sector ⁽⁴⁷⁾ the Commission has pointed out that several duty-free shop concessions have been granted by the Member States to their national carriers, mostly by way of discretionary decisions, and without following transparent bidding procedures. In this sector accessory to air transport, there is at present no Community legislation harmonizing the procedures for the award of the concessions or opening the sector to competition. The exclusive grantee of a concession may, therefore, make monopoly profits.

In the light of the foregoing the Commission considers that in general terms no aid is involved where the grantee is selected in circumstances that would be acceptable to a normal concession grantor operating under normal market economy condition. However, in certain circumstances, for example, where the highest bidder is unreliable or where its solvency is precarious, the Commission would understand the Member State's acceptance of a lower bid.

These cases can be technically very difficult and therefore, it might be helpful to dispose of an independent study. For this purpose the Commission, in opening the Article 93 (2), procedure may request the Member State concerned to appoint an independent consultant, or may request independent advice itself.

⁽⁴⁶⁾ See Commission Decision 92/329/EEC of 25 July 1990, Case IOR-Finalp, OJ No L 183, 3. 7. 1992.

⁽⁴⁷⁾ Doc. SEC(92) 431 final, see points 12, 33, 35 and 36.

46. The Commission is about to develop common rules at Community level in the area of ground handling assistance and airport charges. Any abuse or infringement of competition rules in these areas will be considered under the relevant provisions of the Treaty particularly, Articles 85 to 90.

VIII. TRANSPARENCY OF FINANCIAL TRANSACTIONS

VIII.1. Lack of transparency

47. The Commission's Report on State Aids in the Aviation Sector carried out in 1991 to 1992⁽⁴⁸⁾ clearly demonstrates that there is a need for both increased transparency and scrutiny in the light of State aid rules:

- in many cases, only capital injections and not other forms of public funds or aid schemes have been notified and thus examined under State aid rules,
- several guarantee schemes of different forms have not been notified or have not been reported with the accuracy requested by the Commission. The Commission has been obliged to request additional information particularly on the conditions and modalities of such guarantees and lists of the operations for which such guarantees have already been granted in past years,
- several cases of financial compensation by the Member States for the performance of public service obligations under different forms, including reduction of the fares financed by the State's budget, compensation of the operational losses of companies providing such services and subsidies to airports located in isolated areas, have been reported. However, in several cases, lack of information has prevented the Commission from assessing the situation and additional information has been requested on this subject, for example, a precise breakdown of the subsidized routes including traffic figures and details of existing competitors.

VIII.2. The transparency Directives 80/723/EEC and 85/413/EEC

48. In order to ensure respect for the principle of non-discrimination and neutrality of treatment, the Commission adopted in 1980, on the basis of Article 90 (3) of the Treaty, a Directive on the transparency of financial relations between Member States and public undertakings⁽⁴⁹⁾ which was amended by Directive 85/413/EEC⁽⁵⁰⁾ in order to include, among other sectors, the transportation sector previously excluded.

The Directive requires Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent.

Although the transparency in question applies to all public funds, the following are particularly mentioned as falling within its scope:

- the setting-off of operational losses,
- the provision of capital,
- non-refundable grants or loans on privileged terms,
- the granting of financial advantages by foregoing profits or the recovery of sums due,
- the foregoing of a normal return on public funds used,
- compensation for financial burdens imposed by the public authorities.

According to Article 1 of the Directive, not only are the flows of funds directly from public authorities to public undertakings deemed to fall within the scope

⁽⁴⁸⁾ Doc. SEC(92) 431 final.

⁽⁴⁹⁾ Directive 80/723/EEC, OJ No L 195, 29. 7. 1980, p. 35.

⁽⁵⁰⁾ OJ No L 229, 28. 8. 1985, p. 20.

of the transparency Directive, but also public funds made available by public authorities through the intermediary of public undertakings or financial institutions.

49. Article 5 of the Transparency Directive obliges, *inter alia*, Member States to supply the information required to ensure transparency where the Commission considers it necessary. The Commission will act accordingly. The Commission may examine the opportunity of extending the scope of Directive 93/84/EEC⁽³¹⁾, which amends Directive 80/723/EEC, to air transport.

IX. ACCELERATED CLEARANCE PROCEDURE FOR AIDS OF LIMITED AMOUNT

50. In the interest of administrative simplification the Commission has decided to set out in this communication an accelerated clearance procedure for small aid schemes in the aviation sector⁽³²⁾.

The Commission will apply a more rapid administrative clearance procedure to new or modified existing aid schemes notified pursuant to Article 93 (3) of the EC Treaty if:

- the amount of the aid given to the same beneficiary is not higher than ECU 1 million over a three-year period,

⁽³¹⁾ Commission Directive 93/83/EEC of 30 September 1993, amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings in OJ No L 254, 12. 10. 1993, p. 16.

⁽³²⁾ On 2 July 1992, the Commission adopted a communication on the accelerated clearance of aid for SMES (OJ No C 213, 19. 8. 1992, p. 10) which does not apply to aids in the transport sector.

- the aid is linked to specific investment objectives. Operating aids are excluded.

The Commission does not intend to limit the scope of this accelerated clearance procedure to small and medium-sized enterprises⁽³³⁾. Air carriers, even if they are relatively small do not meet the criteria established for SMEs.

The ceiling of ECU 1 million takes into account the characteristics of the air transport industry which is capital intensive. The price of an airplane, for example, largely exceeds the threshold of ECU 1 million. The objective of this accelerated clearance is to speed up the approval of the small aids given mainly for regional purposes not covered by public service obligations.

The Commission will decide on complete notifications within 20 working days.

X. APPLICATION AND FUTURE REPORTING

51. These guidelines will be applied by the Commission as from their publication in the *Official Journal of the European Communities*.

The Commission will publish at regular intervals reports on the application of State aid rules as well as inventories of existing aids. The next report shall be presented in 1993. The Commission will also decide at the appropriate time on an update of these guidelines.

⁽³³⁾ See communication on the accelerated clearance of aid for SMEs.

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1407/2002
of 23 July 2002
on State aid to the coal industry

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, in particular Article 87(3)(e) and Article 89 thereof,

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

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

Having regard to the opinion of the Consultative Committee set up in accordance with the Treaty establishing the European Coal and Steel Community ⁽³⁾,

Having regard to the opinion of the Economic and Social Committee ⁽⁴⁾,

Whereas:

- (1) The ECSC Treaty and the rules adopted for its application, in particular Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽⁵⁾, expire on 23 July 2002.
- (2) The competitive imbalance between Community coal and imported coal has forced the coal industry to embark on substantial restructuring measures involving major cutbacks in activity over the past few decades.
- (3) The Community has become increasingly dependent on external supplies of primary energy sources. As stated in the Green Paper on a European strategy for the security of energy supply adopted by the Commission on 29 November 2000, the diversification of energy sources, both by geographical area and in products, will make it possible to create the conditions for greater security of supply. Such a strategy includes the development of indigenous sources of primary energy, more especially sources of energy used in the production of electricity.
- (4) In addition, the world political situation brings an entirely new dimension to the assessment of geopolitical risks and security risks in the energy sector and gives a

wider meaning to the concept of security of supplies. In this connection a regular assessment must be made of the risks linked to the Union's energy supply structure.

- (5) As indicated in the Green Paper on a European strategy for the security of energy supply, it is therefore necessary, on the basis of the current energy situation, to take measures which will make it possible to guarantee access to coal reserves and hence a potential availability of Community coal.
- (6) In this connection, the European Parliament adopted a Resolution on 16 October 2001 on the Commission Green Paper on a European strategy for the security of energy supply which acknowledges the importance of coal as an indigenous source of energy. The European Parliament said that provision should be made for financial support for coal production, whilst recognising the need for more efficiency in this sector and for cutting back subsidies.
- (7) Strengthening the Union's energy security, which underpins the general precautionary principle, therefore justifies the maintenance of coal-producing capability supported by State aid. However implementing this objective does not put into question the need to continue the restructuring process of the coal industry given that, in the future, the bulk of Community coal production is likely to remain uncompetitive vis-à-vis imported coal.
- (8) A minimum level of coal production, together with other measures, in particular to promote renewable energy sources, will help to maintain a proportion of indigenous primary energy sources, which will significantly boost the Union's energy security. Furthermore, a proportion of indigenous primary energy sources will also serve to promote environmental objectives within the framework of sustainable development.

⁽¹⁾ OJ C 304 E, 30.10.2001, p. 202.

⁽²⁾ Opinion delivered on 30 May 2002 (not yet published in the Official Journal).

⁽³⁾ OJ C 321, 16.11.2001, p. 2.

⁽⁴⁾ OJ C 48, 21.2.2002, p. 49.

⁽⁵⁾ OJ L 329, 30.12.1993, p. 12.

- (9) The strategic context of energy security is of an evolving nature which justifies at medium term an evaluation of this Regulation, taking into account the contributions of all indigenous primary energy sources.
- (10) This Regulation does not affect the Member States' freedom to choose what energy sources will make up their supply. Aid, and the amount of it, will be granted in accordance with the rules applying to each category of energy source and on the merits of each of the sources.
- (11) In accordance with the principle of proportionality, the production of subsidised coal must be limited to what is strictly necessary to make an effective contribution to the objective of energy security. The aid given by Member States will therefore be limited to covering investment costs or current production losses where mining is part of a plan for accessing coal reserves.
- (12) State aid to help maintain access to coal reserves to ensure energy security should be earmarked for production units which could contribute to this objective at satisfactory economic conditions. The application of these principles will help to contribute to the digression of aid to the coal industry.
- (13) Given risks related to geological uncertainties, aid to cover initial investment cost allow production units which are viable, or close to economic viability, to implement the technical investments necessary to maintain their competitive capacity.
- (14) The restructuring of the coal industry has major social and regional repercussions as a result of the reduction in activity. Production units which are not eligible for aid as part of the objective of maintaining access to coal reserves must therefore be able to benefit, temporarily, from aid to alleviate the social and regional consequences of their closure. This aid will in particular enable the Member States to implement adequate measures for the social and economic development of the areas affected by the restructuring.
- (15) Undertakings will also be eligible for aid to cover costs which, in accordance with normal accounting practice, do not affect the cost of production. This aid is intended to cover exceptional costs, inherited liabilities in particular.
- (16) The degression of aid to the coal industry will enable the Member States, in accordance with their budgetary constraints, to reallocate the aid granted to the energy sector on the basis of the principle of a gradual transfer of aid normally given to conventional forms of energy, in particular the coal sector, to renewable energy sources. Aid for renewable energy sources will be granted in accordance with the rules and criteria set out in the Community guidelines on State aid for environmental protection ⁽¹⁾.
- (17) In accomplishing its task, the Community must ensure that normal conditions of competition are established, maintained and complied with. With regard more especially to the electricity market, aid to the coal industry must not be such as to affect electricity producers' choice of sources of primary energy supply. Consequently, the prices and quantities of coal must be freely agreed between the contracting parties in the light of prevailing conditions on the world market.
- (18) A minimum level of production of subsidised coal will also help to maintain the prominent position of European mining and clean coal technology, enabling it in particular to be transferred to the major coal-producing areas outside the Union. Such a policy will contribute to a significant global reduction in pollutant and greenhouse gas emissions.
- (19) The Commission's authorising power must be exercised on the basis of precise and full knowledge of the measures which governments plan to take. Member States should therefore provide the Commission with a consolidated report showing the full details of the direct or indirect aid which they plan to grant to the coal industry, specifying the reasons for and scope of the proposed aid, its relationship with a plan for accessing coal reserves and, where appropriate, any closure plan submitted.
- (20) In order to take account of the deadline set in Directive 2001/80/EC ⁽²⁾ on large combustion plants, Member States should have the possibility to notify the Commission of the individual identity of production units forming part of the closure plans or the plans for accessing coal reserves by June 2004 at the latest.
- (21) Provided it is compatible with the present scheme, aid for research and development and aid for environmental protection and training may also be granted by Member States to the coal industry. The aid must be granted in compliance with the requirements and criteria laid down by the Commission for these categories of aid.
- (22) The implementation of the provisions of this Regulation on the expiry of the ECSC Treaty and Decision No 3632/93/ECSC may give rise to difficulties for undertakings owing to the fact that two aid schemes will apply during the same calendar year. It is therefore necessary to provide for a transitional period up to 31 December 2002.

⁽¹⁾ OJ C 37, 3.2.2001, p. 3.

⁽²⁾ OJ L 309, 27.11.2001, p. 1.

- (23) The proposed State aid scheme takes account of very diverse factors which characterise the present coal industry and the Community energy market as a whole. These factors, which may change to a lesser or greater extent, some of them unexpectedly, particularly the ability of Community coal to help strengthen the Union's energy security, need to be re-evaluated during the course of the scheme in the context of sustainable development by way of a report. On the basis of this report, taking into account the different categories of fossil fuels available on the territory of the Community, the Commission will present proposals to the Council which will take account of the development and long-term prospects of the scheme, in particular the social and regional aspects of the restructuring of the coal industry.
- (24) This Regulation should enter into force as soon as possible after the expiry of the ECSC Treaty and it should be applied retroactively in order to ensure the full benefit of its provisions,

- (d) 'initial investment costs': fixed capital costs directly related to infrastructure work or to the equipment necessary for the mining of coal resources in existing mines;
- (e) 'production costs' means costs related to current production, calculated in accordance with Article 9(3). These cover, apart from mining operations, operations for the dressing of coal, in particular washing, sizing and sorting, and the transport to the delivery point;
- (f) 'current production losses' means the positive difference between the coal production cost and the delivered selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.

Article 3

Aid

HAS ADOPTED THIS REGULATION:

CHAPTER 1

GENERAL PROVISIONS AND DEFINITIONS

Article 1

Aim

This Regulation lays down rules for the granting of State aid to the coal industry with the aim of contributing to the restructuring of the coal industry. The rules laid down herein take account of:

- the social and regional aspects of the sector's restructuring,
- the need for maintaining, as a precautionary measure, a minimum quantity of indigenous coal production to guarantee access to reserves.

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'coal' means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe ⁽¹⁾;
- (b) 'plan for accessing coal reserves': plan drawn up by a Member State, providing for the production of the minimum quantity of indigenous coal necessary to guarantee access to coal reserves;
- (c) 'closure plan': plan drawn up by a Member State providing for measures culminating in the definitive closure of coal production units;

⁽¹⁾ International system for the codification of medium-grade and high-grade coal (1998); International classification of coal in seam (1998) and International system of codification for low-grade coal (1999).

1. Aid to the coal industry may be considered compatible with the proper functioning of the common market only if it complies with the provisions of Chapter 2, without prejudice to State aid schemes concerning research and technological development, the environment and training.

2. Aid shall cover only costs in connection with coal for the production of electricity, the combined production of heat and electricity, the production of coke and the fuelling of blast furnaces in the steel industry, where such use takes place in the Community.

CHAPTER 2

CATEGORIES OF AID

Article 4

Aid for the reduction of activity

Aid to an undertaking intended specifically to cover the current production losses of production units may be considered compatible with the common market only if it satisfies the following conditions:

- (a) operation of the production units concerned shall form part of a closure plan whose deadline does not extend beyond 31 December 2007;
- (b) the aid notified per tonne coal equivalent shall not exceed the difference between the foreseeable production costs and the foreseeable revenue for a coal year. The aid actually paid shall be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid was granted;
- (c) the amount of aid per tonne coal equivalent may not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries;

- (d) aid must not lead to any distortion of competition between coal buyers and users in the Community;
- (e) aid must not lead to any distortion of competition on the electricity market, the market of combined heat and electricity production, the coke production market and the steel market.

Article 5

Aid for accessing coal reserves

1. Members States may, in accordance with paragraphs 2 and 3, grant aid to an undertaking, intended specifically to production units or to a group of production units, only if the aid contributes to maintaining access to coal reserves. A production unit may receive aid only under one of the categories referred to in paragraphs 2 or 3. No cumulation of aid under paragraph 2 and paragraph 3 shall be possible.

Aid for initial investment

2. Aid intended to cover initial investment costs may be declared to be compatible with the common market only if it satisfies the conditions laid down in Article 4(c), (d) and (e) and the following conditions:

- (a) the aid shall be earmarked for existing production units which have not received aid under Article 3 of Decision No 3632/93/ECSC or which have received aid authorised by the Commission under the said Article 3 having demonstrated that they were able to achieve a competitive position vis-à-vis prices for coal of a similar quality from third countries;
- (b) production units shall draw up an operating plan and a financing plan showing that the aid granted to the investment project in question will ensure the economic viability of these production units;
- (c) the aid notified and actually paid shall not exceed 30 % of the total costs of the relevant investment project which will enable a production unit to become competitive in relation to the prices for coal of a similar quality from third countries.

The aid granted in accordance with this paragraph, whether in the form of a single payment or spread over several years, cannot be paid after 31 December 2010.

Current production aid

3. Aid intended to cover current production losses may be declared to be compatible with the common market only if it satisfies the conditions laid down in Article 4(b) to (e) and the following conditions:

- (a) operation of the production units concerned or of the group of production units in the same undertaking forms part of a plan for accessing coal reserves;

- (b) aid shall be granted to production units which, with particular reference to the level and pattern of production costs, and within the limits of the quantity of indigenous coal to be produced in accordance with the plan referred to in (a), afford the best economic prospects.

Article 6

Degression of aid

1. The overall amount of aid to the coal industry granted in accordance with Article 4 and Article 5(3) shall follow a downward trend so as to result in a significant reduction. No aid for the reduction of activity may be granted under Article 4 beyond 31 December 2007.

2. The overall amount of aid to the coal industry granted in accordance with Articles 4 and 5 shall not exceed, for any year after 2003, the amount of aid authorised by the Commission in accordance with Articles 3 and 4 of Decision No 3632/93/ECSC for the year 2001.

Article 7

Aid to cover exceptional costs

1. State aid granted to undertakings which carry out or have carried out an activity in connection with coal production to enable them to cover the costs arising from or having arisen from the rationalisation and restructuring of the coal industry that are not related to current production ('inherited liabilities') may be considered compatible with the common market provided that the amount paid does not exceed such costs. Such aid may be used to cover:

- (a) the costs incurred only by undertakings which are carrying out or have carried out restructuring, i.e. costs related to the environmental rehabilitation of former coal mining sites;
- (b) the costs incurred by several undertakings.

2. The categories of costs resulting from the rationalisation and restructuring of the coal industry are defined in the Annex.

Article 8

Common provisions

1. The authorised amount of aid granted in accordance with any provision of this Regulation shall be calculated taking account of the aid granted for the same purposes, in whatever form, by virtue of any other national resource.

2. All aid received by undertakings shall be shown in the profit-and-loss accounts as a separate item of revenue distinct from turnover. Where an undertaking receiving aid granted pursuant to this Regulation is engaged not only in mining but also in another economic activity, the funds granted shall be the subject of separate accounts so that financial flows under this Regulation can be clearly identified. The funds shall be managed in such a way that there is no possibility of their being transferred to the other activity concerned.

CHAPTER 3

NOTIFICATION, APPRAISAL AND AUTHORISATION PROCEDURES

Article 9

Notification

1. In addition to the provisions of Article 88 of the Treaty and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (⁽¹⁾), aid as referred to in this Regulation shall be subject to the special rules laid down in paragraphs 2 to 12.

2. Member States which grant aid to the coal industry shall provide the Commission with all the information needed, against the current energy background, to justify the estimated production capacity forming part of the plan for accessing coal reserves, the minimum production level needed to guarantee such access, as well as, regarding the categories of aid provided for in this Regulation, the appropriate types of aid, taking account of the specificities of the coal industry in each Member State.

3. Production costs are calculated in accordance with the three-monthly outline statements of costs sent to the Commission by the coal undertakings or associations thereof. The coal undertakings include normal depreciation and interest on borrowed capital in their calculation of production costs. Eligible interest costs on borrowed capital shall be based on market-based interest rates and limited to operations (processes) listed in Article 2(e).

4. Member States which intend to grant aid for the reduction of activity as referred to in Article 4 shall submit beforehand to the Commission a closure plan for the production units concerned by 31 October 2002 at the latest. This plan shall provide for the following minimum elements:

- (a) identification of the production units;
- (b) the real or estimated production costs for each production unit per coal year; these costs are calculated in accordance with paragraph 3;
- (c) estimated coal production, per coal year, of production units forming the subject of a closure plan;

(d) the estimated amount of aid for the reduction of activity per coal year.

5. Member States which intend to grant the aid as referred to in Article 5(2) shall, by 31 December 2002 at the latest, submit to the Commission a provisional plan for accessing coal reserves. That plan shall provide, as a minimum, for objective selection criteria, such as economic viability, to be met by the production units in order to receive aid for investment projects.

6. Member States which intend to grant the aid as referred to in Article 5(3) shall, by 31 October 2002 at the latest, submit to the Commission a plan for accessing coal reserves. That plan shall provide for the following minimum elements:

- (a) objective selection criteria to be met by the production units in order to be included in the plan;
- (b) identification of production units or a group of production units in the same coal undertaking meeting such selection criteria;
- (c) the real or estimated production costs for each production unit per coal year; these costs are calculated in accordance with paragraph 3;
- (d) an operating plan and a financing plan for each production unit or group of production units in the same undertaking reflecting the budgetary principles of Member States;
- (e) estimated coal production, per coal year, of the production units or group of production units in the same undertaking forming part of the plan for accessing coal reserves;
- (f) the estimated amount of aid for accessing coal reserves for each coal year;
- (g) the respective shares of indigenous coal and renewable energy sources against the amount of indigenous primary energy sources that contribute to the objective of energy security within the framework of sustainable development and their expected upward or downward trend.

7. As part of the notification of the plans referred to in paragraphs 4, 5 and 6, Member States shall provide the Commission with all the information regarding reductions in greenhouse gas emissions. They shall refer in particular to reductions in emissions resulting from efforts made to use clean coal combustion technologies.

8. Member States may, on duly justified grounds, notify the Commission of the individual identity of production units forming part of the plans referred to in paragraphs 4 and 6 by June 2004 at the latest.

9. Member States shall inform the Commission of any amendments to the plan initially submitted to the Commission in accordance with paragraphs 4, 5, 6, 7 and 8.

(¹) OJ L 83, 27.3.1999, p. 1.

10. Member States shall send notification of all the financial support which they intend to grant to the coal industry during a coal year, specifying the nature of the support with reference to the forms of aid provided for in Articles 4, 5 and 7. They shall submit to the Commission all details relevant to the calculation of the foreseeable production costs and their relationship to the plans notified to the Commission in accordance with paragraphs 4, 5, 6, 7 and 8.

11. Member States shall send notification of the amount and full information about the calculation of the aid actually paid during a coal year no later than six months after the end of that year. Before the end of the following coal year, they shall also declare any corrections made to the amounts originally paid.

12. When notifying aid as referred to in Articles 4, 5 and 7 and making the statement of aid actually paid, Member States shall supply all the information necessary for verification of the conditions and criteria set out in these provisions.

Article 10

Appraisal and authorisation

1. The Commission shall appraise the plan(s) notified in accordance with Article 9. The Commission shall take a decision on their conformity with the conditions and criteria set out in Articles 4, 5, 6, 7 and 8 and on their compliance with the objectives of this Regulation, in accordance with the rules of procedure laid down in Regulation (EC) No 659/1999.

2. The Commission shall examine the measures notified in accordance with Article 9(10) in the light of the plans submitted in the framework of Article 9(4), (5), (6), (7) and (8). It shall take a decision in accordance with the requirements of Regulation (EC) No 659/1999.

CHAPTER 4

TRANSITIONAL AND FINAL PROVISIONS

Article 11

Commission reports

1. By 31 December 2006, the Commission shall report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, covering in particular its experience and any problems encountered in the application of this Regulation since its entry into force. It shall evaluate in the light of the measures taken by the Member States the results of the restructuring of the coal industry and the effects on the internal market.

2. It shall present a balance of the respective share of the different indigenous sources of primary energy in each Member State, including the different categories of fossil fuels available. It shall, taking into account the development of renewable sources of energy, evaluate the actual contribution of indigenous coal to long-term energy security in the European Union as part of a strategy of sustainable development, and present its assessment of how much coal is needed to that end.

Article 12

Implementing measures

The Commission shall take all necessary measures for the implementation of this Regulation. It shall establish a joint framework for communication of the information which will enable it to evaluate compliance with the conditions and criteria laid down for the granting of aid.

Article 13

Review measures

1. On the basis of the report produced in accordance with Article 11, the Commission shall, if necessary, submit to the Council proposals for the amendment of this Regulation concerning its application to aid for the period from 1 January 2008. In keeping with the principle of aid reduction, the proposals shall establish, *inter alia*, the principles on the basis of which Member States' plans are to be implemented as from 1 January 2008.

2. The principles referred to in paragraph 1 shall be established in the light of the objectives referred to in Article 1, with particular reference to the social and regional consequences of the measures to be taken and the energy context.

Article 14

Entry into force

1. This Regulation shall enter into force the day of its publication in the *Official Journal of the European Communities*.

It shall apply from 24 July 2002.

2. Aid covering costs for the year 2002 may, however, on the basis of a reasoned request by a Member State, continue to be subject to the rules and principles laid down in Decision No 3632/93/ECSC, with the exception of rules regarding deadlines and procedures.

3. This Regulation shall apply until 31 December 2010.

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

Done at Brussels, 23 July 2002.

For the Council
The President
P. S. MØLLER

ANNEX

Definition of costs referred to in Article 71. *Costs incurred and cost provisions made only by undertakings which are carrying out or have carried out restructuring and rationalisation*

Exclusively:

- (a) the cost of paying social welfare benefits resulting from the pensioning-off of workers before they reach statutory retirement age;
 - (b) other exceptional expenditure on workers who lose their jobs as a result of restructuring and rationalisation;
 - (c) the payment of pensions and allowances outside the statutory system to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such payments before the restructuring;
 - (d) the cost covered by the undertakings for the readaptation of workers in order to help them find new jobs outside the coal industry, especially training costs;
 - (e) the supply of free coal to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such supply before the restructuring;
 - (f) residual costs resulting from administrative, legal or tax provisions;
 - (g) additional underground safety work resulting from the closure of production units;
 - (h) mining damage provided that it has been caused by production units subject to closure due to restructuring;
 - (i) costs related to the rehabilitation of former coal mining sites, notably:
 - residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water,
 - other residual costs resulting from water supplies and the removal of waste water;
 - (j) residual costs to cover former miners' health insurance;
 - (k) exceptional intrinsic depreciation provided that it results from the closure of production units (without taking account of any revaluation which has occurred since 1 January 1994 and which exceeds the rate of inflation);
2. *Costs incurred and cost provisions made by several undertakings*
- (a) increase in the contributions, outside the statutory system, to cover social security costs as a result of the drop, following restructuring, in the number of contributors;
 - (b) expenditure, resulting from restructuring, on the supply of water and the removal of waste water;
 - (c) increase in contributions to bodies responsible for supplying water and removing waste water, provided that this increase is the result of a reduction, following restructuring, in the coal production subject to levy.
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G. SPECIFIC AID INSTRUMENTS

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 ⁽¹⁾. 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 ⁽²⁾ 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.

⁽¹⁾ OJ C 71, 11.3.2000, p. 14.

⁽²⁾ 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 ⁽³⁾, 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.

⁽³⁾ 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 ⁽⁴⁾ 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 ⁽⁵⁾.

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 ⁽⁶⁾. 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 ⁽⁷⁾.

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.

⁽⁴⁾ See Case C 482/99 referred to in footnote 3.

⁽⁵⁾ 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.

⁽⁶⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁷⁾ 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) ⁽⁸⁾ 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 ⁽⁹⁾. 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.

⁽⁸⁾ 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).

⁽⁹⁾ 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 ⁽¹⁰⁾, 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' ⁽¹¹⁾) set out in the following table is charged on the amount effectively guaranteed by the State, based on the rating of the borrower ⁽¹²⁾:

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		

⁽¹⁰⁾ '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).

⁽¹¹⁾ 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, 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.

⁽¹²⁾ 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 ⁽¹³⁾.

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 ⁽¹⁴⁾.

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 ⁽¹⁵⁾ 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.

⁽¹³⁾ 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.

⁽¹⁴⁾ 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).

⁽¹⁵⁾ 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 % ⁽¹⁶⁾ 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 ⁽¹⁷⁾.

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 ⁽¹⁸⁾. 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.

⁽¹⁶⁾ 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.

⁽¹⁷⁾ 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.

⁽¹⁸⁾ 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 ⁽¹⁹⁾. 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;

⁽¹⁹⁾ 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 ⁽²⁰⁾ 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 ⁽²¹⁾ 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 ⁽²²⁾.

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

⁽²⁰⁾ This is based on the assumption that the corresponding level of security is provided by the company to the State and the credit institution.

⁽²¹⁾ See the Communication referred to in footnote 11.

⁽²²⁾ See further details in footnote 14.

associated with the guarantee as well as the administrative and capital costs ⁽²³⁾. 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 ⁽²⁴⁾ 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 ⁽²⁵⁾, 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 ⁽²⁶⁾, the difference between this minimum level and the premium charged will be regarded as aid ⁽²⁷⁾. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the reference rate ⁽²⁸⁾.

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 ⁽²⁹⁾.

⁽²³⁾ 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.

⁽²⁴⁾ OJ L 302, 1.11.2006, p. 29.

⁽²⁵⁾ OJ L 358, 16.12.2006, p. 3.

⁽²⁶⁾ 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.

⁽²⁷⁾ 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).

⁽²⁸⁾ See further details in footnote 11.

⁽²⁹⁾ 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⁽³⁰⁾. 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⁽³¹⁾, 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);

⁽³⁰⁾ See Competition law applicable to State aid in the European Community:
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
and for transport:
http://ec.europa.eu/dgs/energy_transport/state_aid/transport_en.htm

⁽³¹⁾ 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 ⁽³²⁾.

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.

⁽³²⁾ 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	
Payment capacity is dependent upon sustained favourable conditions	B –	B –	B 3	6,3 %
	CCC +	CCC +	Caa 1	
	CCC	CCC	Caa 2	
In or near default	CCC –	CCC –	Caa 3	No safe harbour annual premium can be provided
	CC	CC		
		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 ⁽¹⁾.

(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

⁽¹⁾ 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⁽¹⁾, the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.

⁽¹⁾ 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.

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

(97/C 281/03)

(Text with EEA relevance)

1. Introduction

controlling aid has been achieved under the Treaty's trade provisions and in the OECD and WTO.

1.1. Member States maintain an active policy of supporting their export industry. Of the total aid given by Member States to their manufacturing industry over the period 1992 to 1994, 7 % went on supporting exports, largely in the form of favourable terms for export credits and export-credit insurance ⁽¹⁾.

1.3. While the Commission has so far refrained from exercising its State aid control powers in the areas of export credits and export-credit insurance, work by the Council's Export Credits Group ⁽⁴⁾ and cases before the Court of Justice of the European Communities ⁽⁵⁾ have shown that in one area at least, that of short-term export-credit insurance, the actual or potential distortions of competition in the Community may justify action by the Commission under the State aid rules without waiting for progress on other fronts. The distortions of competition can occur not only between exporters in different Member States in their trade within and outside the Community, but also between export-credit insurers offering their services in the Community.

1.2. Export subsidies directly affect competition in the market place between rival potential suppliers of goods and services. Recognizing their pernicious effects, the Commission, as the guardian of competition under the Treaty, has always strictly condemned export aid in intra-Community trade ⁽²⁾. However, although Member States' support for their exports outside the Community can also affect competition within the Community ⁽³⁾, the Commission has not systematically intervened in this field under the State aid rules in Articles 92, 93 and 94 of the Treaty. There have been several reasons for this. First, this area is partly governed by the provisions of the Treaty relating to external trade, Articles 112 and 113, and Article 112 does indeed provide for harmonization of export aid. Secondly, in is not only competition within the Community that is affected by aid for extra-Community exports, but also the competitiveness of Community exporters *vis-à-vis* those of the Community's trading partners, which give similar aid. Finally, progress in

1.4. The purpose of this Communication is to remove such distortions due to State aid in that sector of the export-credit insurance business in which there is competition between public or publicly supported export-credit insurers and private export-credit insurers. This commercial sector of export-credit insurance relates to the insurance of short-term export-credit risks on trade within the Community and with many countries outside it. Such risks are termed 'marketable' and will be defined in Section 2 below. The definition currently comprises only so-called 'commercial', as opposed to 'political', risks in trade within the Community and with the majority of OECD countries, listed in the Annex. While Member States have made considerable efforts to eliminate aid from the commercial sector of export-credit insurance in anticipation of action

⁽¹⁾ Source: Fifth survey on State aids in the European Community, EC Commission, 1997, p. 20. From 1992 onwards the cutbacks in subsidized export credits agreed in the Helsinki package are likely to reduce this figure.

⁽²⁾ In its seventh report on competition policy (1977), point 242, the Commission stated that export aids in intra-Community trade 'cannot qualify for derogation whatever their intensity, form, grounds or purpose'.

⁽³⁾ See judgment of the Court of Justice in Case C-142/87 *Belgium v. Commission* [1990] ECR I-959. See also Case C-44/93 *Assurances du Crédit v. OND and Belgium* [1994] ECR I-3829, paragraph 30.

⁽⁴⁾ 'L'assurance crédit et le marché unique 1992 (court-terme)', report presented to the coordination group, rapporteur, P. Callut.

⁽⁵⁾ See Case C-63/89 *Assurances du Crédit and Cobac v. Council and Commission* [1991] ECR I-1799, and Case C-44/93 *Assurances du Crédit v OND and Belgium* [1994] ECR I-3829.

by the Community, the Single Market requires safeguards to ensure a level playing field in all circumstances.

This Communication will not deal with the insurance of medium and long-term export-credit risks which are largely non-marketable at the present time. In that area the factors which have led the Commission to refrain from extensive use of its State aid control powers still militate against such action. Instead, efforts are being made to harmonize the terms of export-credit insurance, premiums and country-cover policy, taking due account of the programmes in third countries so as not to undermine the competitiveness of Community exporters.

1.5. Section 2 of this communication describes the structure of the export-credit insurance market and distinguishes the commercial or market sector, in which private insurers operate and which is covered by this communication between private and public or publicly supported export-credit insurers and explains why and to what extent the State aid Articles of the Treaty apply. Finally, in Section 4, the Commission states what action it considers necessary to ensure that any remaining State aid of the types listed in Section 3 is removed from the market sector and requests the Member States pursuant to Article 93 (1) of the Treaty to take such action, if required.

2. *Market and non-market sectors of short-term export-credit insurance*

2.1. The Report of the Council's Export Credit Group (hereinafter referred to as 'the Report'), complaints by private export-credit insurers and cases before the Court of Justice of the European Communities, have shown that in some Member States the same 'official' export-credit agencies that insure the medium and long-term risks of exporters for the account or with the guarantee (*) of the State also operate for the account or with the guarantee of the State in parts of the short-term export-credit insurance market where they are in competition

with private export-credit insurers that have no such links with the State. The 'official' export-credit agencies in question may be government departments, State-owned or State-controlled companies or wholly privately-owned and controlled companies. For the purposes of this communication, such agencies will be termed 'public or publicly supported export-credit insurers'. As well as the 'official' agencies operating in both the medium/long and short-term fields, some privately owned and controlled export-credit insurers that only provide short-term insurance may be supported by their governments through guarantees or equivalent reinsurance arrangements for some segments of their business. These insurers, too, must be categorized as 'public or publicly supported'. On the other hand, export-credit insurers mainly or exclusively engaged in the short term that do not operate for the account or with the guarantee (?) of the State for any of their business will be termed 'private export-credit insurers'.

The Report showed that when public or publicly supported export-credit insurers operated for the account or with the guarantee of the State on parts of the short-term market where they were in competition with private insurers, they enjoyed certain financial advantages which could distort competition against private insurers. In no country did public or publicly supported export-credit insurers have a monopoly for short-term business.

One of the most difficult areas dealt with by the Report was the provision of reinsurance by the State, either directly or indirectly. The Report identified reinsurance arrangements which provide 100 % cover and are equivalent to guarantees as a subsidy. It is now recognized that reinsurance facilities whereby the State only participates in or supplements a private-sector reinsurance treaty may also give insurers benefiting from them an advantage over private insurers not receiving such cover, thereby distorting competition.

2.2. Despite the recent improvements made — with public or publicly supported export-credit insurers increasingly hiving off their short-term business to separate companies or introducing separate accounting — it has been noted above that action is still needed to create the desired level playing field. The first task is to identify the sector in which

(*) In some cases, such as in The Netherlands, medium and long-term business is conducted not under a guarantee, but under a comprehensive reinsurance agreement with the government.

(?) Or with equivalent reinsurance arrangements.

a competitive market exists. The Report used as the decisive criterion for distinguishing the market sector, whether or not private reinsurance was available generally, rather than only in individual cases. It was observed that the answer was generally 'yes' for commercial risks on non-public buyers, but that for political risks (including risks on public buyers, currency transfer risks and non-commercial, catastrophe risks) the capacity available was so inadequate that cover for such risks was clearly to be regarded as a market activity. On the basis of an analysis of the private reinsurance market by reference to the three criteria of duration, location and nature of risks insured, the Report considered 'marketable' risks to involve commercial risks with a risk period of normally a maximum of three years for exports worldwide

- 2.3. Subsequent comments from Member States, business associations and insurers indicated that generally speaking that definition was too broad. Most of those submissions agreed with the Report that political risks should be excluded because the private reinsurance market was not large enough, and they preferred a maximum risk period of two years for commercial risks. Also, it appeared to be very difficult to reinsure on the private market the commercial risk of protracted default in non-OECD countries.
- 2.4. In view of the close links between protracted default and insolvency — protracted default risks being liable to turn into insolvency — and the resulting need to classify both risks in the same category (marketable or non-marketable), it is prudent to exclude all commercial risks on non-OECD countries from the definition of marketable risks and from the scope of this communication for the time being. Finally, it appears that at present there are still difficulties in obtaining private reinsurance of commercial risk in some OECD countries.
- 2.5. In view of the above, 'marketable' risks are defined for the purposes of this communication as commercial risks on non-public debtors⁽⁸⁾ estab-

⁽⁸⁾ Or non-public guarantors. A public debtor or guarantor is a debtor or guarantor who, in one form or another, represents the public authority itself and cannot either judicially or administratively be declared insolvent. For the purposes of this communication, publicly owned or publicly controlled companies resident in the countries listed in the Annex as a marketable risk country and subject to the normal provisions of private company law are considered to be non-public debtors/guarantors.

lished in the countries listed in the Annex. For such risks the maximum risk period (that is, manufacturing plus credit period with normal Berne Union starting point and usual credit term) is less than two years.

All other risks (that is, political, catastrophe⁽⁹⁾ risks and commercial risks on public buyers and on countries not listed in the Annex) are considered not yet to be marketable.

'Commercial risks' are defined for the purposes of this communication as:

- arbitrary repudiation of a contract by a debtor, that is, any arbitrary decision by a non-public debtor to interrupt or terminate the contract without legitimate reason,
- arbitrary refusal by a non-public debtor to accept the goods covered by the contract without legitimate reason,
- insolvency of a non-public debtor or his guarantor,
- non-payment by a non-public debtor or by a guarantor of a debt resulting from the contract, that is, protracted default.

- 2.6. The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time; for example, it might be extended to cover political risks. The definition will therefore have to be reviewed regularly (namely, at least once a year) by the Commission. The Commission will consult the Member States and other interested parties on such reviews⁽¹⁰⁾. In so far as necessary, changes to the

⁽⁹⁾ That is, war, revolution, natural disasters, nuclear accidents, and so forth, not so-called 'commercial, catastrophe risks' (catastrophic accumulations of loss on individual buyers or countries) which may be covered by excess of loss reinsurance and are commercial risks.

⁽¹⁰⁾ *Inter alia*, the Commission will call on the help of the Council (for example, its Export Credits Group).

definition will have to take account of the scope of Community legislation governing export-credit insurance, in order to avoid any conflict or legal uncertainty.

3. *Factors distorting competition between private and public or publicly supported export-credit insurers*

3.1. The factors that may distort competition in favour of public or publicly supported export-credit insurers insuring marketable risks include ⁽¹¹⁾:

— *de jure* or *de facto* State guarantees of borrowing and losses. Such guarantees enable insureds to borrow at rates lower than the normal market rates or make it possible for them to borrow money at all. Furthermore, they obviate the need for insurers to reinsure themselves on the private market,

— any difference in obligations, compared with private insurers, to maintain adequate provisions. It should be noted that when Council Directive 73/239/EEC ⁽¹²⁾ was amended by Directive 87/343/EC ⁽¹³⁾ it was understood that the exclusion of export-credit insurance operations for the account of or guaranteed by the State (Article 2 (2) (d) of the original Directive) did not include operations in the field of short-term commercial risks which public or publicly supported export-credit insurers effected for their own account and not guaranteed by the State ⁽¹⁴⁾. This means that to insure short-term

commercial risks, public or publicly supported insurers must have a certain amount of own funds (solvency margin, including guarantee fund) and technical provisions (notably and equalization reserve) and must have obtained authorization in accordance with Article 6 *et seq.* of Directive 73/239/EEC,

— relief or exemption from taxes normally payable (such as company taxes and taxes levied on insurance policies),

— awards of aid or provisions of capital by the State. With regard to the latter, the principle should be observed that, unless the State is acting as would a private investor in a market economy, capital injections involve State aid ⁽¹⁵⁾; provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information (for instance, information about debtors gathered by embassies) on terms not reflecting their cost; and reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market, which leads either to under-pricing of the reinsurance or to the artificial creation of capacity that would not be forthcoming from the private market.

3.2. The types of treatment listed in paragraph 3.1 give, or may give, the export-credit insurers that receive them a financial advantage over other export-credit insurers. Such financial advantages granted to certain enterprises distort competition and constitute State aid within the meaning of Article 92 (1) of the Treaty.

⁽¹¹⁾ The tying by a public or publicly supported export-credit insurer of insurance of non-marketable risks to the acceptance of cover for marketable risks might infringe Article 86 of the EC Treaty. Such action could both be the subject of proceedings by the Commission and challenged in the courts and before national competition authorities.

⁽¹²⁾ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16. 8. 1973, p. 3).

⁽¹³⁾ Council Directive 87/343/EEC of 22 June 1987 amending Council Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 185, 4. 7. 1987, p. 72).

⁽¹⁴⁾ See judgment of the Court of Justice in Case C-63/89, *Assurances du Credit and Cobac v. Council and Commission*, cited in footnote 5, p. 1848 (paragraph 22).

Article 92 (1) is applicable to all measures which grant a financial or economic advantage to certain enterprises or products and involve a charge on or a loss to public funds, whether actual or contingent,

⁽¹⁵⁾ See communication of the Commission to the Member States concerning public authorities' holdings in company capital (EC Bulletin 9-1984) and communication of the Commission on the application of Articles 92 and 93 of the EC Treaty to public undertakings in the manufacturing sector (OJ C 307, 13. 11. 1993, p. 3).

and for which nothing or little is required from the beneficiary concerned, in so far as such measures affect trade between Member States and distort or threaten to distort competition by favouring certain undertakings or the production of certain goods⁽¹⁶⁾.

The financial advantages listed in paragraph 3.1 in respect of marketable risks as defined in paragraph 2.5 affect intra-Community trade in services. Moreover, they lead to variations in the insurance cover available for marketable risks in different Member States, thereby distorting competition between companies in Member States and having secondary effects on intra-Community trade regardless of whether intra-Community exports outside the Community are concerned⁽¹⁷⁾. The exceptions provided for in Article 92 of the Treaty do not apply to aid for the insurance of marketable risks. The distorting effects of such aid in the Community outweigh any possible national or Community interest in supporting exports. That view has been confirmed by the judgment of the Court of Justice Case C-63/89 which was directly concerned with the issue addressed by this communication. The Court held that although the Directive on partial harmonization of equalization reserves for insurance companies, which exempted export-credit insurance operations for the account of or guaranteed by the State, was not unlawful, the factors distorting competition between private and public or publicly supported export-credit insurers 'might justify recourse to legal action to penalize infringement of the provisions (of Article 92)'⁽¹⁸⁾. In its judgment in Case C-44/93⁽¹⁹⁾, the Court

assumed that the advantages in question constitute State aid and confirmed that the Commission might take action to secure their withdrawal.

4. *Action required to eliminate distortions of competition in short-term export-credit insurance with respect to marketable risks*

4.1. State aid of the types listed in paragraph 3.1, which is enjoyed by public supported export-credit insurers for the marketable risks defined in paragraph 2.5, may distort competition and would therefore be ineligible for exemption under the State aid rules of the Treaty.

4.2. Member States are therefore requested under Article 93 (1) of the Treaty to amend, where necessary, their export-credit insurance systems for marketable risks in such a way that the granting of State aid of the following types to public or publicly supported export-credit insurers in respect of such risks is ended within one year of the publication of this Communication:

- (a) State guarantees for borrowing or losses;
- (b) exemption from the requirement to constitute adequate reserves and the other requirements listed in the second indent of paragraph 3.1;
- (c) relief or exemption from taxes or other charges normally payable;
- (d) award of aid or provisions of capital or other forms of finance in circumstances in which a private investor acting under normal market conditions would not invest in the company or on terms a private investor would not accept;
- (e) provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information (for instance, information about debtors gathered by embassies), on terms not reflecting their cost; and

⁽¹⁶⁾ See judgments of the Court of Justice in Case 30/59 Steenkolenmijnen v. High Authority [1961] ECR p. 1, paragraph 19; Case 173/73 Italy v. Commission [1974] ECR p. 709, Case 730/79 Philip Morris v. Commission [1980] ECR p. 2671.

⁽¹⁷⁾ In its judgment in Case C-142/87 Belgium v. Commission, cited in footnote 3, the Court held that not only aid for intra-Community exports, but also aid for exports outside the Community can influence intra-Community competition and trade. Both types of operation are insured by export-credit insurers and aid with respect to both can therefore have effects on intra-Community competition and trade.

⁽¹⁸⁾ Cited in footnote 5; see paragraph 24. Advocate-General Tesouro, in his opinion in the case, considered that when there is competition between private and public or publicly backed export-credit insurers, 'it is highly doubtful whether the Member States can legitimately provide financial backing for public operators. Intervention of that kind could be incompatible with the rules on public aid' ([1991] ECR I-1835, point 15).

⁽¹⁹⁾ Cited in footnote 3; see especially paragraph 34.

- (f) reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market, which leads either to under-pricing of the reinsurance cover or to the artificial creation of capacity that would not be forthcoming from the private market.

However, pending the outcome of the review mentioned in paragraph 4.3, existing complementary State reinsurance arrangements remain permissible for an interim period, provided that:

- the State reinsurance is a minority element in the insurer's overall reinsurance package,
- where the reinsurance treaties of the insurer combine marketable and non-marketable risks, and any State reinsurance thus unavoidably attaches to marketable risk, the level of State reinsurance for marketable risks must not exceed that which would have been available from the private reinsurance market if reinsurance had been sought for those risks in isolation,
- the State reinsurance does not act so as to enable the insurer to insure business on individual buyers beyond the limits set by the participating private-market reinsurers,
- the premium for State reinsurance demonstrably reflects the risk, is calculated using commercial market techniques and, where an equivalent market premium rate is available, is at least equal to that rate,
- the State reinsurance for marketable risks is open to all credit insurers who are able to satisfy the common eligibility criteria.

4.3. For the purposes of complying with paragraph 4.2, public or publicly supported export-credit insurers will, at the very least, have to keep a separate administration and separate accounts for their insurance of marketable risks and non-marketable risks for the account or with the guarantee of the State, demonstrating that they do not enjoy State aid in their insurance of marketable risks. The

accounts for business insured on the insurer's own account should comply with Council Directive 91/674/EC⁽²⁰⁾.

Furthermore, any Member State providing reinsurance cover to an export-credit insurer by way of participation or involvement in private sector reinsurance treaties covering both marketable and non-marketable risks will have to demonstrate that its arrangements do not involve State aid within the meaning of paragraph 4.2 (f).

For this purpose the Commission, in close liaison with the Member States, will continuously, as from the publication of this Communication, monitor such arrangements on the basis of six-monthly reports submitted by Member States concerned and by the end of 1998 will carry out a complete review of such arrangements. The review will take into account all the knowledge and experience acquired in the meantime about the operation of the short-term export-credit insurance market, and Member States' intervention therein, from the reports on implementation supplied under paragraph 4.5 from the first of the annual reviews to be undertaken under paragraph 4.6 and from any notifications of use of the escape clause under paragraph 4.4. Should the review find that the arrangements in a Member State involve State aid, then the Member State will be required to terminate them by the end of 1999 at the latest.

- 4.4. The principle that export-credit insurance for marketable risks should be provided by public or publicly supported export-credit insurers only if the financial advantages listed in paragraph 4.2 are withdrawn from them may be departed from in the circumstances set out below.

In certain countries, cover for marketable export-credit risks may be temporarily unavailable from private export-credit insurers or from public or publicly supported export-credit insurers operating for their own account, owing to a lack of insurance or reinsurance capacity. Therefore those risks are temporarily considered to be non-marketable.

In such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for

⁽²⁰⁾ Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31. 12. 1991, p. 7).

the account of or with the guarantee of the State. The insurer should, as far as possible, align its premium rates for such risks with the rates charged elsewhere by private export-credit insurers for the type of risk in question.

Any Member State intending to use that escape clause should immediately notify the Commission of its draft decision. That notification should contain a market report demonstrating the unavailability of cover for the risks in the private insurance market by producing evidence thereof from two large, well-known international private export-credit insurers as well as a national credit insurer, thus justifying the use of the escape clause. It should, moreover, contain a description of the conditions which the public or publicly supported export-credit insurer intends to apply in respect of such risks.

Within two months of the receipt of such notification, the Commission will examine whether the use of the escape clause is in conformity with the above conditions and compatible with the Treaty.

If the Commission finds that the conditions for the use of the escape clause are fulfilled, its decision on compatibility is limited to two years from the date of the decision, provided that the market conditions justifying the use of the escape clause do not change during that period.

Furthermore, the Commission may, in consultation with the other Member States, revise the conditions for the use of the escape clause; it may also decide to discontinue it or replace it with another appropriate system.

- 4.5. This communication will apply from 1 January 1998 for a period of five years. Member States are requested to inform the Commission within two months of notification of this communication, whether they accept its recommendations. By 1 January 1999 at the latest, Member States must inform the Commission of the action they have taken to comply herewith. Should it appear either through those reports or otherwise that the systems in operation in the Member States still involve State aid, the Commission will assess such aid pursuant to Articles 92 and 93 of the Treaty, in accordance with the policy set out above.
- 4.6. In cooperation with the Member States and interested parties, the Commission will review the definition of marketable risks and the operation of the present communication in the light of market developments and possible Community legislation. All information received by the Commission from Member States and interested parties in connection with such reviews will with the permission of the supplier of the information, be made available to all the other participants in the review.

ANNEX

List of marketable risk countries

European Union

Austria
Belgium
Denmark
Finland
France
Germany
Greece
Ireland
Italy
Luxembourg
Netherlands
Portugal
Spain
Sweden
United Kingdom

Countries which are members of the OECD and which are considered to be marketable risk countries

Australia
Canada
Iceland
Japan
New Zealand
Norway
Switzerland
United States of America

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

(2001/C 217/02)

(Text with EEA relevance)

I. Introduction

The communication of the Commission to 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⁽¹⁾ (hereinafter referred to as 'the 1997 communication') was to apply from 1 January 1998 for a period of five years, which would normally expire on 31 December 2002.

The purpose of the 1997 communication is to remove distortions of competition due to State aid in the sector of export credit insurance, where there is competition between public or publicly supported export credit insurers and private export credit insurers. In particular, the sector directly concerned by such competition, and therefore by the 1997 communication, is that of export credit insurance relating to short term export credit risks on trade within the Community and with countries outside it.

These risks are defined in the 1997 communication as 'marketable risks'. Marketable risks are those risks which may not be covered by export credit insurers with the support of the State. All those risks which are not 'marketable' can *a contrario* be publicly supported.

Point 2.6 of the 1997 communication states that:

'The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time; for example, it might be extended to cover political risks. The definition will therefore have to be reviewed regularly (namely at least once a year) by the Commission. The Commission will consult Member States and other interested parties on such reviews⁽¹⁰⁾. In so far as necessary, changes to the definition will have to take account of the scope of Community legislation governing export credit insurance, in order to avoid any conflict or legal uncertainty.

⁽¹⁰⁾ *Inter alia*, the Commission will call on the help of the Council (for example, its Export Credits Group).'

Following the completion of a study into the private reinsurance market, and after consultation of the Member States, both within the Council Export Credits Group and at a multi lateral meeting on State aid, the Commission has decided to amend the definition of marketable risk to include political risks arising within the European Union and in those OECD member countries currently listed in the Annex to the 1997 communication. The current list of names of all the Member

States will be replaced by a generic reference to the Member States of the European Union so that the future enlargement of the European Union will not necessitate further amendment of the 1997 communication.

The new definition of marketable risk will apply from 1 January 2002 until 31 December 2004. State aid notifications which are pending on 1 January 2002 will be assessed in accordance with the new definition. Unlawful State aid, that is aid put into effect in contravention of Article 88(3) of the Treaty, will be assessed in accordance with the rules in force at the time the aid was granted.

The Commission has also decided to extend the duration of the 1997 communication until 31 December 2004.

The Commission wishes to inform Member States and interested parties that it intends to undertake a further study in 2003 to verify the capacity of the private reinsurance market to adapt to a further extension of the definition of marketable risk to cover a wider range of commercial risks, possibly including commercial risks arising in all countries of the world. Should the results of that study and consultations with Member States confirm that such coverage is possible, it will amend the definition of marketable risk accordingly as part of the general review of the 1997 communication in 2004.

II. Amendments to the 1997 communication

Accordingly, the following amendments to the 1997 communication will take effect on 1 January 2002:

1. In Point 2.5, the first two paragraphs are replaced by the following:

'In view of the above, "marketable" risks are defined for the purposes of this communication as commercial and political risks on public and non public debtors established in the countries listed in the Annex. For such risks the maximum risk period (that is, manufacturing plus credit period with normal Berne Union starting point and usual credit term) is less than two years. All other risks (that is, catastrophe risks⁽⁹⁾ and commercial and political risks on countries not listed in the Annex) are considered to be not yet marketable.

⁽⁹⁾ That is, war, revolution, natural disasters, nuclear accidents, and so forth, not so called "commercial, catastrophe risks" (catastrophic accumulations of loss on individual buyers or countries) which may be covered by excess of loss reinsurance and are commercial risks.'

⁽¹⁾ OJ C 281, 17.9.1997, p. 4.

2. Point 2.6 is replaced by the following:

'The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time. The definition may, therefore, be reviewed, notably at the expiry of this communication on 31 December 2004. The Commission will consult Member States and other interested parties on such reviews ⁽¹⁰⁾. In so far as necessary, changes to the definition will have to take account of the scope of Community legislation governing export credit insurance, in order to avoid any conflict or legal uncertainty.

⁽¹⁰⁾ *Inter alia*, the Commission will call on the help of the Council (for example, its Export Credits Group).'

3. In Point 4.5, the first sentence is replaced by the following:

'This communication will apply from 1 January 1998 for a period of seven years.'

4. The Annex is replaced by the following:

'ANNEX

LIST OF MARKETABLE RISK COUNTRIES

European Union	Countries which are members of the OECD
All the Member States	Australia Canada

Iceland
Japan
New Zealand
Norway
Switzerland
United States of America'

III. Appropriate measures proposed to Member States under Article 88(1) of the Treaty

The Commission proposes to Member States, on the basis of Article 88(1) of the Treaty, the following appropriate measures concerning their respective existing schemes.

In order to comply with the new definition of marketable risks, Member States should amend, where necessary, their export credit systems for marketable risks in such a way that the granting of State aid of the types indicated in point 4.2(a) to (f) of the 1997 communication to publicly supported export credit insurers in respect of such risks is ended by 1 January 2002.

The Member States are invited to give their explicit agreement to the proposed appropriate measures within two months from the date of publication of this communication. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

Commission communication concerning the prolongation of the 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

(2004/C 307/04)

(Text with EEA relevance)

The original 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 was adopted in 1997 ⁽¹⁾ and was to apply for a period of five years from 1 January 1998.

In 2001, the Commission adopted an amendment ⁽²⁾ to the 1997 communication concerning the definition of 'marketable' risks to reflect the different situation of the private reinsurance market. The Commission also decided to extend the duration of the 1997 communication until 31 December 2004. Furthermore, Point 2.6. of the 1997 communication was amended as follows: 'The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time. The definition may, therefore, be reviewed, notably at the expiry of this communication on 31 December 2004. The Commission will consult Member States and other interested parties on such reviews'.

In order to allow time to assess the capacity of the private reinsurance market and to complete this review, the Commission has decided to continue to apply the current communication as amended in 2001 until such time as new rules on State aid in the field of short-term export-credit insurance are published or, at the latest, until 31 December 2005.

⁽¹⁾ OJ C 281, 17.9.1997, p. 4.

⁽²⁾ OJ C 217, 2.8.2001, p. 2.

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

(2005/C 325/11)

I. Introduction

The 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 ⁽¹⁾ (hereinafter referred to as 'the 1997 communication') was adopted in 1997 and was to apply for a period of five years from 1 January 1998 until 31 December 2002.

In 2001, the Commission adopted an amendment to the 1997 communication ⁽²⁾ (hereinafter referred to as 'the 2001 amendment') concerning the definition of 'marketable' risks which may not be covered by export-credit insurers with the support of the State. The 2001 amendment also extended the validity of the 1997 communication until 31 December 2004. The validity of the 1997 communication was further extended until 31 December 2005 by a communication adopted by the Commission in 2004 ⁽³⁾.

According to point 2.6 of the 1997 communication as laid down in the 2001 amendment:

'The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time. The definition may, therefore, be reviewed, notably at the expiry of this communication on 31 December 2004. The Commission will consult Member States and other interested parties on such reviews ⁽¹⁰⁾. In so far as necessary, changes to the definition will have to take account of the scope of Community legislation governing export-credit insurance, in order to avoid any conflict or legal uncertainty.'

⁽¹⁰⁾ *Inter alia*, the Commission will call on the help of the Council (for example, its Export Credits Group)'.

The 2001 amendment also states in its introduction that:

'The Commission wishes to inform Member States and interested parties that it intends to undertake a further study in 2003 to verify the capacity of the private reinsurance market to adapt to a further extension of the definition of marketable risk to cover a wider range of commercial risks, possibly including commercial risks arising in all countries of the world. Should the results of that study and consultations with Member States confirm that such coverage is possible, it will amend the definition of market-

able risk accordingly as part of the general review of the 1997 communication in 2004.'

Following the completion of a study on the situation of the private reinsurance market in the field of export credit insurance, and after consultation of the Member States both within the Council Working Group on Export Credits and at a multi-lateral meeting on State aid as well as of other interested parties, the Commission has decided to leave unchanged the definition of 'marketable' risks contained in the 2001 amendment. However, due to the unavailable or insufficient cover in the majority of Member States of export-credit insurance offered by private insurers to small companies with a limited export turnover, which is caused by no or very low profitability reflecting an insufficient spread of foreign countries/buyers and lack of education and knowledge of the complexities of export-credit insurance among such companies entailing significant handholding and processing costs, the Commission is prepared to consider their export-related risks as temporarily 'non-marketable' in these Member States where there is no adequate offer by the private market, also in consideration of the need for the commercial insurers to adapt to the increased market size created by the EU enlargement.

This new provision will apply from 1 January 2006 until 31 December 2010. However, the Commission will assess the market situation for those SMEs with limited export turnover within three years. Should export-credit insurance cover for such SMEs prove to be sufficiently available in the private market, the Commission will amend this Communication by considering their export-related risks as 'marketable.'

The Commission has also decided to extend the validity of the 1997 Communication until 31 December 2010.

The Commission wishes to inform Member States and interested parties that in 2010 it will re-examine the capacity of the private reinsurance market to adapt the definition of 'marketable' risks accordingly if necessary, in particular with regard to the new situation considered to give rise to 'non-marketable' risks.

II. Amendments to the 1997 communication

The following amendments to the 1997 communication as amended by the 2001 amendment will take effect on 1 January 2006:

⁽¹⁾ OJ C 281, 17.9.1997, p. 4.

⁽²⁾ OJ C 217, 2.8.2001, p. 2.

⁽³⁾ OJ C 307, 11.12.2004, p. 12.

1. In point 2.5, the following paragraph is introduced after the first paragraph:

'Notwithstanding the definition of "marketable" risks contained in the first sentence of the previous paragraph, if and to the extent that no private insurance market exists in a Member State, commercial and political risks incurred on public and non-public debtors established in the countries listed in the Annex are considered to be temporarily non-marketable if incurred by small and medium-sized enterprises falling within the relevant EU definition ⁽¹⁾ and having a total annual export turnover not exceeding EUR 2 million ⁽²⁾. In such circumstances, a public or publicly supported export-credit insurer shall, as far as possible, align its premium rates for such "non-marketable" risks with the rates charged elsewhere by export-credit insurers for the type of risk in question, namely taking into account the limited spread of foreign buyers, the characteristics of the insured enterprises, and the associated costs. Member States intending to submit a notification to the Commission on the application of this clause shall be subject to the same procedure and the same conditions as set out in point 4.4 below for the application of the escape clause. The Commis-

sion reserves the right to discontinue this clause or to revise the conditions of its application in consultation with Member States if it finds that the capacity of the private insurance market in this segment changes during the period of validity of this Communication'.

2. Point 2.6 is replaced by the following:

'The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time. The definition may, therefore, be reviewed, notably at the expiry of this communication. The Commission will consult Member States' representatives with relevant experience in this field and other interested parties on such reviews. In so far as necessary, changes to the definition will have to take account of the scope of Community legislation governing export-credit insurance, in order to avoid any conflict or legal uncertainty'.

3. Point 4.5 is replaced by the following:

'This Communication will apply until 31 December 2010'.

⁽¹⁾ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36, as may be amended in the future.

⁽²⁾ The calculation of the relevant annual export turnover will be effected according to Article 4 of Annex I of Commission Recommendation 2003/361/EC of 6 May 2003, as may be amended in the future. The provisions laid down in Article 4(2) of Annex I will apply *mutatis mutandis* with respect to the annual export turnover of the relevant enterprise.

Communication of the Commission amending the period of application of 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

(Text with EEA relevance)

(2010/C 329/06)

I. INTRODUCTION

The 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 ⁽¹⁾ (‘the 1997 Communication’) was adopted in 1997 and was to apply for a period of five years from 1 January 1998. It was subsequently amended and its period of application was prolonged in 2001 ⁽²⁾, 2004 ⁽³⁾ and 2005 ⁽⁴⁾. It now applies until 31 December 2010.

The 1997 Communication stipulates that marketable risks cannot be covered by export-credit insurance with the support of Member States. Marketable risks are commercial and political risks on public and non-public debtors established in countries listed in the Annex to that Communication, with a maximum risk period of less than two years. However, point 4.4 of the 1997 Communication gives the possibility, under certain conditions, for those risks to be temporarily taken on to the account of a public or publicly supported export-credit insurer.

In December 2008, as a consequence of the financial crisis, the Commission adopted the Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽⁵⁾, which introduced a temporary procedural simplification to point 4.4 of the 1997 Communication, regarding the demonstration of the unavailability of cover for short-term export-credit insurance.

Since its adoption in 1997 and before the financial crisis, the Commission had only applied the 1997 Communication in few cases. Most of the relevant experience available to assess the public intervention in the short-term segment of the export credit market is very recent and cannot yet be fully evaluated. In addition, as a consequence of the current financial crisis, a lack of insurance or reinsurance capacity to cover marketable risks may still exist in some Member State and justify State intervention.

Having regard to the limited evidence available and the need to ensure continuity and legal certainty in the treatment of short-term export-credit insurance with the support of the State in uncertain economic situation, the Commission has decided to extend the period of application of the 1997 Communication until 31 December 2012.

II. AMENDMENT TO THE 1997 COMMUNICATION

The following amendment to the 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 applies from 1 January 2011:

— point 4.5 is replaced by the following:

‘This Communication applies until 31 December 2012.’

⁽¹⁾ OJ C 281, 17.9.1997, p. 4.

⁽²⁾ OJ C 217, 2.8.2001, p. 2.

⁽³⁾ OJ C 307, 11.12.2004, p. 12.

⁽⁴⁾ OJ C 325, 22.12.2005, p. 22.

⁽⁵⁾ OJ C 16, 22.1.2009, p. 1.

Commission notice on the application of the State aid rules to measures relating to direct business taxation

(98/C 384/03)

(Text with EEA relevance)

Introduction

1. On 1 December 1997, following a wide-ranging discussion on the need for coordinated action at Community level to tackle harmful tax competition, the Council (Ecofin) adopted a series of conclusions and agreed a resolution on a code of conduct for business taxation (hereinafter 'code of conduct') ⁽¹⁾. On that occasion, the Commission undertook to draw up guidelines on the application of Articles 92 and 93 of the Treaty to measures relating to direct business taxation and committed itself 'to the strict application of the aid rules concerned'. The code of conduct aims to improve transparency in the tax area through a system of information exchanges between Member States and of assessment of any tax measures that may be covered by it. For their part, the State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition.
2. The Commission's undertaking regarding State aid in the form of tax measures forms part of the wider objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition in the single market. The principle of incompatibility with the common market and the derogations from that principle apply to aid 'in any form whatsoever', including certain tax measures. However, the question whether a tax measure can be qualified as aid under Article 92(1) of the Treaty calls for clarification which this notice proposes to provide. Such clarification is particularly important in view of the procedural requirements that stem from designation as aid and of the consequences where Member States fail to comply with such requirements.
3. Following the completion of the single market and the liberalisation of capital movements, it has also become apparent that there is a need to examine the particular effects of aid granted in the form of tax measures and to spell out the consequences as regards assessment of the aid's compatibility with the common market ⁽²⁾. The establishment of economic and monetary union and the consolidation of national budgets which it entails will make it even more essential to have strict control of State aid in whatever form it may take. Similarly, account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States.
4. In addition to the objective of ensuring that Commission decisions are transparent and predictable, this notice also aims to ensure consistency and equality of treatment between Member States. The Commission intends, as the code of conduct notes, to examine or re-examine case by case, on the basis of this notice, the tax arrangements in force in the Member States.

A. Community powers of action

5. The Treaty empowers the Community to take measures to eliminate various types of distortion that harm the proper functioning of the common market. It is thus essential to distinguish between the different types of distortion.
6. Some general tax measures may impede the proper functioning of the internal market. In the case of such measures, the Treaty provides, on the one hand, for the possibility of harmonising Member States' tax provisions on the basis of Article 100 (Council directives, adopted unanimously). On the other, some disparities between planned or existing general provisions in Member States may distort competition and create distortions that need to be eliminated on the basis of Articles 101 and 102 (consultation of the relevant Member States by the Commission; if necessary, Council directives adopted by a qualified majority).

⁽¹⁾ OJ C 2, 6.1.1998, p. 1.

⁽²⁾ See action plan for the single market, CSE(97) 1, 4 June 1997, strategic target 2, action 1.

7. The distortions of competition deriving from State aid fall under a system of prior Commission authorisation, subject to review by the Community judicature. Pursuant to Article 93(3), State aid measures must be notified to the Commission. Member States may not put their proposed aid measures into effect until the Commission has approved them. The Commission examines the compatibility of aid not in terms of the form which it may take, but in terms of its effect. It may decide that the Member State must amend or abolish aid which the Commission finds to be incompatible with the common market. Where aid has already been implemented in breach of the procedural rules, the Member State must in principle recover it from the recipient(s).

B. Application of Article 92(1) of the EC Treaty to tax measures

8. Article 92(1) 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'. In applying the Community rules on State aid, it is irrelevant whether the measure is a tax measure, since Article 92 applies to aid measures 'in any form whatsoever'. To be termed aid, within the meaning of Article 92, a measure must meet the cumulative criteria described below.

9. Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:

- a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),
- a total or partial reduction in the amount of tax (such as exemption or a tax credit),
- deferment, cancellation or even special rescheduling of tax debt.

10. Secondly, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States⁽³⁾. Furthermore, State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.

11. Thirdly, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of the beneficiary's legal status or means of financing. Under settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Member States. The mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected. Neither the fact that aid is relatively small in amount⁽⁴⁾, nor the fact that the recipient is moderate in size or its share of the Community market very small⁽⁵⁾, nor indeed the fact that the recipient does not carry out exports⁽⁶⁾ or exports virtually all its production outside the Community⁽⁷⁾ do anything to alter this conclusion.

12. Lastly, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system'⁽⁸⁾. If so, the measure is not considered to be aid within the meaning of Article 92(1) of the Treaty. These various aspects are looked at below.

⁽³⁾ Judgment of the Court of Justice in Case 248/84 Germany v. Commission [1987] ECR 4013.

⁽⁴⁾ With the exception, however, of aid meeting the tests of the *de minimis* rule. See the Commission notice published in OJ C 68, 6.3.1996, p. 9.

⁽⁵⁾ Joined Cases C-278/92, C-279/92 and C-280/92 Spain v. Commission [1994] ECR I-4103.

⁽⁶⁾ Case 102/87 France v. Commission [1998] ECR 4067.

⁽⁷⁾ Case C-142/87 Belgium v. Commission [1990] ECR I-959.

⁽⁸⁾ Case 173/73 Italy v. Commission [1974] ECR 709.

Distinction between State aid and general measures

13. Tax measures which are open to all economic agents operating within a Member State are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not *de facto* be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of Member States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:

— tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),

— measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment).

14. The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid. Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.

15. In a judgment delivered in 1974 (*), the Court of Justice held that any measure intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system 'without there being any justifi-

cation for this exemption on the basis of the nature or general scheme of this system' constituted State aid. The judgment also states that 'Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects'. The judgment also points out that the fact that the measure brings charges in the relevant sector more into line with those of its competitors in other Member States does not alter the fact that it is aid. Such divergences between tax systems, which, as pointed out above, are covered by Articles 100 to 102, cannot be corrected by unilateral measures that target the firms which are most affected by the disparities between tax systems.

16. The main criterion in applying Article 92(1) to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned. If this is not the case, then State aid is involved.

The selectivity or specificity criterion

17. The Commission's decision-making practice so far shows that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 92(1). Measures which are regional or local in scope may favour certain undertakings, subject to the principles outlined in paragraph 16. The Treaty itself qualifies as aid measures which are intended to promote the economic development of a region. Article 92(3)(a) and (c) explicitly provides, in the case of this type of aid, for possible derogations from the general principle of incompatibility laid down in Article 92(1).

18. The Treaty clearly provides that a measure which is sectorally specific is caught by Article 92(1). Article 92(1) expressly includes the phrase 'the production of certain goods' among the criteria determining whether there is aid that is subject to Commission

(*) See footnote 8.

monitoring. According to well-established practice and case-law, a tax measure whose main effect is to promote one or more sectors of activity constitutes aid. The same applies to a measure that favours only national products which are exported⁽¹⁰⁾. Furthermore, the Commission has taken the view that a measure which targets all of the sectors that are subject to international competition constitutes aid⁽¹¹⁾. A derogation from the base rate of corporation tax for an entire section of the economy therefore constitutes, except for certain cases⁽¹²⁾, State aid, as the Commission decided for a measure concerning the whole of the manufacturing sector⁽¹³⁾.

19. In several Member States, different tax rules apply depending on the status of the undertakings. Some public undertakings, for example, are exempt from local taxes or from company taxes. Such rules, which accord preferential treatment to undertakings having the legal status of public undertaking and carrying out an economic activity, may constitute State aid within the meaning of Article 92 of the Treaty.

20. Some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions (intra-group services, intermediation or coordination) or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid as referred to in Article 92(1).

Discretionary administrative practices

21. The discretionary practices of some tax authorities may also give rise to measures that are caught by Article 92. The Court of Justice acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the

discretionary power goes beyond the simple management of tax revenue by reference to objective criteria⁽¹⁴⁾.

22. If in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.

Justification of a derogation by 'the nature or general scheme of the system'

23. The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system⁽¹⁵⁾. However, it is up to the Member State to provide such justification.

24. The progressive nature of an income tax scale or profit tax scale is justified by the redistributive purpose of the tax. Calculation of asset depreciation and stock valuation methods vary from one Member State to another, but such methods may be inherent in the tax systems to which they belong. In the same way, the arrangements for the collection of fiscal debts can differ from one Member State to the other. Lastly, some conditions may be justified by objective differences between taxpayers. However, if the tax authority has discretionary freedom

⁽¹⁰⁾ Joined Cases 6 and 11/69 Commission v. France [1969] ECR 561.

⁽¹¹⁾ Commission Decision 97/239/EC of 4 December 1996 in the 'Maribel bis/ter' case (OJ L 95, 10.4.1997, p. 25) (currently *sub judice*, Case C-75/97).

⁽¹²⁾ In particular, agriculture and fisheries, see paragraph 27.

⁽¹³⁾ Commission decision of 22 July 1998 in the 'Irish corporation tax' case (SG(98) D/7209) not yet published.

⁽¹⁴⁾ Case C-241/94 France v. Commission (Kimberly Clark Sopalin) [1996] ECR I-4551.

⁽¹⁵⁾ Commission decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ L 146, 20.6.1996, p. 42).

to set different depreciation periods or different valuation methods, firm by firm, sector by sector, there is a presumption of aid. Such a presumption also exists when the fiscal administration handles fiscal debts on a case by case basis with an objective different from the objective of optimising the recovery of tax debts from the enterprise concerned.

25. Obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, such as foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits. Furthermore, it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members.
26. A distinction must be made between, on the one hand, the external objectives assigned to a particular tax scheme (in particular, social or regional objectives) and, on the other, the objectives which are inherent in the tax system itself. The whole purpose of the tax system is to collect revenue to finance State expenditure. Each firm is supposed to pay tax once only. It is therefore inherent in the logic of the tax system that taxes paid in the State in which the firm is resident for tax purposes should be taken into account. Certain exceptions to the tax rules are, however, difficult to justify by the logic of a tax system. This is, for example, the case if non-resident companies are treated more favourably than resident ones or if tax benefits are granted to head offices or to firms providing certain services (for example, financial services) within a group.
27. Specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agriculture or fisheries sectors), may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors; such provisions do not therefore constitute State aid. Lastly, the logic underlying certain specific provisions on the taxation of small and medium-sized enterprises (including small agricultural enterprises⁽¹⁶⁾) is comparable to that underlying the progressiveness of a tax scale.

⁽¹⁶⁾ Operators in the agricultural sector with no more than 10 annual work units.

C. Compatibility with the common market of State aid in the form of tax measures

28. If a tax measure constitutes aid that is caught by Article 92(1), it can nevertheless, like aid granted in other forms, qualify for one of the derogations from the principle of incompatibility with the common market provided for in Article 92(2) and (3). Furthermore, where the recipient, whether a private or public undertaking, has been entrusted by the State with the operation of services of general economic interest, the aid may also qualify for application of the provisions of Article 90 of the Treaty⁽¹⁷⁾.
29. The Commission could not, however, authorise aid which proved to be in breach both of the rules laid down in the Treaty, particularly those relating to the ban on discrimination and to the right of establishment, and of the provisions of secondary law on taxation⁽¹⁸⁾. Such aspects may, in parallel, be the object of a separate procedure on the basis of Article 169. As is clear from case-law, those aspects of aid which are indissolubly linked to the object of the aid and which contravene specific provisions of the Treaty other than Articles 92 and 93 must however be examined in the light of the procedure under Article 93 as part of an overall examination of the compatibility or the incompatibility of the aid.
30. The qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid. However the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, *inter alia*, the effects of aid that are brought to light in the application of the code of conduct.
31. Where a fiscal aid is granted in order to provide an incentive for firms to embark on certain specific projects (investment in particular) and where its intensity is limited with respect to the costs of carrying out the project, it is no different from a subsidy and may be accorded the same treatment. Nevertheless, such arrangements must lay down sufficiently transparent rules to enable the benefit conferred to be quantified.

⁽¹⁷⁾ Judgment of the Court of First Instance in Case T-106/95 FFSA and others v. Commission [1997] ECR II-229. Order of the Court of Justice in Case C-174/97 P [1998] I-1303.

⁽¹⁸⁾ Case 74/76 Iannelli v. Meroni [1977] ECR 557. See also Cases 73/79 'Sovraprezzo' [1980] ECR 1533, T-49/93 'SIDE' [1995] ECR II-2501 and Joined Cases C 142 and 143/80 'Salengo' [1981] ECR 1413.

32. In most cases, however, tax relief provisions are general in nature: they are not linked to the carrying-out of specific projects and reduce a firm's current expenditure without it being possible to assess the precise volume involved when the Commission carries out its *ex ante* examination. Such measures constitute 'operating aid'. Operating aid is in principle prohibited. The Commission authorises it at present only in exceptional cases and subject to certain conditions, for example in shipbuilding, certain types of environmental protection aid ⁽¹⁹⁾ and in regions, including ultra-peripheral regions, covered by the Article 92(3)(a) aid derogation provided that they are duly justified and their level is proportional to the handicaps they are intended to offset ⁽²⁰⁾. It must in principle (with the exception of the two categories of aid mentioned below) be degressive and limited in time. At present, operating aid can also be authorised in the form of transport aid in ultra-peripheral regions and in certain Nordic regions that are sparsely populated and are seriously handicapped in terms of accessibility. Operating aid may not be authorised where it represents aid for exports between Member States. As for State aid in favour of the maritime transport sector the specific rules for that sector apply ⁽²¹⁾.

33. If it is to be considered by the Commission to be compatible with the common market, State aid intended to promote the economic development of particular areas must be 'in proportion to, and targeted at, the aims sought'. For the examination of regional aid the criteria allow account to be taken of other possible effects, in particular of certain effects brought to light by the code of conduct. Where a derogation is granted on the basis of regional criteria, the Commission must ensure in particular that the relevant measures:

— contribute to regional development and relate to activities having a local impact. The establishment of off-shore activities does not, to the extent that their externalities on the local economy are low, normally provide satisfactory support for the local economy,

— relate to real regional handicaps. It is open to question whether there are any real regional handicaps for activities for which the additional

costs have little incidence, such as for example the transport costs for financing activities, which lend themselves to tax avoidance,

— are examined in a Community context ⁽²²⁾. The Commission must in this respect take account of any negative effects which such measures may have on other Member States.

D. Procedures

34. Article 93(3) requires Member States to notify the Commission of all their 'plans to grant or alter aid' and provides that any proposed measures may not be put into effect without the Commission's prior approval. This procedure applies to all aid, including tax aid.

35. If the Commission finds that State aid which has been put into effect in breach of this rule does not qualify for any of the exemptions provided for in the Treaty and is therefore incompatible with the common market, it requires the Member State to recover it, except where that would be contrary to a general principle of Community law, in particular legitimate expectations to which the Commission's behaviour can give rise. In the case of State aid in the form of tax measures, the amount to be covered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. Interest is added to this basic amount. The interest rate to be applied is equivalent to the reference rate used to calculate the grant equivalent of regional aid.

36. Article 93(1) states that the Commission 'shall in cooperation with Member States, keep under constant review all systems of aid existing in those States'. Such review extends to State aid in the form of tax measures. So as to allow such review to be carried out, the Member States are required to submit to the Commission every year reports on their existing State aid systems. In the case of tax relief or full or partial tax exemption, the reports must provide an estimate of budgetary revenue lost. Following its review, the Commission may, if it

⁽¹⁹⁾ Community guidelines on State aid for environmental protection (OJ C 72, 10.3.1994, p. 3).

⁽²⁰⁾ Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

⁽²¹⁾ Community guidelines on State aid to maritime transport (OJ C 205, 5.7.1997, p. 5).

⁽²²⁾ Case 730/79 Philip Morris v. Commission [1980] ECR 2671.

considers that the scheme is not or is no longer compatible with the common market, propose that the Member State amend or abolish it.

publication, examine the plans for tax aid notified to it and tax aid illegally implemented in the Member States and will review existing systems. This notice is published for guidance purposes and is not exhaustive. The Commission will take account of all the specific circumstances in each individual case.

E. Implementation

37. The Commission will, on the basis of the guidelines set out in this notice and as from the time of its

38. The Commission will review the application of this notice two years after its publication.

Non-opposition to a notified concentration

(Case No IV/M.1202 — Renault/Iveco)

(98/C 384/04)

(Text with EEA relevance)

On 22 October 1998, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EEC) No 4064/89. The full text of the decision is only available in French and will be made public after it is cleared of any business secrets it may contain. It will be available:

- as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),
- in electronic form in the 'CFR' version of the CELEX database, under document number 398M1202. CELEX is the computerised documentation system of European Community law; for more information concerning subscriptions please contact:

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Tel. (352) 29 29-42455, fax (352) 29 29-42763.

Withdrawal of notification of a concentration

(Case No IV/M.1246 — LHZ/Carl Zeiss)

(98/C 384/05)

(Text with EEA relevance)

On 24 September 1998, the European Commission received notification of a proposed concentration between LH Systems and Carl Zeiss Stiftung. On 1 December 1998, the notifying parties informed the Commission that they withdrew their notification.

H. REFERENCE/DISCOUNT RATES AND RECOVERY INTEREST RATES

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission on the revision of the method for setting the reference and discount rates

(2008/C 14/02)

(This communication replaces the previous notices on the method for setting the reference and discount rates)

REFERENCE AND DISCOUNT RATES

Within the framework of the Community control of State aid, the Commission makes use of reference and discount rates. The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. They are also used to check compliance with the *de minimis* rule and block exemption regulations.

BACKGROUND TO THE REFORM

The main reason for re examining the methodology for setting reference and discount rates is that the required financial parameters are not always available in all Member States, especially in the new ones ⁽¹⁾. In addition, the current method could be improved in order to take account of the debtor's creditworthiness and collaterals.

Therefore, this Communication presents a revised method for setting reference and discount rates. The proposed approach builds on the current arrangement, which is accepted by all Member States and practical to apply, to develop a new method that mitigates some of the current shortcomings, is compatible with the various financial systems in the EU (in particular in the new Member States) and remains simple to implement.

STUDY

A study by Deloitte & Touche ⁽²⁾, commissioned by DG Competition, proposes a system based on two pillars: a 'standard' approach and an 'advanced' approach.

⁽¹⁾ The current reference rates for these Member States are those communicated by the Member States as reflecting a suitable market rate. The methodology for arriving at these rates diverges from one Member State to another.

⁽²⁾ Available on the website of DG Competition:
http://ec.europa.eu/comm/competition/state_aid/others/

Standard approach

In this approach, the Commission publishes, each quarter, a base rate calculated on several maturities — 3 months, 1 year, 5 years and 10 years — and for various currencies. IBOR rates ⁽¹⁾ and ask swap rates are used or, in the absence of these parameters, government bond rates. The premium applied to obtain the reference rate for a loan is calculated according to the borrower's creditworthiness and collaterals. According to the rating category of the company ('rating' provided by rating agencies in the case of major companies or by banks in the case of SMEs), the margin applicable to the default case (normal rating and normal collateralisation ⁽²⁾) represents 220 basis points. The increase could be up to 1 650 in the case of 'low' creditworthiness and low collateralisation.

Advanced approach

This approach would allow Member States to appoint an independent calculation agent — a central bank for instance — in charge of publishing regularly a fair reference interest rate, for a higher number of maturities and on a more frequent basis than the standard approach. This approach would be justified by the knowledge and proximity of the financial and banking data available to this institution in comparison with the Commission. In that case, the Commission and an external auditor would validate calculation methods. In this approach, opting out, in certain cases, could be considered.

Weaknesses

Despite the economic relevance of the two methods, certain difficulties can be underlined.

Standard approach:

- it does not solve the problem of the lack of financial data in the new Member States and adds new, not readily accessible parameters,
- this standard method could favour large companies to the detriment of SMEs for which either no rating is available, or a less advantageous one exists (in particular because of information asymmetry with respect to the lender). It could give rise to multiple disputes on the subject of calculation methods for the premium to be applied according to creditworthiness and the level of collaterals,
- it does not simplify the task of Member States, in particular regarding calculations to check compliance with the *de minimis* rule and the block exemption regulations.

Advanced method:

- the advanced method could prove problematic when applied to aid schemes: the volatility of market rates might make the difference between the underlying rate of a loan scheme and the then valid reference rate so advantageous to the borrower that some measures would become incompatible with the State aid rules,
- a quarterly adjustment of the rates would complicate the handling of cases as the calculated aid amounts may vary considerably between the beginning of the assessment phase and the date of the final decision taken by the Commission,
- these arrangements seem overly complicated and may fail to ensure consistently fair treatment across Member States.

NEW METHODOLOGY

To avoid these difficulties, the Commission proposes a method that:

- is easy to apply (in particular for the Member States when dealing with measures falling under the *de minimis* or block exemption regulations),
- ensures equal treatment across Member States with minimum deviations from current practice and facilitating the application of reference rates for the new Member States,
- uses simplified criteria taking into account firms' creditworthiness instead of the mere size of undertakings, which seems a too simplistic criterion.

⁽¹⁾ Inter bank offered rate on the money market.

⁽²⁾ Cases where the recipient shows a satisfactory rating (BB) and a loss given default rate between 31 % and 59 %.

Moreover, this method makes it possible to avoid adding uncertainty and complexity to calculation methods in a changing banking and financial environment due to the implementation of the Basel II framework, which could have a significant impact on the allocation of capital as well as on banks' behaviour. The Commission will continue to monitor this changing environment and, if necessary, provide further guidance.

COMMISSION NOTICE

The main reason for re-examining the methodology for setting reference and discount rates is that the required financial parameters are not always available in all Member States. In addition, the current method can be improved in order to take account of the debtor's creditworthiness and collaterals.

The Commission therefore adopts the following methodology for setting the reference rates:

— Calculation basis: 1 year IBOR

The base rate is based on 1 year money market rates, available in almost all Member States, the Commission reserving the right to use shorter or longer maturities adapted to certain cases.

Where those rates are not available, the 3 month money market rate will be used.

In the absence of reliable or equivalent data or in exceptional circumstances the Commission may, in close cooperation with the Member State(s) concerned and in principle based on data from that Member State's Central Bank, determine another calculation basis.

— Margins ⁽¹⁾

The following margins are to be applied in principle depending on the rating of the undertaking concerned and the collateral ⁽²⁾ offered.

Loan margins in basis points			
Rating category	Collateralisation		
	High	Normal	Low
Strong (AAA A)	60	75	100
Good (BBB)	75	100	220
Satisfactory (BB)	100	220	400
Weak (B)	220	400	650
Bad/Financial difficulties (CCC and below)	400	650	1 000 ⁽¹⁾

⁽¹⁾ Subject to the application of the specific provisions for rescue and restructuring aid, as currently laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2) and in particular point 25(a), which refers to 'a rate at least comparable with the rates observed for loans to healthy companies, and in particular at the reference rates adopted by the Commission'. Hence, for rescue aid cases, the 1-year IBOR increased with at least 100 basis points shall be applied.

Normally, 100 basis points are added to the base rate. This assumes (i) loans to undertakings with satisfactory rating and high collateral; or (ii) loans to undertakings with good rating and normal collateral.

⁽¹⁾ As follows from the study, the margin is largely independent of the maturity of the loan.

⁽²⁾ Normal collateral should be understood as the level of collateral normally required by financial institutions as a guarantee for their loan. The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor's exposure taking into account recoverable amounts from collateral and the bankruptcy assets; as a consequence the LGD is inversely proportional to the validity of collaterals. For the present communication it is assumed that 'High' collateralisation implies an LGD below or equal to 30 %, 'Normal' collateralisation an LGD between 31 % and 59 %, and 'Low' collateralisation an LGD above or equal to 60 %. For more details, on the notion LGD, see Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework — Comprehensive Version, available on: <http://www.bis.org/publ/bcbs128.pdf>

For borrowers that 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 base rate should be increased by at least 400 basis points (depending on the available collaterals) and the margin can never be lower than the one which would be applicable to the parent company.

Ratings do not need to be obtained from specific rating agencies — national rating systems or rating systems used by banks to reflect default rates are equally acceptable ⁽¹⁾.

The above margins may be revised from time to time to take account of the market situation.

— Update

An update of the reference rate will be carried out every year. The base rate will thus be calculated on the basis of the 1 year IBOR recorded in September, October and November of the previous year. The then fixed base rate will be in force as from the first of January. For the period from 1 July 2008 until 31 December 2008, the reference rate will exceptionally be calculated on the basis of the 1 year IBOR recorded in February, March and April 2008, subject to the application of the next paragraph.

In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the previous three months, deviates by 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.

— Discount rate: Calculation of net present value

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.

— The present methodology will enter into force as of 1 July 2008.

⁽¹⁾ For a comparison between the most commonly used credit rating mechanisms, see e.g. Table 1 in Working Paper No 207 of the Bank for International settlements:
<http://www.bis.org/publ/work207.pdf>

I. TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN MEMBER STATES AND PUBLIC UNDERTAKINGS

Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings in company capital

(Bulletin EC 9- 1984, pages 28- 29 of the English version)

2.1.30. More and more often recently the Commission has had to rule on the compatibility of the acquisition of public authorities' holdings in company capital with the EEC Treaty rules on State aids.

To prevent a major breach in State aid discipline which could imperil all the Community is doing in this connection, the Commission has felt essential to spell out how this discipline applies in cases where the authorities acquire a participation in undertakings.

The Commission also felt it should have access to the information necessary to keep a proper watch on such acquisitions since it is frequently not apparent that they involve aid.

The Commission has therefore sent Member States a paper¹ explaining its general approach to the acquisition of shareholdings by the public authorities and setting out Member States' obligations in the field.

The paper in no way prejudices the question whether such aids are actually compatible or incompatible with the discipline and rules applying to them under the Treaty.

Public authorities' holdings in company capital

The Commission's position

(Bulletin EC 9- 1984, pages 93- 95 of the English version)

3.5.1. The Commission has sent Member States a paper explaining its general approach to the acquisition of shareholdings by the public authorities and setting out Member States' obligations in the field:

'Public holding' means a direct holding of central, regional or local government, or a direct holding of financial institutions or other national, regional or industrial agencies² which are funded from State resources within the meaning of Article 92(1) of the EC Treaty, or over which central, regional or local government exercises a dominant influence.

The Commission has already had occasion in the past to consider the question of public holdings in company capital from the angle of policy on State aid; in most cases, in view of the particular circumstances, it has regarded them as constituting State aid. This position is spelt out clearly in the steel and shipbuilding codes.

The steel code states that 'the concept of aid includes ... any aid elements contained in the financing measures taken by Member States in respect of the steel undertakings which they directly or indirectly control and which do not count as the provision of equity capital according to standard company practice in a market economy' (Commission Decision No

¹ Point 3.5.1.

² This includes public undertakings as defined in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980).

2320/81/ECSC of 7 April 1981 establishing Community rules for aid to the steel industry³: recital II, last paragraph, and Article 1). Pursuant to that Decision the Commission has usually regarded any contribution of capital to companies as State aid.

The shipbuilding code contains a formula identical to the one in the steel code (Council Directive No 81/363/EEC of 28 April 1981 on aid to shipbuilding⁴: last recital and Article 1(e)).

1. The Treaty establishes both the principle of impartiality with regard to the system of property ownership (Article 222) and the principle of equality between public and private undertakings. This means that Commission action may neither penalize nor favour public authorities which provide companies with equity capital. Nor is it for the Commission to express any opinion as to the choice companies make between methods of financing - loan or equity - whether the funds are of private or public origin.

Where, applying the guidelines laid down in this paper, it is apparent that a public authority which injects capital by acquiring a holding in a company is not merely providing equity capital under normal market economy conditions, the case has to be assessed in the light of Article 92 of the EC Treaty.

2. Four types of situation can be distinguished in which public authorities may have occasion to acquire a holding in the capital of companies:

(a) the setting up of a company,

(b) partial or total transfer of ownership from the private to the public sector,

(c) in an existing public enterprise, injection of fresh capital or conversion of endowment funds into capital,

(d) in an existing private sector company, participation in an increase in share capital.

3. On this basis four cases can be distinguished.

3.1. Straightforward partial or total acquisition of a holding in the capital of an existing company, without any injection of fresh capital, does not constitute aid to the company.

3.2. Nor is State aid involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply:

(i) where a new company is set up with the public authorities holding the entire capital or a majority or minority interest, provided the authorities apply the same criteria as provider of capital under normal market economy conditions;

(ii) where fresh capital is injected into a public enterprise, provided this fresh capital corresponds to new investment needs and to costs directly linked to them, that the industry in which the enterprise operates does not suffer from structural overcapacity in the common market, and that the enterprise's financial position is sound;

³ OJ L 228, 13.8.1981.

⁴ OJ L 137, 23.5.1981.

(iii) where the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance;

(iv) where, even though the holding is acquired in the manner referred to in either of the last two indents of Section 3.3 below, it is in a small or medium-sized enterprise which because of its size is unable to provide adequate security on the private financial market, but whose prospects are such as to warrant a public holding exceeding its net assets or private investment;

(v) where the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regarded as the normal behaviour of a provider of capital, although profitability is delayed;

(vi) where the recipient company's development potential, reflected in innovative capacity from investment of all kinds, is such that the operation may be regarded as an investment involving a special risk but likely to pay off ultimately.

3.3. On the other hand, there is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

This is the case:

(i) where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested;

(ii) where, because of its inadequate cash flow if for no other reason, the company would be unable to raise the funds needed for an investment programme on the capital market;

(iii) where the holding is a short term one, with duration and selling price fixed in advance, so that the return to the provider of capital is considerably less than he could have expected from a capital market investment for a similar period;

(iv) where the public authorities' holding involves the taking over or the continuation of all or part of the nonviable operations⁵ of an ailing company through the formation of a new legal entity;

(v) where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook;

(vi) where the amount of the holding exceeds the real value (net assets plus value of any goodwill or knowhow) of the company, except in the case of companies of the kind referred to in the fourth indent of Section 3.2. above.

3.4. Some acquisitions may not fall within the categories indicated in Sections 3.2 and 3.3 so that it cannot be decided from the outset whether they do, or do not constitute State aid.

⁵ Excluding the straightforward takeover of the assets of a company which has become insolvent or gone into liquidation.

In certain circumstances, however, there is a presumption that there is indeed State aid.

This is the case where:

- (i) the authorities' intervention takes the form of acquisition of a holding combined with other types of intervention which need to be notified pursuant to Article 93(3);
- (ii) the holding is taken in an industry experiencing particular difficulties, without the circumstances being covered by Section 3.3; accordingly, where the Commission finds that an industry is suffering from structural overcapacity and even though most such cases will be within the scope of Section 3.3, it may consider it necessary to monitor all holdings in that industry, including those coming under Section 3.2.

4. Leaving aside the fact that the Commission has at all times the right to request information from the Member States case by case, the obligations devolving on Member States in the light of the Commission's practice to date and the approach outlined here should be set out anew and specified in detail.

4.1. In the case referred to at 3.1, there is no need to place any particular obligations on Member States.

4.2. In the cases referred to at 3.2, the Commission would ask Member States to inform it retrospectively by means of regular, and normally annual, reports on holdings acquired by financial institutions and directly by public authorities. The information given should include the following at least, possibly as part of the financial institutions' reports:

- (i) name of the institution or authority which acquired the holding,
- (ii) name of the company involved,
- (iii) amount of the holding,
- (iv) capital of the company before the holding was acquired,
- (v) industry in which the company operates,
- (vi) number of employees.

4.3. As regards the cases referred to in Section 3.3, since these do constitute State aid, Member States are required to notify the Commission pursuant to Article 93(3) of the EC Treaty before they are put into effect.

4.4. With regard to the cases referred to in Section 3.4 in which it is not clear from the outset whether or not they involve State aid, Member States should inform the Commission retrospectively by means of regular and normally annual reports in the manner described in Section 4.2.

In cases of the kind described in Section 3.4 where there is a presumption of State aid, the Commission should be informed in advance. On the basis of an examination of the information received, it will decide within 15 working days whether the information should be regarded as notification for the purposes of Article 93(3) of the EC Treaty.

4.5. Without prejudice to the Commission's right to ask for information on specific cases, the obligation to supply regular retrospective information only applies to shareholdings in companies where one of the following thresholds is exceeded:

- (i) balance sheet total: ECU 4 million,
- (ii) net turnover: ECU 8 million,
- (iii) number of employees: 250.

The Commission may review these thresholds in the light of future experience.

5. Member States also use certain forms of intervention which, while not having all the features of a capital contribution in the form of acquisition of a public holding, resemble this sufficiently to be treated in the same way. This is the case notably with capital contributions taking the form of convertible debenture loans or of loans where the financial yield is, at least in part, dependent on the company's financial performance.

The criteria in Section 3 also apply in respect of these forms of intervention, and Member States are under the obligations set out in Section 4.

6. In certain cases the Commission has authorized aid measures which also include the acquisition of holdings in certain circumstances. The various procedural clauses in the authorization decisions are not affected by the provisions in this paper.

7. This paper also applies to holdings in agricultural undertakings. It may be adapted to take account of any new circumstances arising from the accession of new Member States.

COMMISSION COMMUNICATION TO THE MEMBER STATES

(93/C 307/03)

Following the annulment of the Commission's communication, concerning 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, by the Court of Justice of the European Communities, in June 1993, the Commission has decided to adopt as a directive, the obligation for Member States to provide the Commission with financial data on an annual basis. This Directive has been forwarded to Member States and has been published ⁽¹⁾.

At the same time the Commission readopted the above communication omitting the reporting requirement that was contained in paragraphs 45 to 53, and references thereto, previously set out in paragraphs 2, 27, 29, 31 and 54.

This revised text is reproduced below:

⁽¹⁾ OJ No L 254, 12. 10. 1993.

Commission communication to the Member States

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

I. INTRODUCTION

1. A reinforced application of policy towards State aids is necessary for the successful completion of the internal market. One of the areas identified as worthy of attention in this respect is public undertakings. There is need for both increased transparency and development of policy for public undertakings because they have not been sufficiently covered by State aid disciplines:

- in many cases only capital injections and not other forms of public funds have been fully included in aid disciplines for public undertakings,
- in addition, these disciplines in general only cover loss-making public undertakings,
- finally it also appears that there is a considerable volume of aid to public undertakings given other than through approved aid schemes (which are also available to private undertakings) which have not been notified under Article 93 (3).

2. This communication is designed to remedy this situation. In the first place it explains the legal background of the Treaty and outlines the aid policy and case-law of the Council, Parliament, Commission and Court of Justice for public enterprises. This will, in particular, focus, on the one hand, on Directive 80/723/EEC on the transparency of the financial

relationship between public undertakings and the State, and, on the other hand, it will develop the well established principle that where the State provides finances to a company in circumstances that would not be acceptable to an investor operating under normal market economy conditions, State aid is involved. The communication then explains how the Commission intends to increase transparency by applying this principle to all forms of public funds and to companies in all situations.

3. This communication does not deal with the question of the compatibility under one of the derogations provided for in the EEC Treaty because no change is envisaged in this policy. Finally, this communication is limited to the manufacturing sector. This will not, however, preclude the Commission from using the approach described by this communication in individual cases or sectors outside manufacturing to the extent that the principles in this communication apply in these excluded sectors and where it feels that it is essential to determine if State aid is involved.

II. PUBLIC UNDERTAKINGS AND THE RULES OF COMPETITION

4. Article 222 states: 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. In other words the Treaty is neutral in the choice a Member State may make between public and private ownership and does not

prejudice a Member State's right to run a mixed economy. However, these rights do not absolve public undertakings from the rules of competition because the institution of a system ensuring that competition in the common market is not distorted is one of the bases on which the Treaty is built (Article 3 (f)). The Treaty also provides the general rules for ensuring such a system (Articles 85 to 94). In addition the Treaty lays down that these general rules of competition shall apply to public undertakings (Article 90 (1)). There is a specific derogation in Article 90 (2) from the general rule of Article 90 (1) in that the rules of competition apply to all public undertakings including those entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the application of such rules does not obstruct the performance in law or in fact of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. In the context of the State aid rules (Articles 92 to 94), this means that aid granted to public undertakings must, like any other State aid to private undertakings, be notified in advance to the Commission (Article 93 (3)) to ascertain whether or not it falls within the scope of Article 92 (1), i. e. aid that affects trade and competition between Member States. If it falls within Article 92 (1), it is for the Commission to determine whether one of the general derogations provided for in the Treaty is applicable such that the aid becomes compatible with the common market. It is the Commission's role to ensure that there is no discrimination against either public or private undertakings when it applies the rules of competition.

5. It was to ensure this principle of non-discrimination, or neutrality of treatment, that the Commission adopted in 1980 a Directive on the transparency of financial relations between Member States and public undertakings⁽¹⁾. The Commission was motivated by the fact that the complexity of the financial relations between national public authorities and public undertakings tended to hinder its duty of ensuring that aid incompatible with the common market was not granted. It further considered that the State aid rules could only be applied fairly to both public and private undertakings when the financial relations between public authorities and public undertakings were made transparent.

6. The Directive obliged Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent (Article 1). Member States shall, when the Commission considers it necessary so to request, supply

to it the information referred to in Article 1, together with any necessary background information, notably the objectives pursued (Article 5). Although the transparency in question applied to all public funds, the following were particularly mentioned as falling within its scope:

- the setting-off of operating losses,
- the provision of capital,
- non-refundable grants or loans on privileged terms,
- the granting of financial advantages by forgoing profits or the recovery of sums due,
- the forgoing of a normal return on public funds used,
- compensation for financial burdens imposed by the public authorities.

7. The Commission further considered that transparency of public funds must be achieved irrespective of the manner in which such provision of public funds is made. Thus, not only were the flows of funds directly from public authorities to public enterprises deemed to fall within the scope of the Transparency Directive, but also the flows of funds indirectly from other public undertakings over which the public authority holds a dominant influence (Article 2).

8. The legality of the Transparency Directive was upheld by the Court of Justice in its judgment of 6 July 1982⁽²⁾.

8.1. On the argument that there was no necessity for the Directive and that it infringed the rule of proportionality, the Court held as follows (paragraph 18): 'In view of the diverse forms of public undertakings in the various Member States and the ramifications of their activities, it is inevitable that their financial relations with public authorities should themselves be very diverse, often complex and therefore difficult to supervise, even with the assistance of the sources of published information to which the applicant governments have referred. In those circumstances there is an undeniable need for the Commission to seek additional information on those relations by establishing common criteria for all the Member States and for all the undertakings in question'.

⁽¹⁾ Directive 80/723/EEC (OJ No L 195, 29. 7. 1980, p. 35), as amended by Directive 85/413/EEC (OJ No L 229, 28. 8. 1985, p. 20), which included previously excluded sectors.

⁽²⁾ Joined Cases 188 to 190/80, *France, Italy and the United Kingdom v. Commission* [1982] ECR 2545.

8.2. On the argument that the Directive in question infringed the principle of neutrality of Article 222 of the Treaty, the Court held that (paragraph 21), 'it should be borne in mind that the principle of equality, to which the governments refer in connection with the relationship between public and private undertakings in general, presupposes that the two are in comparable situations. ... private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions. The economic and financial consequences of the impact of such factors lead to the establishment between those undertakings and public authorities of financial relations of a special kind which differ from those existing between public authorities and private undertakings. As the Directive concerns precisely those special financial relations, the submission relating to discrimination cannot be accepted.'

8.3. On the argument that the Directive's list of public funds to be made transparent (Article 3) was an attempt to define the notion of aid within the meaning of Articles 92 and 93, the Court stated as follows (paragraph 23): 'In relation to the definition contained in Article 3 of the financial relations which are subject to the rules contained in the Directive, it is sufficient to state that it is not an attempt by the Commission to define the concept of aid which appears in Articles 92 and 93 of the Treaty, but only a statement of the financial transactions of which the Commission considers that it must be informed in order to check whether a Member State has granted aids to the undertakings in question, without complying with its obligation to notify the Commission under Article 93 (3).'

8.4. On the argument that the public enterprises on which information was to be provided (Article 2) was an attempt to define the notion of public undertakings within the meaning of Article 90 of the Treaty, the Court stated that (paragraph 24), 'it should be emphasized that the object of those provisions is not to define the concept as it appears in Article 90 of the Treaty, but to establish the necessary criteria to delimit the group of undertakings whose financial relations with the public authorities are to be subject to the duty laid down by the Directive to supply information'. It continued in paragraph 25 as follows: 'According to Article 2 of the Directive, the expression "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence. According to the second paragraph, such influence is to be presumed when the public authorities directly or indirectly hold the major part of the undertaking's subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body'. It continued in paragraph 26 as follows: 'As the Court has

already stated, the reason for the inclusion in the Treaty of the provisions of Article 90 is precisely the influence which the public authorities are able to exert over the commercial decisions of public undertakings. That influence may be exerted on the basis of financial participation or of rules governing the management of the undertaking. By choosing the same criteria to determine the financial relations on which it must be able to obtain information in order to perform its duty of surveillance under Article 90 (3), the Commission has remained within the limits of the discretion conferred upon it by that provision'.

9. The principles developed by the Court of Justice with respect to the Transparency Directive are now part of the established jurisprudence and of particular importance is the fact that the Court has confirmed that:

- making financial relations transparent and the provision, on request, of information under the Directive is necessary and respects the principle of proportionality,
- the Directive respects the principle of neutrality of treatment of public and private undertakings,
- for the purposes of monitoring compliance with Articles 92 and 93 the Commission has a legitimate interest to be informed of *all the types of flows of public funds* to public enterprises, and
- for the purposes of monitoring compliance with Articles 92 and 93 the Commission has a legitimate interest in the flows of public funds to public undertakings that come either *directly* from the public authorities or *indirectly* from other public undertakings.

III. PRINCIPLES TO BE USED IN DETERMINING WHETHER AID IS INVOLVED

10. Having established over which enterprises and over which funds the Commission has a legitimate interest for the purposes of Articles 90 and 92, it is necessary to examine the principles to be used in determining whether any aid is involved. Only if aid is involved is there any question of any prior notification. Where aid is involved it is necessary to then examine whether any of the derogations provided for in the Treaty are applicable⁽¹⁾. This analysis of determining on the one hand whether aid is involved and on the other whether the aid is compatible under one of the derogations of the Treaty, must be kept as a two stage process if full transparency is to be assured.

⁽¹⁾ See also points 32 and 33 below.

11. When public undertakings, just like private ones, benefit from monies granted under transparent aid schemes approved by the Commission, then it is clear that aid is involved and under what conditions the Commission has authorized its approval. However, the situation with respect to the other forms of public funds listed in the Transparency Directive is not always so clear. In certain circumstances public enterprises can derive an advantage from the nature of their relationship with public authorities through the provision of public funds when this latter provides funds in circumstances that go beyond its simple role as proprietor. To ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise, and the terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions (hereinafter 'market economy investor principle'). As the Commission points out in its communication on 'Industrial policy in an open and competitive environment' (COM(90) 556) 'competition is becoming ever more global and more intense both on the world and on Community markets'. This trend has many implications for European companies, for example with regards to R&D, investment strategies and their financing. Both public and private enterprises in similar sectors and in comparable economic and financial situations must be treated equally with respect to this financing. However if any public funds are provided on terms more favourable (i.e. in economic terms more cheaply) than a private owner would provide them to a private undertaking in a comparable financial and competitive position, then the public undertaking is receiving an advantage not available to private undertakings from their proprietors. Unless the more favourable provision of public funds is treated as aid, and evaluated with respect to one of the derogations of the Treaty, then the principle of neutrality of treatment between public and private undertakings is infringed.

12. This principle of using an investor operating under normal market conditions as a benchmark to determine both whether aid is involved and if so to quantify it, has been adopted by the *Council* and the *Commission* in the steel and shipbuilding sectors, and has been endorsed by the *Parliament* in this context. In addition the Commission has adopted and applied this principle in numerous individual cases. The principle has also been accepted by the *Court* in every case submitted to it as a yardstick for the determination of whether aid was involved.

13. In 1981 the Council adopted the principle of the market economy investor principle on two occasions. Firstly it approved unanimously the Commission decision establishing Community rules for aids to the steel

industry (*), and secondly it approved, by a qualified majority, the Shipbuilding Code (**). In both cases the Council stated that the concept of aid includes any aid elements contained in the financing measures taken by Member States in respect of the steel/shipbuilding undertakings which they *directly or indirectly control* and which do not count as the provision of equity capital *according to standard company practice in a market economy*. Thus not only did the Council approve or adopt the market economy principle, it went along the same lines as the Commission in the abovementioned Transparency Directive, which brought within its scope not only the direct provision of funds but also their indirect provision.

14. The Council has maintained this general principle, most recently in 1989 in the case of steel (*), and in 1990 in the case of shipbuilding (?). In fact in the 1989 steel aid code the Council agreed to prior notification of all provisions of capital or similar financing in order to allow the Commission to decide whether they constituted aid, i.e. could 'be regarded as a genuine provision of risk capital *according to usual investment practice in a market economy*' (Article 1 (2)). The Council also reaffirmed and approved unanimously this principle in Commission Decision 89/218/ECSC concerning new aid to Finsider/ILVA (*).

15. The Parliament has been called upon to give its opinion on the market economy investor principle contained in the Shipbuilding Directives. For these Directives the Parliament agreed to the Commission drafts which included this principle (*).

16. The Commission adopted the same market economy investor principle when it laid down its position in general on public holdings in company capital which still remains valid (10). It stated 'where it is apparent that a public authority which injects capital . . . in a company is not merely providing equity capital under normal market economy conditions, the case has to be assessed in the light of Article 92 of the EEC Treaty' (para-

(*) Decision 81/2320/ECSC of 7 August 1981 (OJ No L 228, 13. 8. 1981, p. 14). See, in particular, the second recital and Article 1.

(**) Council Directive 81/363/EEC of 28 April 1981 (OJ No L 137, 23. 5. 1981, p. 39). See, in particular, the last recital and Article 1 (e).

(*) Commission Decision 322/89/ECSC of 1 February 1989 (OJ No L 38, 10. 2. 1989, p. 8).

(?) Council Directive 90/684/EEC of 21 December 1990, (OJ No L 380, 31. 12. 1990, p. 27).

(*) OJ No L 86, 31. 3. 1989, p. 76.

(*) See for example OJ No C 28, 9. 2. 1981, p. 23, and OJ No C 7, 12. 1. 1987, p. 320.

(10) Communication to the Member States concerning public authorities holdings in company capital. (Bulletin EC 9 — 1984).

graph 1). It considered in particular that State aid was involved 'where the financial position of the company, and particularly the structure and volume of its debts, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested'.

17. The Commission has moreover applied this market economy investor principle in many individual cases to determine whether any aid was involved. The Commission examined in each case the financial circumstances of the company which received the public funds to see if a market economy investor would have made the monies available on similar terms. In the Leeuwarden decision the Commission established that the capital injections constituted aid because 'the overcapacity in the ... industry constituted handicaps indicating that the firm would *probably* have been unable to raise on the private capital market the funds essential to its survival. The situation on the market provides *no reasonable grounds* for hope that a firm urgently needing large-scale restructuring could generate sufficient cash flow to finance the replacement investment necessary ...' ⁽¹¹⁾. This policy has been applied consistently over a number of years. More recently in the CdF/Orkem decision ⁽¹²⁾, the Commission established that the public authority 'injected capital into an undertaking in conditions that are not those of a market economy'. In fact, the company in question 'had very little chance of obtaining sufficient capital from the private market to ensure its survival and long-term stability'. In the ENI-Lanerossi decision ⁽¹³⁾, the Commission stated that 'finance was granted in circumstances that would not be acceptable to a private investor operating under normal market economy conditions, as in the present case the financial and economic position of these factories, particularly in view of the duration and volumes of their losses, was such that a normal return in dividends or capital gains could not be expected for the capital invested' ⁽¹⁴⁾. There have also been a number of cases where the Com-

mission has clearly stated that capital injections by the State have not constituted aid because a reasonable return by way of dividends or capital growth could normally be expected ⁽¹⁵⁾.

18. The Commission has also applied the market economy investor principle to many individual cases under the shipbuilding Directives and steel aid codes. In shipbuilding, for example in Bremer Vulkan ⁽¹⁶⁾, the Commission considered that a bridging loan and the purchase of new shares constituted State aid because it did 'not accept the argument put forward by the German Government that [it] ... only acted like a private investor who happened to be better at foreseeing future market developments than anyone else.' In steel, for example, it took decisions in several individual cases where capital injections were considered as aid ⁽¹⁷⁾.

19. It is noteworthy that in many of the above described cases the capital injected into the public undertaking came not directly from the State but indirectly from State holding companies or other public undertakings.

20. The Court has been called upon to examine a number of cases decided by the Commission in its application of the market economy investor principle set out in the 1984 guidelines. In each case submitted to it, the Court accepted the principle as an appropriate one to be used to determine whether or not aid was involved. It then examined whether the Commission decision sufficiently proved its application in the specific circumstances of the case in question. For example, in its judgment in Case 40/85 ⁽¹⁸⁾ (Boch), the Court stated (paragraph 13):

⁽¹¹⁾ OJ No L 277, 29. 9. 1982, p. 15.

⁽¹²⁾ OJ No C 198, 7. 8. 1990, p. 2.

⁽¹³⁾ OJ No L 16, 20. 1. 1989, p. 52.

⁽¹⁴⁾ Decisions Meura (OJ No L 276, 19. 10. 1984, p. 34), Leeuwarden (OJ No L 277, 29. 9. 1982, p. 15), Intermills I (OJ No L 280, 2. 10. 1982, p. 30), Boch/Noviboch (OJ No L 59, 27. 2. 1985, p. 21), Boussac (OJ No L 352, 15. 12. 1987, p. 42), Alfa-Fiat (OJ No L 394, 31. 5. 1989, p. 9), Pinault-Isoroy (OJ No L 119, 7. 5. 1988, p. 38), Fabelta (OJ No L 62, 3. 3. 1984, p. 18), Ideal Spun (OJ No L 283, 27. 10. 1984, p. 42), Renault (OJ No L 220, 11. 8. 1988, p. 30), Veneziana Vetro (OJ No L 166, 16. 6. 1989, p. 60), Quimigal (OJ No C 188, 28. 7. 1990, p. 3) and IOR/Finalp (not yet published) where the same reasoning can be found.

⁽¹⁵⁾ Decisions CDF/Orkem, in parts, (op. cit.), Quimigal, in parts, (op. cit.), Intermills II (Bulletin EC 4-1990, point 1.1.34) and Ernaelsteen (18th Competition Report, points 212 and 213).

⁽¹⁶⁾ Not yet published.

⁽¹⁷⁾ OJ No L 227, 19. 8. 1983, p. 1. See also, in particular, cases relating to Arbed, Sidmar, ALZ, Hoogovens, Irish Steel, Sacilor/Usinor and British Steel where the same reasoning can be found. In all these steel cases the aid was held to be compatible. More recently, the Council unanimously approved this principle in the Finsider/ILVA case — see point 26 below.

⁽¹⁸⁾ *Belgium v. Commission* [1986] ECR 2321.

'An appropriate way of establishing whether [the] measure is a State aid is to apply the criterion, which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is almost entirely held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question'.

The Court has recently reaffirmed this principle in the *Boussac* judgment⁽¹⁹⁾, where it stated (paragraphs 39 and 40): 'In order to determine if the measures constitute State aid, it is necessary to apply the criterion in the Commission's decision, which was not contested by the French Government, whether it would have been possible for the undertaking to obtain the funds on the private capital market', and 'the financial situation of the company was such that it would not expect an acceptable return on the investment within a reasonable time period and that *Boussac* would not have been able to find the necessary funds on the market' (unofficial translation)⁽²⁰⁾. The Court has recently further refined the market economy investor principle by making a distinction between a private investor whose time horizon is a short-term even speculative one, and that of a private holding group with a longer-term perspective (*Alfa/Fiat* and *Lanerossi*)⁽²¹⁾. 'It is necessary to make clear that the behaviour of a private investor with which the intervention of the public investor ... must be compared, whilst not necessarily that of an ordinary investor placing his capital with a more or less short-term view of its profitability, must at least be that of a private holding or group of enterprises which pursue a structural, global or sectoral policy and which are guided by a longer-term view of profitability'. On the basis of the facts of the case 'the Commission was able to correctly conclude that a private investor, even if taking decisions at the level of the whole group in a wider economic context, would not under normal market economy conditions, have been able to expect an acceptable rate of profitability (even in the long term) on the capital invested ...' (unofficial translation). 'A private investor may well inject new capital to ensure the survival of a company experiencing temporary difficulties, but which after, if necessary, a restructuring will become profitable again. A mother company may also, during a limited time, carry the losses of a subsidiary in order to allow this latter to withdraw from the sector under the most favourable conditions. Such decisions can

be motivated not only by the possibility to get a direct profit, but also by other concerns such as maintaining the image of the whole group or to redirect its activities. However, when the new injections of capital are divorced from all possibility of profitability, even in the long term, these injections must be considered as aid ...' (unofficial translation).

21. The fact that in many of the cases decided by the Court the injections came indirectly from State holding companies or from other public undertakings and not directly from the State, did not alter the aid character of the monies in question. The Court has always examined the economic reality of the situation to determine whether State resources were involved. In the *Steinicke and Weinlig* judgment⁽²²⁾, the Court stated that '... save for the reservation in Article 90 (2) of the Treaty, Article 92 covers all private and public undertakings and all their production' and that 'in applying Article 92 regard must primarily be had to the effects of aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid'. More recently in the *Crédit Agricole* judgment⁽²³⁾, the Court confirmed this and added that '... aid need not necessarily be financed from State resources to be classified as State aid ... there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer aid'.

IV. INCREASED TRANSPARENCY OF POLICY

22. To date most but by no means all of the cases which have come before the Council, the Commission and the Court where the market economy investor principle has been applied have concerned capital injections in loss-making or even near-bankrupt companies. One of the aims of this communication is to increase transparency by more systematically applying aid disciplines

- to public undertakings in all situations, not just those making losses as is the case at present,
- to all the forms of public funds mentioned in the Transparency Directive (Article 3 — see points 6 and 8.3 above), in particular, for loans, guarantees and the rate of return, not just for capital injections as is the case at present.

23. This increased transparency of policy is to be brought about by clearly applying the market economy

⁽¹⁹⁾ Case C-301/87 (not yet published).

⁽²⁰⁾ See also *Inter Mills* Case 323/82, *Leeuwarden* Joined Cases 296/318/82, *Meura* Case 234/84 where the same reasoning can be found.

⁽²¹⁾ Cases C-305/89 and C-303/88 respectively (not yet published).

⁽²²⁾ Case 78/76.

⁽²³⁾ Case 290/83.

investor principle to public undertakings in all situations and all public funds covered by the Transparency Directive. The market economy investor principle is used because:

- it is an appropriate yardstick both for measuring any financial advantage a public undertaking may enjoy over an equivalent private one and for ensuring neutrality of treatment between public and private undertakings,
- it has proved itself practical to the Commission in numerous cases,
- it has been confirmed by the Court (see particularly points 20 and 21 above), and
- it has been approved by the Council in the steel and shipbuilding sector.

Unless this clarification is implemented there is a danger not only of lack of transparency, but also of discrimination against private undertakings which do not have the same links with the public authorities nor the same access to public funds. The current communication is a logical development of existing policy rather than any radical new departure and are necessary to explain the application of the principle to a wider number of situations and a wider range of funds. In fact the Court, the Commission and the Council have already applied the principle of the market economy investor in a limited number of cases to the forms of public funds other than equity which are also the object of this communication — i.e. guarantees, loans, return on capital⁽²⁴⁾.

24. *Guarantee.* In IOR/Finalp (op. cit.) the Commission considered that when a State holding company became the one and only owner of an ailing company (thereby exposing it to unlimited liability under Italian commercial law) this was equivalent to taking extra risk by giving in effect an open-ended *guarantee*. The Commission using its well established principle stated that a market economy investor would normally be reluctant to become the one and only shareholder of a company if as a consequence he must assume unlimited liability for it; he will make sure that this additional risk is outweighed by additional gains.

25. *Loan.* In Boch (op. cit.) the Court stated (paragraphs 12 and 13): 'By virtue of Article 92 (1) ... the

provisions of the Treaty concerning State aid apply to aid granted by a Member State or through State resources in any form whatsoever. It follows ... that no distinction can be drawn between aid granted in the form of *loans* and aid granted in the form of a subscription of capital of an undertaking ... An appropriate way of establishing whether such a measure is a State aid is to apply the criterion ... of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets.'

26. *Return on capital.* When it opened the Article 88 procedure of the ECSC Treaty (letter to the Italian Government of 6 May 1988) in the Finsider/ILVA case, the Commission considered that the loans granted by State credit institutions were not granted to the undertaking in question under conditions acceptable to a private investor operating under normal market conditions, but were dependent on an (*implicit*) *guarantee* of the State and as such constituted State aid. In fact at a later date this implicit guarantee was made explicit when the debts were honoured. The opening of the procedure led to a decision with the unanimous approval of the Council⁽²⁵⁾ which imposed conditions on the enterprise in question to ensure that its *viability* would be re-established, and a *minimum return on capital* should be earned.

V. PRACTICALITY OF THE MARKET ECONOMY INVESTOR PRINCIPLE

27. The practical experience gained by the Commission from the application of State aid rules to public enterprises and the general support among the Community institutions for the basic themes of the market economy investor principle confirm the Commission's view that it is as such an appropriate yardstick to determine whether or not aid exists. However it is noted that the majority of cases to which the mechanism has been applied have been of a particular nature and the wider application of the mechanism may appear to cause certain difficulties. Some further explanations are therefore warranted. In addition, the fear has been expressed that the application of the market economy investor principle could lead to the Commission's judgment replacing the investor and his appreciation of investment projects. In the first place this criticism can be refuted by the fact that this principle

⁽²⁴⁾ It should be noted that this is not an exhaustive list of the different forms of financing which may entail aid. The Commission will act against the provision of any other advantages to public undertakings in a tangible or intangible form that may constitute aid.

⁽²⁵⁾ OJ No L 86, 31. 3. 1989, p. 76. See also the Commission Communication to the Council of 25 October 1988 — SEC(88) 1485 final and point 207 of the 14th Competition Report. In fact, the whole aim of the Steel Code for all Member States was to restore viability through a minimum return and self-financing according to market principles.

has already shown itself to be both an appropriate and practical yardstick for determining which public funds constitute aid in numerous individual cases. Secondly it is not the aim of the Commission in the future, just as it has not been in the past, to replace the investor's judgment. Any requests for extra finance naturally calls for public undertakings and public authorities, just as it does for private undertakings and the private providers of finance, to analyse the risk and the likely outcome of the project.

In turn, the Commission realizes that this analysis of risk requires public undertakings, like private undertakings, to exercise entrepreneurial skills, which by the very nature of the problem implies a wide margin of judgment on the part of the investor. Within that wide margin the exercise of judgment by the investor cannot be regarded as involving State aid. It is in evaluation of the justification for the provision of funds that the Member State has to decide if a notification is necessary in conformity with its obligation under Article 93 (3). In this context, it is useful to recall the arrangements of the 1984 communication on public authorities' holdings which stated that where there is a presumption that a financial flow from the State to a public holding constitutes aid, the Commission shall be informed in advance. On the basis of an examination of the information received it will decide within 15 working days whether the information should be regarded as notification for the purposes of Article 93 (3) (point 4.4.2). Only where there are no objective grounds to reasonably expect that an investment will give an adequate rate of return that would be acceptable to a private investor in a comparable private undertaking operating under normal market conditions, is State aid involved even when this is financed wholly or partially by public funds. It is not the Commission's intention to analyse investment projects on an *ex-ante* basis (unless notification is received in advance in conformity with Article 93 (3)).

28. There is no question of the Commission using the benefit of hindsight to state that the provision of public funds constituted State aid on the sole basis that the out-turn rate of return was not adequate. Only projects where the Commission considers that there were no objective or bona fide grounds to reasonably expect an adequate rate of return in a comparable private undertaking *at the moment the investment/financing* decision is made can be treated as State aid. It is only in such cases that funds are being provided more cheaply than would be available to a private undertaking, i.e. a subsidy is involved. It is obvious that, because of the inherent risks

involved in any investment, not all projects will be successful and certain investments may produce a sub-normal rate of return or even be a complete failure. This is also the case for private investors whose investment can result in sub-normal rates of return or failures. Moreover such an approach makes no discrimination between projects which have short or long-term pay-back periods, as long as the risks are adequately and objectively assessed and discounted at the time the decision to invest is made, in the way that a private investor would.

29. This communication, by making clearer how the Commission applies the market economy investor principle and the criteria used to determine when aid is involved, will reduce uncertainty in this field. It is not the Commission's intention to apply the principles in this communication (in what is necessarily a complex field) in a dogmatic or doctrinaire fashion. It understands that a wide margin of judgment must come into entrepreneurial investment decisions. The principles have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid. This approach will also have to be applied to any cross-subsidization by a profitable part of a public group of undertakings of an unprofitable part. This happens in private undertakings when either the undertaking in question has a strategic plan with good hopes of long-term gain, or that the cross-subsidy has a net benefit to the group as a whole. In cases where there is cross-subsidization in public holding companies the Commission will take account of similar strategic goals. Such cross-subsidization will be considered as aid only where the Commission considers that there is no other reasonable explanation to explain the flow of funds other than that they constituted aid. For fiscal or other reasons certain enterprises, be they public or private, are often split into several legally distinct subsidiaries. However the Commission will not normally ask for information of the flow of funds between such legally distinct subsidiaries of companies for which one consolidated report is required.

30. The Commission is also aware of the differences in approach a market economy investor may have between his minority holding in a company on the one hand and full control of a large group on the other hand. The former relationship may often be characterized as more of a speculative or even short-term interest, whereas the latter usually implies a longer-term interest. Therefore where the public authority controls an individual public undertaking or group of undertakings it will normally be less motivated by purely

short-term profit considerations than if it had merely a minority/non-controlling holding and its time horizon will accordingly be longer. The Commission will take account of the nature of the public authorities' holding in comparing their behaviour with the benchmark of the equivalent market economy investor. This remark is also valid for the evaluation of calls for extra funds to financially restructure a company as opposed to calls for funds required to finance specific projects⁽²⁶⁾. In addition the Commission is also aware that a market economy investor's attitude is generally more favourably disposed towards calls for extra finance when the undertaking or group requiring the extra finance has a good record of providing adequate returns by way of dividends or capital accumulation on past investments. Where a company has underperformed in this respect in comparison with equivalent companies, this request for finance will normally be examined more sceptically by the private investor/owner called upon to provide the extra finance. Where this call for finance is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified. Finally where a decision is made to abandon a line of activity because of its lack of medium/long-term commercial viability, a public group, like a private group, can be expected to decide the timing and scale of its run down in the light of the impact on the overall credibility and structure of the group.

31. In evaluating any calls for extra finance a shareholder would typically have at his disposal the information necessary to judge whether he is justified in responding to these calls for additional finance. The extent and detail of the information provided by the undertaking requiring finance may vary according to the nature and volume of the funding required, to the relationship between the undertaking and the shareholder and even to the past performance of the undertaking in providing an adequate return⁽²⁷⁾. A market economy investor would not usually provide any additional finance without the appropriate level of information. Similar considerations would normally apply to public undertakings seeking finance. This financial information in the form of the relevant documentation should be made available at the specific request of the

Commission if it is considered that it would help in evaluating the investment proposals from the point of view of deciding whether or not their financing constitutes aid⁽²⁸⁾. The Commission will not disclose information supplied to it as it is covered by the obligation of professional secrecy. Therefore investment projects will not be scrutinized by the Commission in advance except where aid is involved and prior notification in conformity with Article 93 (3) is required. However where it has reasonable grounds to consider that aid may be granted in the provision of finance to public undertakings, the Commission, pursuant to its responsibilities under Articles 92 and 93, may ask for the information from Member States necessary to determine whether aid is involved in the specific case in question.

VI. COMPATIBILITY OF AID

32. Each Member State is free to choose the size and nature of its public sector and to vary it over time. The Commission recognizes that when the State decides to exercise its right to public ownership, commercial objectives are not always the essential motivation. Public enterprises are sometimes expected to fulfil non-commercial functions alongside or in addition to their basic commercial activities. For example, in some Member States public companies may be used as a locomotive for the economy, as part of efforts to counter recession, to restructure troubled industries or to act as catalysts for regional development. Public companies may be expected to locate in less developed regions where costs are higher or to maintain employment at levels beyond purely commercial levels. The Treaty enables the Commission to take account of such considerations where they are justified in the Community interest. In addition the provision of some services may entail a public service element, which may even be enforced by political or legal constraints. These non-commercial objectives/functions (i.e. social goods) have a cost which ultimately has to be financed by the State (i.e. taxpayers) either in the form of new finance (e.g. capital injections) or a reduced rate of return on capital invested. This aiding of the provision of public services can in certain circumstances distort competition. Unless one of the derogations of the Treaty is applicable, public undertakings are not exempted from the rules of

⁽²⁶⁾ This may be particularly important for public undertakings that have been deliberately under-capitalized by the public authority owner for reasons extraneous to commercial justifications (e.g. public expenditure restrictions).

⁽²⁷⁾ Minority shareholders who have no 'inside' information on the running of the company may require a more formal justification for providing funds than a controlling owner who may in fact be involved at board level in formulating strategies and is already party to detailed information on the undertaking's financial situation.

⁽²⁸⁾ The provision of this information on request falls within scope of the Commission's powers of investigation of aid under Articles 92 and 93 in combination with Article 5 of the EEC Treaty and under Article 1 (c) of the Transparency Directive which states that the use to which public funds are put should be made transparent.

competition by the imposition of these non-commercial objectives.

33. If the Commission is to carry out its duties under the Treaty, it must have the information available to determine whether the financial flows to public undertakings constitute aid, to quantify such aid and then to determine if one of the derogations provided for in the Treaty is applicable. This communication limits itself to the objective of increasing transparency for the financial flows in question which is an essential first step. To decide, as a second step, whether any aid that is identified is compatible, is a question which is not dealt with because such a decision will be in accordance with the well known principles used by the Commission in the area to which no change is envisaged. (It should be stressed that the Commission is concerned with aid only when it has an impact on intra-Community trade and competition. Thus, if aid is granted for a non-commercial purpose to a public undertaking which has no impact on intra-Community trade and competition, Article 92 (1) is not applicable). This obligation of submitting to Community control all aid having a Community dimension is the necessary counterpart to the right of Member States being able to export freely to other Member States and is the basis of a common market.

VII. DIFFERENT FORMS OF STATE INTERVENTION

34. In deciding whether any public funds to public undertakings constitute aid, the Commission must take into account the factors discussed below for each type of intervention covered by this communication — capital injections, guarantees, loans, return on investment⁽²⁹⁾. These factors are given as a guide to Member States of the likely Commission attitude in individual cases. In applying this policy the Commission will bear in mind the practicability of the market economy investor principle described above. This communication takes over the definition of public funds and public undertakings used in the Transparency Directive. This is given as guidance for Member States as to the general attitude of the Commission. However, the Commission will obviously have to prove in individual cases of application of this policy that public undertakings within the meaning of Article 90 and State resources within the meaning of Article 92 (1) are involved, just as it has in individual cases in the past. As far as any provision of information under the Transparency Directive is concerned, these definitions have been upheld by the Court for the purposes of the Directive and there is no further obligation on the Commission to justify them.

⁽²⁹⁾ This list is not exhaustive — see footnote 24 above.

Capital injections

35. A capital injection is considered to be an aid when it is made in circumstances which would not be acceptable to an investor operating under normal market conditions. This is normally taken to mean a situation where the structure and future prospects for the company are such that a normal return (by way of dividend payments or capital appreciation) by reference to a comparable private enterprise cannot be expected within a reasonable time. Thus, the 1984 communication on capital injections remains valid.

A market economy investor would normally provide equity finance if the present value⁽³⁰⁾ of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay. The context within which this will have to be interpreted was explained above in paragraphs 27 to 31.

36. In certain Member States investors are obliged by law to contribute additional equity to firms whose capital base has been eroded by continuous losses to below a predetermined level. Member States have claimed that these capital injections cannot be considered as aid as they are merely fulfilling a legal obligation. However, this 'obligation' is more apparent than real. Commercial investors faced with such a situation must also consider all other options including the possibility of liquidating or otherwise running down their investment. If this liquidation or running down proves to be the more financially sound option taking into account the impact on the group and is not followed, then any subsequent capital injection or any other State intervention has to be considered as constituting aid.

37. When comparing the actions of the State and those of a market economy investor in particular when a company is not making a loss, the Commission will evaluate the financial position of the company at the time it is/was proposed to inject additional capital. On the basis of an evaluation of the following items the Commission will examine whether there is an element of aid contained in the amount of capital invested. This aid element consists in the *cost* of the investment less the *value* of the investment, appropriately discounted. It

⁽³⁰⁾ Future cash flows discounted at the company's cost of capital (in-house discount rate).

is stressed that the items listed below are indispensable to any analysis but not necessarily sufficient since account must also be taken of the principles set out in paragraphs 27 to 31 above and of the question whether the funds required are for investment projects or a financial restructuring.

37.1. *Profit and loss situation.* An analysis of the results of the company spread over several years. Relevant profitability ratios would be extracted and the underlying trends subject to evaluation.

37.2. *Financial indicators.* The debt/equity ratio (gearing of the company) would be compared with generally accepted norms, industry-sector averages and those of close competitors, etc. The calculation of various liquidity and solvency ratios would be undertaken to ascertain the financial standing of the company (this is particularly relevant in relation to the assessment of the loan-finance potential of a company operating under normal market conditions). The Commission is aware of the difficulties involved in making such comparisons between Member States due in particular to different accounting practices or standards. It will bear this in mind when choosing the appropriate reference points to be used as a comparison with the public undertakings receiving funds.

37.3. *Financial projections.* In cases where funding is sought to finance an investment programme then obviously this programme and the assumptions upon which it is based have to be studied in detail to see if the investment is justified.

37.4. *Market situation.* Market trends (past performance and most importantly future prospects) and the company's market share over a reasonable time period should be examined and future projections subjected to scrutiny.

Guarantees

38. The position currently adopted by the Commission in relation to loan guarantees has recently been communicated to Member States⁽³¹⁾. It regards all guarantees given by the State directly or by way of delegation through financial institutions as falling within the scope of Article 92 (1) of the EEC Treaty. It is only if guarantees are assessed at the granting stage that all the distortions or potential distortions of competition can be detected. The fact that a firm receives a guarantee even if it is never called in may enable it to continue trading, perhaps forcing competitors who do not enjoy such facilities to go out of business. The firm in question has

therefore received support which has disadvantaged its competitors i.e. it has been aided and this has had an effect on competition. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation (see point 37 above). The aid element of these guarantees would be the difference between the rate which the borrower would pay in a free market and that actually obtained with the benefit of the guarantee, net of any premium paid for the guarantee. Creditors can only safely claim against a government guarantee where this is made and given explicitly to either a public or a private undertaking. If this guarantee is deemed incompatible with the common market following evaluation with respect to the derogations under the Treaty, reimbursement of the value of any aid will be made by the undertaking to the Government even if this means a declaration of bankruptcy but creditors' claims will be honoured. These provisions apply equally to public and private undertakings and no additional special arrangements are necessary for public enterprises other than the remarks made below.

38.1. Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee when such status allows the enterprises in question to obtain credit on terms more favourable than would otherwise be available.

38.2. Where a public authority takes a hold in a public undertaking of a nature such that it is exposed to unlimited liability instead of the normal limited liability, the Commission will treat this as a guarantee on all the funds which are subject to unlimited liability⁽³²⁾. It will then apply the above described principles to this guarantee.

Loans

39. When a lender operating under normal market economy conditions provides loan facilities for a client he is aware of the inherent risk involved in any such venture. The risk is of course that the client will be unable to repay the loan. The potential loss extends to the full amount advanced (the capital) and any interest due but unpaid at the time of default. The risk attached to any loan arrangement is usually reflected in two distinct parameters:

- (a) the interest rate charged;
- (b) the security sought to cover the loan.

⁽³¹⁾ Communication to all Member States dated 5 April 1989, as amended by letter of 12 October 1989.

⁽³²⁾ See point 24 above.

40. Where the perceived risk attached to the loan is high then *ceteris paribus* both (a) and (b) above can be expected to reflect this fact. It is when this does not take place in practice that the Commission will consider that the firm in question has had an advantage conferred on it, i.e. has been aided. Similar considerations apply where the assets pledged by a fixed or floating charge on the company would be insufficient to repay the loan in full. The Commission will in future examine carefully the security used to cover loan finance. This evaluation process would be similar to that proposed for capital injections (see point 37 above).

41. The aid element amounts to the difference between the rate which the firm should pay (which itself is dependent on its financial position and the security which it can offer on foot of the loan) and that actually paid. (This one-stage analysis of the loan is based on the presumption that in the event of default the lender will exercise his legal right to recover any monies due to him). In the extreme case, i.e. where an unsecured loan is given to a company which under normal circumstances would be unable to obtain finance (for example because its prospects of repaying the loan are poor) then the loan effectively equates a grant payment and the Commission would evaluate it as such.

42. The situation would be viewed from the point of view of the lender at the moment the loan is approved. If he chooses to lend (or is directly or indirectly forced to do so as may be the case with State-controlled banks) on conditions which could not be considered as normal in banking terms, then there is an element of aid involved which has to be quantified. These provisions would of course also apply to private undertakings obtaining loans from public financial institutions.

Return on investments

43. The State, in common with any other market economy investor, should expect a normal return obtained by comparable private undertakings on its capital investments by way of dividends or capital appreciation⁽³³⁾. The rate of return will be measured by the profit (after depreciation but before taxation and disposals) expressed as a percentage of assets employed. It is therefore a measure that is neutral with respect to the form of finance used in each undertaking (i.e. debt or equity) which for public undertakings may be decided for reasons extraneous to purely commercial considerations. If this normal return is neither forthcoming beyond the short term nor is likely to be forthcoming in the long term (with the uncertainty of this longer-term

⁽³³⁾ The foregoing of a normal return on public funds falls within the scope of the Transparency Directive.

future gain not appropriately accounted for) and no remedial action has been taken by the public undertaking to rectify the situation, then it can be assumed that the entity is being indirectly aided as the State is foregoing the benefit which a market economy investor would expect from a similar investment. A normal rate of return will be defined with reference where possible being made to comparable private companies. The Commission is aware of the difficulties involved in making such comparisons between Member States — see particularly point 37. In addition the difference in capital markets, currency fluctuations and interest rates between Member States further complicate international comparisons of such ratios. Where accounting practices even within a single Member State make accurate asset valuation hazardous, thereby undermining rate of return calculations, the Commission will examine the possibility of using either adjusted valuations or other simpler criteria such as operating cash flow (after depreciation but before disposals) as a proxy of economic performance.

When faced with an inadequate rate of return a private undertaking would either take action to remedy the situation or be obliged to do so by its shareholders. This would normally involve the preparation of a detailed plan to increase overall profitability. If a public undertaking has an inadequate rate of return, the Commission could consider that this situation contains elements of aid, which should be analysed with respect to Article 92. In these circumstances, the public undertaking is effectively getting its capital cheaper than the market rate, i.e. equivalent to a subsidy.

44. Similarly, if the State forgoes dividend income from a public undertaking and the resultant retained profits do not earn a normal rate of return as defined above then the company in question is effectively being subsidized by the State. It may well be that the State sees it as preferable for reasons not connected with commercial considerations to forgo dividends (or accept reduced dividend payments) rather than make regular capital injections into the company. The end result is the same and this regular 'funding' has to be treated in the same way as new capital injections and evaluated in accordance with the principles set out above.

45. Duration

After an initial period of five years, the Commission will review the application of the policy described in this communication. On the basis of this review, and after consulting Member States, the Commission may propose any modifications which it considers appropriate.

COMMISSION DIRECTIVE 2006/111/EC**of 16 November 2006****on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings****(Text with EEA relevance)****(Codified version)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

- (1) Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings⁽¹⁾ has been substantially amended several times⁽²⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) Public undertakings play a substantial role in the national economy of the Member States.
- (3) Member States sometimes grant special or exclusive rights to particular undertakings, or make payments or give some other kind of compensation to particular undertakings entrusted with the operation of services of general economic interest. These undertakings are often also in competition with other undertakings.
- (4) Article 295 of the Treaty provides that the Treaty is in no way to prejudice the rules in Member States governing the system of property ownership. There should be no unjustified discrimination between public and private undertakings in the application of the rules on competition. This Directive should apply to both public and private undertakings.
- (5) The Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market.
- (6) However, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty.
- (7) A fair and effective application of the aid rules in the Treaty to both public and private undertakings will be possible only if these financial relations are made transparent.
- (8) Such transparency applied to public undertakings should enable a clear distinction to be made between the role of the State as public authority and its role as proprietor.
- (9) Article 86(1) of the Treaty imposes obligations on Member States in the case of public undertakings and undertakings to which Member States grant special or exclusive rights. Article 86(2) of the Treaty applies to undertakings entrusted with the operation of services of general economic interest. Article 86(3) of the Treaty requires the Commission to ensure the application of the provisions of that Article and provides it with the requisite means to this end. In order to ensure the application of the provisions of Article 86 of the Treaty the Commission must have the necessary information. This entails defining the conditions for ensuring such transparency.
- (10) It should be made clear what is to be understood by the terms 'public authorities' and 'public undertakings'.
- (11) The Member States have differing administrative territorial structures. This Directive should cover public authorities at all levels in each Member State.
- (12) Public authorities may exercise a dominant influence on the behaviour of public undertakings not only where they are the proprietor or have a majority participation but also by virtue of powers they hold in management or supervisory bodies as a result either of the rules governing the undertaking or of the manner in which the shareholdings are distributed.
- (13) The provision of public funds to public undertakings may take place either directly or indirectly. Transparency must be achieved irrespective of the manner in which such provision of public funds is made. It may also be necessary to ensure that adequate information is made available as regards the reasons for such provision of public funds and their actual use.

⁽¹⁾ OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2005/81/EC (OJ L 312, 29.11.2005, p. 47).

⁽²⁾ See Annex I, Part A.

- (14) Complex situations linked to the diverse forms of public and private undertakings granted special or exclusive rights or entrusted with the operation of services of general economic interest as well as the range of activities that might be carried on by a single undertaking and the different degrees of market liberalisation in the various Member States could complicate application of the competition rules, and particularly Article 86 of the Treaty. It is therefore necessary for Member States and the Commission to have detailed data about the internal and financial and organisational structure of such undertakings, in particular separate and reliable accounts relating to different activities carried on by the same undertaking.
- (15) The accounts should show the distinction between different activities, the costs and revenues associated with each activity and the methods of cost and revenue assignment and allocation. Such separate accounts should be available in relation to, on the one hand, products and services in respect of which the Member State has granted a special or exclusive right or entrusted the undertaking with the operation of a service of general economic interest, as well as, on the other hand, for each other product or service in respect of which the undertaking is active. The obligation of separation of accounts should not apply to undertakings whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of these services of general economic interest. It does not seem necessary to require separation of accounts within the area of services of general economic interest or within the area of the special or exclusive rights, as far as this is not necessary for the cost and revenue allocation between these services and products and those outside the services of general economic interest or the special or exclusive rights.
- (16) Requiring Member States to ensure that the relevant undertakings maintain such separate accounts is the most efficient means by which fair and effective application of the rules of competition to such undertakings can be assured. In 1996 the Commission adopted a Communication on services of general interest in Europe ⁽¹⁾, which was supplemented by another Communication in 2001 ⁽²⁾, in which it emphasised the importance of such services. It is necessary to take account of the importance of the sectors concerned, which may involve services of general interest, the strong market position that the relevant undertakings may have and the vulnerability of emerging competition in the sectors being liberalised. In accordance with the principle of proportionality it is necessary and appropriate for the achievement of the basic objective of transparency to lay down rules on such separate accounts. This Directive does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the provisions of the third paragraph of Article 5 of the Treaty.
- (17) In certain sectors provisions adopted by the Community require Member States and certain undertakings to maintain separate accounts. It is necessary to ensure an equal treatment for all economic activities throughout the Community and to extend the requirement to maintain separate accounts to all comparable situations. This Directive should not amend specific rules established for the same purpose in other Community provisions and should not apply to activities of undertakings covered by those provisions.
- (18) Certain undertakings should be excluded from the application of this Directive by virtue of the size of their turnover. This applies to those public undertakings whose business is not conducted on such a scale as to justify the administrative burden of ensuring transparency. In view of the limited potential for an effect on trade between Member States, it is not necessary, at this time, to require separate accounts in relation to the supply of certain categories of services.
- (19) This Directive is without prejudice to other provisions of the Treaty, notably Articles 86(2), 88 and 296, and to any other rules concerning the provision of information by Member States to the Commission.
- (20) In cases where the compensation for the fulfilment of services of general economic interest has been fixed for an appropriate period following an open, transparent and non discriminatory procedure it does not seem necessary to require such undertakings to maintain separate accounts.
- (21) The undertakings in question being in competition with other undertakings, information acquired should be covered by the obligation of professional secrecy.
- (22) A reporting system based on *ex post facto* checks of the financial flows between public authorities and public undertakings operating in the manufacturing sector will enable the Commission to fulfil its obligations. That system of control must cover specific financial information.
- (23) In order to limit the administrative burden on Member States, the reporting system should make use of both publicly available data and information available to majority shareholders. The presentation of consolidated reports is to be permitted. Incompatible aid to major undertakings operating in the manufacturing sector will have the greatest distortive effect on competition in the common market. Therefore, such a reporting system may at present be limited to undertakings with a yearly turnover of more than EUR 250 million.

⁽¹⁾ OJ C 281, 26.9.1996, p. 3.

⁽²⁾ OJ C 17, 19.1.2001, p. 4.

(24) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex I, Part B,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

- (a) public funds made available directly by public authorities to the public undertakings concerned;
- (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;
- (c) the use to which these public funds are actually put.

2. Without prejudice to specific provisions laid down by the Community the Member States shall ensure that the financial and organisational structure of any undertaking required to maintain separate accounts is correctly reflected in the separate accounts, so that the following emerge clearly:

- (a) the costs and revenues associated with different activities;
- (b) full details of the methods by which costs and revenues are assigned or allocated to different activities.

Article 2

For the purpose of this Directive:

- (a) 'public authorities' means all public authorities, including the State and regional, local and all other territorial authorities;
- (b) 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

- (i) hold the major part of the undertaking's subscribed capital; or

(ii) control the majority of the votes attaching to shares issued by the undertakings; or

(iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

(c) 'public undertakings operating in the manufacturing sector' means all undertakings whose principal area of activity, defined as being at least 50 % of total annual turnover, is in manufacturing. These undertakings are those whose operations fall under Section D — Manufacturing being subsection DA up to and including subsection DN of the NACE (Rev.1) classification ⁽¹⁾;

(d) 'undertaking required to maintain separate accounts' means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities;

(e) 'different activities' means, on the one hand, all products or services in respect of which a special or exclusive right is granted to an undertaking or all services of general economic interest with which an undertaking is entrusted and, on the other hand, each other separate product or service in respect of which the undertaking is active;

(f) 'exclusive rights' means rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area;

(g) 'special rights' means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area:

(i) limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non discriminatory criteria; or

(ii) designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity; or

⁽¹⁾ OJ L 83, 3.4.1993, p. 1.

(iii) confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.

Article 3

The transparency referred to in Article 1(1) shall apply in particular to the following aspects of financial relations between public authorities and public undertakings:

- (a) the setting off of operating losses;
- (b) the provision of capital;
- (c) non refundable grants, or loans on privileged terms;
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (e) the forgoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

Article 4

1. To ensure the transparency referred to in Article 1(2), the Member States shall take the measures necessary to ensure that for any undertaking required to maintain separate accounts:

- (a) the internal accounts corresponding to different activities are separate;
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

2. Paragraph 1 shall only apply to activities which are not covered by specific provisions laid down by the Community and shall not affect any obligations of Member States or undertakings arising from the Treaty or from such specific provisions.

Article 5

1. As far as the transparency referred to in Article 1(1) is concerned, this Directive shall not apply to financial relations between the public authorities and:

(a) public undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;

(b) central banks;

(c) public credit institutions, as regards deposits of public funds placed with them by public authorities on normal commercial terms;

(d) public undertakings whose total annual net turnover over the period of the two financial years preceding that in which the funds referred to in Article 1(1) are made available or used has been less than EUR 40 million. However, for public credit institutions the corresponding threshold shall be a balance sheet total of EUR 800 million.

2. As far as the transparency referred to in Article 1(2) is concerned, this Directive shall not apply:

(a) to undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;

(b) to undertakings whose total annual net turnover over the period of the two financial years preceding any given year in which it enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty, or in which it is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty is less than EUR 40 million; however, for public credit institutions the corresponding threshold shall be a balance sheet total of EUR 800 million;

(c) to undertakings which have been entrusted with the operation of services of general economic interest pursuant to Article 86(2) of the Treaty if the compensation they receive, in any form whatsoever, was fixed for an appropriate period following an open, transparent and non discriminating procedure.

Article 6

1. Member States shall ensure that information concerning the financial relations referred to in Article 1(1) be kept at the disposal of the Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned. However, where the same funds are used during a later financial year, the five year time limit shall run from the end of that financial year.

2. Member States shall ensure that information concerning the financial and organisational structure of undertakings referred to in Article 1(2) be kept at the disposal of the Commission for five years from the end of the financial year to which the information refers.

3. Member States shall, where the Commission considers it necessary so to request, supply to it the information referred to in paragraphs 1 and 2, together with any necessary background information, notably the objectives pursued.

Article 7

The Commission shall not disclose such information supplied to it pursuant to Article 6(3) as is of a kind covered by the obligation of professional secrecy.

The first paragraph shall not prevent publication of general information or surveys which do not contain information relating to particular public undertakings to which this Directive applies.

Article 8

1. Member States whose public undertakings operate in the manufacturing sector shall supply the financial information as set out in paragraphs 2 and 3 to the Commission on an annual basis within the timetable contained in paragraph 5.

2. The financial information required for each public undertaking operating in the manufacturing sector and in accordance with paragraph 4 shall be the annual report and annual accounts, in accordance with the definition of Council Directive 78/660/EEC⁽¹⁾. The annual accounts and annual report include the balance sheet and profit/loss account, explanatory notes, together with accounting policies, statements by directors, segmental and activity reports. Moreover, notices of shareholders' meetings and any other pertinent information shall be provided.

The reports required shall be provided for each individual public undertaking separately, as well as for the holding or subholding company which consolidates several public undertakings in so far as the consolidated sales of the holding or subholding company lead to its being classified as 'manufacturing'.

3. The following details, in so far as not disclosed in the annual report and annual accounts of each public undertaking, shall be provided in addition to the information referred to in paragraph 2:

- (a) the provision of any share capital or quasi capital funds similar in nature to equity, specifying the terms of its or their provision (whether ordinary, preference, deferred or convertible shares and interest rates; the dividend or conversion rights attaching thereto);
- (b) non refundable grants, or grants which are only refundable in certain circumstances;
- (c) the award to the enterprise of any loans, including overdrafts and advances on capital injections, with a specification of interest rates and the terms of the loan and its security, if any, given to the lender by the enterprise receiving the loan;
- (d) guarantees given to the enterprise by public authorities in respect of loan finance (specifying terms and any charges paid by enterprises for these guarantees);
- (e) dividends paid out and profits retained;
- (f) any other forms of State intervention, in particular, the forgoing of sums due to the State by a public undertaking, including *inter alia* the repayment of loans, grants, payment of corporate or social taxes or any similar charges.

The share capital referred to in (a) shall include share capital contributed by the State directly and any share capital received contributed by a public holding company or other public undertaking, including financial institutions, whether inside or outside the same group, to a given public undertaking. The relationship between the provider of the finance and the recipient shall always be specified.

4. The information required by paragraphs 2 and 3 shall be provided for all public undertakings whose turnover for the most recent financial year was more than EUR 250 million.

The information required above shall be supplied separately for each public undertaking including those located in other Member States, and shall include, where appropriate, details of all intra and inter group transactions between different public undertakings, as well as transactions conducted directly between public undertakings and the State.

Certain public enterprises split their activities into several legally distinct undertakings. For such enterprises the Commission is willing to accept one consolidated report. The consolidation should reflect the economic reality of a group of enterprises operating in the same or closely related sectors. Consolidated reports from diverse, and purely financial, holdings shall not be sufficient.

⁽¹⁾ OJ L 222, 14.8.1978, p. 11.

5. The information required under paragraphs 2 and 3 shall be supplied to the Commission on an annual basis.

The information shall be provided within 15 working days of the date of publication of the annual report of the public undertaking concerned. In any case, and specifically for undertakings which do not publish an annual report, the required information shall be submitted not later than nine months following the end of the undertaking's financial year.

6. In order to assess the number of companies covered by this reporting system, Member States shall supply to the Commission a list of the companies covered by this Article and their turnover. The list is to be updated by 31 March of each year.

7. Member States will furnish the Commission with any additional information that it deems necessary in order to complete a thorough appraisal of the data submitted.

Article 9

The Commission shall regularly inform the Member States of the results of the operation of this Directive.

Article 10

Directive 80/723/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

This Directive shall enter into force on 20 December 2006.

Article 12

This Directive is addressed to the Member States.

Done at Brussels, 16 November 2006.

For the Commission

Neelie KROES

Member of the Commission

ANNEX I

PART A

REPEALED DIRECTIVE WITH ITS SUCCESSIVE AMENDMENTS

(referred to in Article 10)

Commission Directive 80/723/EEC	(O) L 195, 29.7.1980, p. 35)
Commission Directive 85/413/EEC	(O) L 229, 28.8.1985, p. 20)
Commission Directive 93/84/EEC	(O) L 254, 12.10.1993, p. 16)
Commission Directive 2000/52/EC	(O) L 193, 29.7.2000, p. 75)
Commission Directive 2005/81/EC	(O) L 312, 29.11.2005, p. 47)

PART B

LIST OF TIME LIMITS FOR TRANSPOSITION INTO NATIONAL LAW

(referred to in Article 10)

Directive	Time limit for transposition
80/723/EEC	31 December 1981
85/413/EEC	1 January 1986
93/84/EEC	1 November 1993
2000/52/EC	31 July 2001
2005/81/EC	19 December 2006

ANNEX II

CORRELATION TABLE

Directive 80/723/EEC	This Directive
Article 1	Article 1
Article 2(1), introductory sentence	Article 2, introductory sentence
Article 2(1), point (a)	Article 2, point (a)
Article 2(1), point (b)	Article 2, point (b), first subparagraph
Article 2(1), points (c) to (f)	Article 2, points (c) to (f)
Article 2(1), point (g), introductory words	Article 2, point (g), introductory words
Article 2(1), point (g), first indent	Article 2, point (g)(i)
Article 2(1), point (g), second indent	Article 2, point (g)(ii)
Article 2(1), point (g), third indent	Article 2, point (g)(iii)
Article 2(2), introductory sentence	Article 2, point (b), second subparagraph, introductory sentence
Article 2(2), point (a)	Article 2, point (b), second subparagraph, point (i)
Article 2(2), point (b)	Article 2, point (b), second subparagraph, point (ii)
Article 2(2), point (c)	Article 2, point (b), second subparagraph, point (iii)
Article 3	Article 3
Article 3a	Article 4
Article 4	Article 5
Article 5	Article 6
Article 5a(1)	Article 8(1)
Article 5a(2), first subparagraph, introductory sentence	Article 8(2), first subparagraph
Article 5a(2), first subparagraph, point (i)	Article 8(2), first subparagraph
Article 5a(2), second subparagraph, introductory sentence	Article 8(3), first subparagraph, introductory sentence
Article 5a(2), second subparagraph, point (ii)	Article 8(3), first subparagraph, point (a)
Article 5a(2), second subparagraph, point (iii)	Article 8(3), first subparagraph, point (b)
Article 5a(2), second subparagraph, point (iv)	Article 8(3), first subparagraph, point (c)
Article 5a(2), second subparagraph, point (v)	Article 8(3), first subparagraph, point (d)
Article 5a(2), second subparagraph, point (vi)	Article 8(3), first subparagraph, point (e)
Article 5a(2), second subparagraph, point (vii)	Article 8(3), first subparagraph, point (f)
Article 5a(3), first subparagraph	Article 8(4), first subparagraph
Article 5a(3), second subparagraph, first sentence	Article 8(4), second subparagraph
Article 5a(3), second subparagraph, second sentence	Article 8(3), second subparagraph, first sentence
Article 5a(3), second subparagraph, third sentence	Article 8(3), second subparagraph, second sentence
Article 5a(3), second subparagraph, last sentence	Article 8(2), second subparagraph
Article 5a(3), third subparagraph	Article 8(4), third subparagraph

Directive 80/723/EEC	This Directive
Article 5a(4), first subparagraph	Article 8(5), first subparagraph
Article 5a(4), second subparagraph	Article 8(5), second subparagraph
Article 5a(4), third subparagraph	Article 8(6)
Article 5a(5)	—
Article 5a(6)	Article 8(7)
Article 6(1)	Article 7, first paragraph
Article 6(2)	Article 7, second paragraph
Article 7	Article 9
Article 8	—
—	Article 10
—	Article 11
Article 9	Article 12
—	Annex I
—	Annex II

J. SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

Community framework for State aid in the form of public service compensation

(2005/C 297/04)

1. PURPOSE AND SCOPE

1. It is apparent from the case-law of the Court of Justice of the European Communities ⁽¹⁾, that public service compensation does not constitute State aid within the meaning of Article 87(1) of the EC Treaty if it fulfils certain conditions. However, if public service compensation does not meet these conditions and if the general criteria for the applicability of Article 87(1) are satisfied, such compensation constitutes State aid.
2. 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 ⁽²⁾ lays down the conditions under which certain types of public service compensation constitute State aid compatible with Article 86(2) of the EC Treaty and exempts compensation satisfying those conditions from the prior notification requirement. Public service compensation which constitutes State aid and does not fall within the scope of Decision 2005/842/EC *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* will still be subject to the prior notification requirement. The purpose of this framework is to spell out the conditions under which such State aid can be found compatible with the common market pursuant to Article 86(2).
3. This framework is applicable to public service compensation granted to undertakings in connexion with activities subject to the rules of the EC Treaty, with the exception of the transport sector, and the public service broadcasting sector covered by the Communication from the Commission on the application of State aid rules to public service broadcasting ⁽³⁾.
4. The provisions of this framework apply without prejudice to the stricter specific provisions relating to public service obligations contained in sectoral Community legislation and measures.
5. This framework applies without prejudice to the Community provisions in force in the field of public procurement and competition (in particular Articles 81 and 82 of the EC Treaty).

⁽¹⁾ Judgments in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark') [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243.

⁽²⁾ OJ L 312, 29.11.2005, p. 67.

⁽³⁾ OJ C 320, 15.11.2001, p. 5.

2. CONDITIONS GOVERNING THE COMPATIBILITY OF PUBLIC SERVICE COMPENSATION THAT CONSTITUTES STATE AID

2.1. General provisions

6. In its judgment in *Altmark*, the Court laid down the conditions under which public service compensation does not constitute State aid as follows:

'[...] First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. [...].

'[...] Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. [...] Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.

'[...] Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit [...].

'[...] Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

7. Where these four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the EC Treaty do not apply. If the Member States do not respect these criteria and if the general criteria for the applicability of Article 87(1) of the EC Treaty are met, public service compensation constitutes State aid.

8. The Commission considers that at the current stage of development of the common market, such State aid may be declared compatible with the Treaty under Article 86(2) of the EC Treaty if it is necessary to the operation of the services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Community. The following conditions should be met in order to achieve such balance.

2.2. Genuine service of general economic interest within the meaning of Article 86 of the EC Treaty

9. It is apparent from the case-law of the Court of Justice that with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. Thus, the Commission's task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest.

10. It transpires from Article 86(2) that undertakings⁽¹⁾ entrusted with the operation of services of general economic interest are undertakings entrusted with 'a particular task'. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are encouraged to consult widely, with a particular emphasis on users.

2.3. Need for an instrument specifying the public service obligations and the methods of calculating compensation

11. The concept of service of general economic interest within the meaning of Article 86 of the EC Treaty means that the undertakings in question have been entrusted with a special task by the State⁽²⁾. Public authorities remain responsible — with the exception of the sectors in which there are Community rules governing the matter — for setting the framework of criteria and conditions for the provision of services, regardless of the legal status of the provider and of whether the service is provided on the

⁽¹⁾ 'Undertaking' is to be understood as any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. 'Public undertaking' is to be understood as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, as defined in Article 2(1)(b) of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2000/52/EC, OJ L 193, 29.7.2000, p. 75).

⁽²⁾ See, in particular, the judgment in Case C-127/73 BRT v SABAM [1974] ECR-313.

basis of free competition. Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and of the State. The term 'State' covers the central, regional and local authorities.

12. Responsibility for operation of the service of general economic interest must be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. The act or acts must specify, in particular:

(a) the precise nature and the duration of the public service obligations;

(b) the undertakings and territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking;

(d) the parameters for calculating, controlling and reviewing the compensation;

(e) the arrangements for avoiding and repaying any over-compensation.

13. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, Member States are invited to consult widely, with particular emphasis on users.

2.4. Amount of compensation

14. The **amount of compensation** may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.

15. In any event, compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation granted for the operation of a service of general economic interest, but actually used to operate on other markets is not justified, and consequently constitutes incompatible State aid. The undertaking receiving public service compensation may, however, enjoy a reasonable profit.

16. The **costs to be taken into consideration** include all the costs incurred in the operation of the service of general economic interest. Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, an appropriate contribution to fixed costs common to both the service of general economic interest and other activities and an adequate return on the own capital assigned to the service of general economic interest⁽¹⁾. The costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the functioning of the service of general economic interest. The costs linked to any activities outside the scope of the service of general economic interest must cover all the variable costs, an appropriate contribution to fixed common costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the service of general economic interest. The calculation of costs must follow criteria which have previously been defined and be based on generally accepted cost accounting principles which must be brought to the knowledge of the Commission in the context of the notification pursuant to Article 88(3) of the EC Treaty.

17. The **revenue to be taken into account** must include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to a service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 87 of the EC Treaty, and are added to its revenue. The Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest.

18. **'Reasonable profit'** should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector

are taken into account. In determining what amounts to a reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency.

19. When a company carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues. Where an undertaking is entrusted with the operation of several services of general economic interest either because the authority assigning the service of general economic interest is different or because the nature of the service of general economic interest is different, the undertaking's internal accounts must make it possible to ensure that there is no over-compensation at the level of each service of general economic interest. These principles are without prejudice to the provisions of Directive 80/723/EEC in cases where that Directive applies.

3. OVER-COMPENSATION

20. Member States must check regularly, or arrange for checks to be made, to ensure that there has been no over-compensation. Since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State, and for the future, the parameters for the calculation of the compensation must be updated.

21. Where the amount of over-compensation does not exceed 10 % of the amount of annual compensation, such over-compensation may be carried forward to the next year. Some services of general economic interest may have costs that vary significantly each year, notably as regards specific investments. In such cases, exceptionally, over-compensation in excess of 10 % in certain years may prove necessary for the operation of the service of general economic interest. The specific situation which may justify over-compensation in excess of 10 % should be explained in the notification to the Commission. However, the situation should be reviewed at intervals determined on the basis of the situation in each sector which, in any event, should not exceed four years. All over-compensation discovered at the end of that period should be repaid.

22. Any over-compensation may be used to finance another service of general economic interest operated by the same undertaking, but such a transfer must be shown in the undertaking's accounts and be carried out in accordance with the rules and principles set out in this framework, notably as regards prior notification. The Member States must ensure that such transfers are subjected to proper control. The transparency rules laid down in Directive 80/723/EEC apply.

⁽¹⁾ See Joined Cases C-83/01P, C-93/01P and C-94/01P *Chronopost SA* [2003] ECR I - 6993.

23. The amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the Treaty (for example, environmental aid, employment aid and aid for small and medium-sized enterprises). If a Member State wishes to grant such aid, the prior notification procedure laid down in Article 88(3) of the EC Treaty should be complied with. Aid may be disbursed only if it has been authorised by the Commission. If such aid is compatible with a block exemption Regulation, the conditions of the relevant block exemption Regulation must be fulfilled.

4. CONDITIONS AND OBLIGATIONS ATTACHED TO COMMISSION DECISIONS

24. According to Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market, and lay down obligations to enable compliance with the decision to be monitored. In the field of services of general economic interest, conditions and obligations may be necessary notably to ensure that aid granted to the undertakings concerned does not actually lead to over-compensations. In this context, periodical reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

5. APPLICATION OF THE FRAMEWORK

25. This framework will apply for a period of six years from the date of its publication in the *Official Journal of the European Union*. The Commission may, after consulting the Member States, amend the framework before it expires, for important reasons linked to the development of the

common market. Four years after the date of publication of this framework, the Commission will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided by the Member States. The results of the impact assessment will be made available to the European Parliament, the Committee of Regions and the Economic and Social Committee and to the Member States.

26. The Commission will apply the provisions of this framework to all aid projects notified to it and will take a decision on those projects after the framework is published in the Official Journal, even if the projects were notified prior to such publication. In the case of non-notified aid, the Commission will apply:

- (a) the provisions of this framework, if the aid was granted after publication of the framework in the Official Journal;
- (b) the provisions in force at the time the aid was granted, in all other cases.

6. APPROPRIATE MEASURES

27. The Commission proposes as appropriate measures for the purposes of Article 88(1) of the EC Treaty that Member States bring their existing schemes regarding public service compensation into line with this framework, within 18 months following its publication in the Official Journal. Member States should confirm to the Commission within one month of publication of the framework in the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.

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

Communication from the Commission amending the period of application of the Communication from the Commission — Community framework for State aid in the form of public service compensation

(Text with EEA relevance)

(2011/C 337/02)

I. Introduction

The Community framework for State aid in the form of public service compensation ('the framework') was adopted in 2005 and was to apply for a period of six years from 29 November 2005. The framework is therefore due to expire on 29 November 2011.

The Commission is currently in the process of preparing a comprehensive review of the State aid rules for the compensation of services of general economic interest. Draft texts of the new package, including a draft for the revision of the framework, were published in September 2011.

In order to allow sufficient time for the consultation process on the new rules, and to avoid legal uncertainty for the interim period between the expiry of the framework and the entry into force of the new package the Commission has decided to extend the period of application of the framework until the entry into force of the new framework.

II. Amendment to the 2005 framework

The following amendment to the Communication from the Commission — Community framework for State aid in the form of public service compensation applies from 29 November 2011:

— paragraph 25 is replaced by the following:

'This framework applies until the date of the entry into force of a new framework on State aid in the form of public service compensation as announced in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 March 2011.'

COMMISSION DECISION

of 28 November 2005

on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest

(notified under document number C(2005) 2673)

(2005/842/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

confers responsibility for the execution of a certain task to an undertaking. Secondly, the entrustment must relate to a service of general economic interest. Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end (here inafter the necessity requirement). Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

Whereas:

(1) Article 16 of the Treaty requires the Community, without prejudice to Articles 73, 86 and 87, to use its powers in such a way as to make sure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.

(2) For certain services of general economic interest to operate on the basis of principles and under conditions that enable them to fulfil their missions, financial support from the State intended to cover some or all of the specific costs resulting from the public service obligations may prove necessary. In accordance with Article 295 of the Treaty, as interpreted by the case law of the Court of Justice and Court of First Instance of the European Communities, it is irrelevant from the viewpoint of Community law whether such services of general economic interest are operated by public or private undertakings.

(3) Article 86(2) of the Treaty states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 86(2) allows an exception from the rules contained in the Treaty, provided that a number of criteria are met. Firstly, there must be an act of entrustment, whereby the State

(4) In its judgment in the case of *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ⁽¹⁾ (Altmark), the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 87 of the Treaty provided that four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport, would have incurred.

(5) Where those four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the Treaty do not apply. If the Member States do not respect those criteria and if the general criteria for the applicability of Article 87(1) of the Treaty are met, public service compensation constitutes State aid that is subject to Articles 73, 86, 87 and 88 of the Treaty. This Decision should therefore only apply to public service compensation in so far as it constitutes State aid.

⁽¹⁾ [2003] ECR I 7747.

- (6) Article 86(3) of the Treaty allows the Commission to specify the meaning and extent of the exception under Article 86(2) of the Treaty, and to set out rules intended to enable effective monitoring of the fulfilment of the criteria set out in Article 86(2), where necessary. The conditions under which certain systems of compensation are compatible with Article 86(2) and are not subject to the prior notification requirement of Article 88(3) of the Treaty should therefore be specified.
- (7) Such aid may be declared compatible only if it is granted in order to ensure the provision of services that are services of general economic interest as referred to in Article 86(2) of the Treaty. It is clear from the case law that, with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus, with the exception of the sectors in which there are Community rules governing the matter, the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest.
- (8) In order for Article 86(2) of the Treaty to apply, the undertaking beneficiary of the aid must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest. According to the case law on the interpretation of Article 86(2) of the Treaty, such act or acts of entrustment must specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned.
- (9) In order to ensure that the criteria set out in Article 86(2) of the Treaty are met, it is necessary to lay down more precise conditions which must be fulfilled in respect of the entrustment of the operation of services of general economic interest. Indeed the amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in a formal act of the competent public authorities within the Member State concerned. The form of the instrument may vary from one Member State to another but it should specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of undertakings concerned, and the costs to be borne by the undertaking concerned.
- (10) When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are invited to consult widely, with particular emphasis on users.
- (11) Moreover, in order to avoid unjustified distortions of competition, Article 86(2) of the Treaty requires that compensation does not exceed what is necessary to cover the costs incurred by the undertaking in discharging the public service obligations, account being taken of the relevant receipts and a reasonable profit. This should be understood as referring to the actual costs incurred by the undertaking concerned.
- (12) Compensation in excess of what is necessary to cover the costs incurred by the undertaking concerned is not necessary for the operation of the service of general economic interest, and consequently constitutes incompatible State aid that should be repaid to the State. Compensation granted for the operation of a service of general economic interest but actually used by the undertaking concerned to operate on another market is also not necessary for the operation of the service of general economic interest, and consequently also constitutes incompatible State aid that should be repaid.
- (13) In order to ensure compliance with the necessity requirement set out in Article 86(2) of the Treaty it is necessary to lay down provisions relating to the calculation and monitoring of the amount of compensation granted. Member States should check regularly that the compensation granted does not lead to overcompensation. Nevertheless, in order to allow a minimum of flexibility for undertakings and Member States, where the amount of overcompensation does not exceed 10 % of the amount of annual compensation, it should be possible for such overcompensation to be carried forward to the next period and be deducted from the amount of compensation which would otherwise have been payable. The revenue of undertakings entrusted with the operation of services of general economic interest in the field of social housing may vary dramatically, in particular due to the risk of insolvency of leaseholders. Consequently, where such undertakings only operate services of general economic interest, it should be possible for any overcompensation during one period to be carried forward to the next period, up to 20 % of the annual compensation.

- (14) To the extent that compensation is granted to undertakings entrusted with the operation of services of general economic interest, the amount of the compensation does not go beyond the costs of the services, and the thresholds laid down in this Decision are respected, the Commission considers that the development of trade is not affected to such an extent as would be contrary to the interests of the Community. In such circumstances, the Commission considers that the compensation should be deemed to constitute State aid compatible with Article 86(2) of the Treaty.
- (15) Small amounts of compensation granted to undertakings providing services of general economic interest whose turnover is limited do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Community. When the conditions set out in this Decision are fulfilled, prior notification should therefore not be required. For the purpose of defining the scope of the exemption from notification, the turnover of undertakings receiving public service compensation and the level of such compensation should be taken into consideration.
- (16) Hospitals and undertakings in charge of social housing which are entrusted with tasks involving services of general economic interest have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that at the current stage of development of the internal market, the intensity of distortion of competition in those sectors is not necessarily proportionate to the level of turnover and compensation. Accordingly, hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to the main activities, notably in the field of research, and undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions, should benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the thresholds laid down in this Decision, if the services performed are qualified as services of general economic interest by the Member States.
- (17) Article 73 of the Treaty constitutes a *lex specialis* with regard to Article 86(2). It lays down the rules applicable to public service compensation in the land transport sector. That Article has been developed by Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway⁽¹⁾, which lays down general conditions for public service obligations in the land transport sector and imposes methods for calculating compensation. Regulation (EEC) No 1191/69 exempts all compensation in the land transport sector that fulfils the conditions of notification under Article 88(3) of the Treaty. It also allows Member States to derogate from its provisions in the case of undertakings providing exclusively urban, suburban or regional transport. Where that derogation is applied, any compensation for public service obligations is, in so far as it constitutes State aid, governed by Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway⁽²⁾. According to the judgment in *Altmark*, compensation which does not respect the provisions of Article 73 cannot be declared compatible with the Treaty on the basis of Article 86(2), or on the basis of any other Treaty provision. Consequently, such compensation should not be covered by this Decision.
- (18) Unlike land transport, the maritime and air transport sectors are subject to Article 86(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport sectors are to be found in Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes⁽³⁾ and Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)⁽⁴⁾. However, contrary to Regulation (EEC) No 1191/69, these Regulations do not refer to the compatibility of the possible State aid elements nor contain an exemption from the obligation to notify under Article 88(2) of the Treaty. It is therefore appropriate to apply this Decision to public service compensation in the air and maritime transport sectors provided that, in addition to fulfilling the conditions set out in this Decision, such compensation also respects the sectoral rules contained in Regulation (EEC) No 2408/92 and Regulation (EEC) No 3577/92 when applicable.
- (19) The thresholds applicable to public service compensation in the air and maritime transport sectors should normally be the same as those applicable in general. However, in the specific cases of public service compensation for air or maritime links to islands and for airports and ports which constitute services of general economic interest as
- (1) OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).
- (2) OJ L 130, 15.6.1970, p. 1. Regulation as last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).
- (3) OJ L 240, 24.8.1992, p. 8. Regulation as last amended by 2003 Act of Accession.
- (4) OJ L 364, 12.12.1992, p. 7.

referred to in Article 86(2) of the Treaty it is more appropriate to also provide alternative thresholds based on average annual number of passengers as this more accurately reflects the economic reality of these activities.

- (20) This Decision is to a large extent a specification of the meaning and extent of the exception under Article 86(2) of the Treaty as it has been consistently applied in the past by the Court of Justice and the Court of First Instance and by the Commission. To the extent that it does not modify the material law applicable in this area it should apply immediately. However, certain provisions of this Decision go beyond the status quo by setting out additional requirements aimed at enabling effective monitoring of the criteria set out in Article 86(2). In order to allow Member States to take the necessary measures in this respect, it is appropriate to foresee a period of one year prior to the application of those specific provisions.
- (21) Exemption from the requirement of prior notification for certain services of general economic interest does not rule out the possibility for Member States to notify a specific aid project. Such notification will be assessed in accordance with the principles of the Community framework for State aid in the form of public service compensation ⁽¹⁾.
- (22) This Decision applies without prejudice to the provisions of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ⁽²⁾.
- (23) This Decision applies without prejudice to the Community provisions in force in the fields of public procurement and of competition, in particular Articles 81 and 82 of the Treaty.
- (24) This Decision applies without prejudice to stricter specific provisions relating to public service obligations that are contained in sectoral Community legislation,

HAS ADOPTED THIS DECISION:

Article 1

Subject matter

This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) of the Treaty.

Article 2

Scope

1. This Decision applies to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty which falls within one of the following categories:

- (a) public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million;
- (b) public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned;
- (c) public service compensation for air or maritime links to islands on which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers;
- (d) public service compensation for airports and ports for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1 000 000 passengers, in the case of airports, and 300 000 passengers, in the case of ports.

⁽¹⁾ OJ C 297, 29.11.2005.

⁽²⁾ OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

The threshold of EUR 30 million in point (a) of the first subparagraph may be determined by taking an annual average representing the value of compensation granted during the contract period or over a period of five years. For credit institutions, the threshold of EUR 100 million of turnover shall be replaced by a threshold of EUR 800 million in terms of balance sheet total.

2. In the field of air and maritime transport, this Decision shall only apply to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty which complies with Regulation (EEC) No 2408/92 and Regulation (EEC) No 3577/92, when applicable.

This Decision shall not apply to State aid in the form of public service compensation granted to undertakings in the field of land transport.

Article 3

Compatibility and exemption from notification

State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the common market and shall be exempt from the obligation of prior notification provided for in Article 88(3) of the Treaty, without prejudice to the application of stricter provisions relating to public service obligations contained in sectoral Community legislation.

Article 4

Entrustment

In order for this Decision to apply, responsibility for operation of the service of general economic interest shall be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. The act or acts shall specify, in particular:

- (a) the nature and the duration of the public service obligations;
- (b) the undertaking and territory concerned;
- (c) the nature of any exclusive or special rights assigned to the undertaking;
- (d) the parameters for calculating, controlling and reviewing the compensation;

- (e) the arrangements for avoiding and repaying any overcompensation.

Article 5

Compensation

1. The amount of compensation shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations. The compensation must be actually used for the operation of the service of general economic interest concerned, without prejudice to the undertaking's ability to enjoy a reasonable profit.

The amount of compensation shall include all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit shall take account of all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.

2. The costs to be taken into consideration shall comprise all the costs incurred in the operation of the service of general economic interest. They shall be calculated, on the basis of generally accepted cost accounting principles, as follows:

- (a) where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration;
- (b) where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest shall be taken into consideration;
- (c) the costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, a proportionate contribution to fixed costs common to both service of general economic interest and other activities and a reasonable profit;
- (d) the costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the operation of the service of general economic interest.

3. The revenue to be taken into account shall include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to another service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 87. The Member State concerned may decide that the profits accruing from other activities outside the scope of the service of general economic interest are to be assigned in whole or in part to the financing of the service of general economic interest.

4. For the purposes of this Decision 'reasonable profit' means a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate shall not normally exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency.

5. When a company carries out activities falling both inside and outside the scope of services of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues.

The costs linked to any activities outside the scope of the service of general economic interest shall cover all the variable costs, an appropriate contribution to common fixed costs and an adequate return on capital. No compensation shall be granted in respect of those costs.

Article 6

Control of overcompensation

Member States shall carry out regular checks, or ensure that such checks are carried out, to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5.

Member States shall require the undertaking concerned to repay any overcompensation paid, and the parameters for the calcu

lation of the compensation shall be updated for the future. Where the amount of overcompensation does not exceed 10 % of the amount of the annual compensation, such overcompensation may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period.

In the sector of social housing, Member States shall carry out regular checks, or ensure that such checks are carried out, at the level of each undertaking, to ensure that the undertaking concerned is not receiving compensation in excess of the amount determined in accordance with Article 5. Any overcompensation may be carried forward to the next period up to 20 % of the annual compensation, provided that the undertaking concerned only operates services of general economic interest.

Article 7

Availability of information

The Member States shall keep available for a period of at least 10 years, all the elements necessary to determine whether the compensation granted is compatible with this Decision.

Upon a written request from the Commission, Member States shall provide the Commission with all the information that the latter considers necessary to determine whether the systems of compensation in force are compatible with this Decision.

Article 8

Reports

Periodic reports on the implementation of this Decision, comprising a detailed description of the conditions of application in all sectors, including the social housing and the hospital sectors, shall be submitted to the Commission by each Member State every three years.

The first report shall be submitted by 19 December 2008.

Article 9

Evaluation

By 19 December 2009 at the latest, the Commission will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided by the Member States in accordance with Article 8.

The results of the impact assessment will be made available to the European Parliament, the Committee of Regions, the European Economic and Social Committee and the Member States.

Article 10

Entry into force

This Decision shall enter into force on 19 December 2005.

Points (c), (d) and (e) of Article 4, and Article 6 shall apply from 29 November 2006.

Article 11

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 28 November 2005.

For the Commission

Neelie KROES

Member of the Commission

European Commission

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