Competition law in the European Communities

Volume IIA
Rules applicable to State aid

Situation at 30 June 1998

EUROPEAN COMMISSION

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Directorate-General for Competition

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(1) The figures in brackets correspond to the articles under the new numbering which will come into effect with the Treaty of Amsterdam following its ratification by Member States.

[2] Text applicable as well as the framework for national aid for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products (OJ C 302, 12.11.1987, p. 6).

Introduction

The Treaty of 1951 establishing the European Coal and Steel Community (ECSC) and the Treaty of 1957 establishing the European Economic Community (EEC) both contain rules on State aid to industry which are applicable throughout the common market.

This report is a collection of basic texts on State aid which shows how the Community competition policy has developed in this area. It is a complement to the texts on competition law in the EEC Treaty and the ECSC Treaty published by the Commission.

In order to give as complete a picture as possible, the report includes different texts, of which all have not been published in the Official Journal and which have different legal status.

The report does not seek to be exhaustive, and some older texts are omitted where more recent ones which provide an accurate picture of how the policy is applied.

This edition does not include the basic texts on State aid to agriculture (products listed in Annex II to the EC Treaty).

A — Provisions of the Treaties

I — Provisions of the EC Treaty

Article 7d (16)

Without prejudice to Articles 73, 86 and 87, 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 Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

Article 42 (36)

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 Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council may, in particular, 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 77 (73)

Aid shall be compatible with this Treaty if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 90 (86)

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 this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.

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 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.

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 92 (87)

1. Save as otherwise provided in this Treaty, 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.

2. The following shall be compatible with the common 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.

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

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(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; [However, the aids granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries;] (*)

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest (1);

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

Article 93 (88)

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 common 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 common market having regard to Article 92, 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.

(*) Point (c) as will be amended by the entry into force of the Treaty of Amsterdam.
(1) Point (d) as inserted by Article G(18) TEU.

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 169 and 170, refer the matter to the Court of Justice 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 common market, in derogation from the provisions of Article 92 or from the regulations provided for in Article 94, 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 common market having regard to Article 92, 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.

Article 94 (89) [2]

The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, 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] As amended by Article G(19) TEU.

II — Provisions of the ECSC Treaty

Article 4

The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

(a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products;

(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;

(c) subsidies or aid granted by States, or special charges imposed by States, in any form whatsoever;

(d) restrictive practices which tend towards the sharing or exploiting of markets.

Article 54

The High Authority may facilitate the carrying out of investment programmes by granting loans to undertakings or by guaranteeing other loans which they may contract.

With the unanimous assent of the Council, the High Authority may, by the same means, assist the financing of works and installations which contribute directly and primarily to increasing the production, reducing the production costs of facilitating the marketing of products within its jurisdiction.

In order to encourage coordinated development of investment, the High Authority may, in accordance with Article 47, require undertakings to inform it of individual programmes in advance, either by a special request addressed to the undertaking concerned or by a decision stating what kind and scale of programme must be communicated.

The High Authority may, after giving the parties concerned full opportunity to submit their comments, deliver a reasoned opinion on such programmes within the framework of the general objectives provided for in Article 46. If application is made by the undertaking concerned, the High Authority must deliver a reasoned opinion. The High Authority shall notify the opinion to the undertaking concerned and shall bring the opinion to the attention of its government. Lists of such opinions shall be published.

If the High Authority finds that the financing of a programme or the operation of the installations therein planned would involve subsidies, aid, protection or discrimination contrary to this Treaty, the adverse opinion delivered by it on these grounds shall have the force of a decision within the meaning of Article 14 and the effect of prohibiting the undertaking concerned from drawing on resources other than its own funds to carry out the programme.

The High Authority may impose on undertakings which disregard the prohibition referred to in the preceding paragraph, fines not exceeding the amounts improperly devoted to carrying out the programme in question.

Article 95

In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken, or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.

Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed.

If, after the end of the transitional period provided in the Convention on the Transitional Provisions, unforeseen difficulties emerging in the light of experience in the application of this Treaty, or fundamental economic or technical changes directly affecting the common market in coal and steel, make it necessary to adapt the rules for the High Authority's exercise of its powers, appropriate amendments may be made; they must not, however, conflict with the provisions of Articles 2, 3 and 4 or interfere with the relationship between the powers of the High Authority and those of the other institutions of the Community.

The amendments shall be proposed jointly by the High Authority and the Council, acting by an eight-ninths majority of its members, and shall be submitted to the Court for its opinion. In considering them, the Court shall have full power to assess all points of fact and of law. If as a result of such consideration it finds the proposals compatible with the provisions of the preceding paragraph, they shall be forwarded to the Assembly and shall enter into force if approved by a majority of three-quarters of the votes cast and two-thirds of the members of the Assembly.

B — General procedural rules

I — Guide to procedures in State aid cases

Introduction

Sources of law and practice

1. Article 93 of the EC Treaty makes the European Commission ('the Commission') responsible for enforcing Article 92, which declares State aid that affects trade between the Member States of the Community to be incompatible with the common market (paragraph 1) except in certain circumstances where an exemption is, or may be granted (paragraphs 2 and 3). So far, the procedural rules for applying Articles 92 and 93 have been developed in a piecemeal fashion by Commission decisions and judgments of the European Court of Justice. Whenever an important procedural issue has been clarified, the Commission has written to the Member States drawing their attention to it and has often also issued a public notice in the *Official Journal of the European Communities*. From time to time the Council or the Commission have also laid down special procedural provisions for particular industries or for aid of certain types or for certain purposes.

2. However, the procedural rules in State aid cases have never been codified. This brief guide is intended to make up for that deficiency. The source materials — the Treaty articles, Council and Commission legislation, communications from the Commission to the Member States and notices in the *Official Journal of the European Communities* — are reproduced — or in the case of Court judgments summarised — elsewhere in this volume. The guide only deals with aid falling under the EC Treaty, and not with the special rules for the coal and steel industries under the ECSC Treaty.

Status of guide

3. The guide attempts to describe the current state of law and practice derived from these various sources. The Commission's understanding of the law is, of course, subject to any different interpretation ultimately given to it by the Court of Justice. Nor does the guide preclude the adoption of different procedural rules for State aid in particular sectors or circumstances at a later date.

Layout

4. The guide first deals chronologically with the various steps in the procedure for a normal case, where the Member State notifies the aid to the Commission for approval and awaits its decision. Sections 1 to 3 are thus:

(1) Notification (Article 93(3)): Member States are required to inform the Commission when they plan to grant aid.

(2) Decisions without the opening of a formal investigation under Article 93(2): the Commission normally has two months to decide whether to authorise the aid (1) without further scrutiny or to begin a formal investigation.

(3) Formal investigation proceedings (Article 93(2)) and decisions concluding them: the proceedings end with the Commission deciding either to authorise the Member State to grant the aid or to prohibit it from doing so.

5. The next section describes the procedure in cases where Member States breach their obligation to notify proposed aid to the Commission and not to grant it until authorised.

(4) Procedure in cases of unnotified aid, including decisions to order suspension or recovery: if the Commission finds that a Member State has granted, or is in the process of granting, aid without authorisation and that the aid could not have been or cannot be authorised, it can order the Member State to recover aid already paid and to cease payment if the aid is still being granted. The Commission can also order the Member State to supply information about the aid.

6. The Commission is required to monitor aid schemes it has previously authorised, or which date from before the entry into force of the Treaty, or before the accession of the Member State concerned. The next section thus covers:

(5) Review of existing aid (Article 93(1)): the Commission may recommend the Member State to change or abolish a scheme if necessary and, if the Member State declines, the Commission can require it to do so after a formal investigation under Article 93(2).

This section also describes the Commission's practice when overhauling its general policy towards aid of particular types or for particular purposes or sectors and issuing either binding rules that apply to all existing aid schemes of that type or notices setting out its future policy towards such aid. The reporting requirements the Commission imposes for monitoring purposes when approving aid are also described in this section.

7. The guide concludes with Sections 6 and 7 on complaints and the publication of decisions.

8. In Annex 1, a short description of the administrative arrangements in the Commission is given, with a flowchart showing the paths taken by cases from notification to decision. The Annex also explains the counting of time limits.

Annex 2 describes the arrangements for cooperation between the Commission and the EFTA Surveillance Authority and for publication of each other's decisions under the European Economic Area Agreement. References to the Commission in the text of the guide should be taken to include, where appropriate, the EFTA Surveillance Authority. Under the EEA Agreements, the EFTA Surveillance Authority performed the same aid control functions as the Commission in 1994 in relation to Austria, Finland and Sweden and continues to do so in relation to the EFTA States members of the EEA that have not joined the EC.

The guide does not deal with the procedure involving the Council provided for in the third and fourth subparagraphs of Article 93(2).

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(1) That is not to raise objection to its granting, on the ground that the aid is compatible with the common market.

1. Notification

1.1. Treaty provisions

9. Article 93(3) states: '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 92, 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'.

10. This provision places procedural obligations both on the Member State concerned and on the Commission.

The Member State:

(a) must notify new aid and alterations to existing aid arrangements in advance (first sentence), and

(b) may not put the proposed measures into effect until the Commission has taken a decision on the case (third sentence).

For its part, the Commission must:

(c) within a reasonable time 'submit its comments', i.e., decide either to authorise the aid because it qualifies for exemption or to initiate the formal investigation procedure under Article 93(2) if it has doubts whether the aid qualifies for exemption (first and second sentences).

1.2. Notification in practice

1.2.1. Scope of the notification requirement

11. Member States are required to notify the Commission for approval of all plans to grant aid or to alter existing aid arrangements ([2]). This also applies to aid that may qualify for approval under Article 92(2), if the requisite conditions are met, because the Commission has to check that this is the case. The only exception to the notification obligation for new aid is for that classed as *de minimis* because the amount is considered to be too small to affect trade between Member States significantly and thus to fall within Article 92(1) of the Treaty. This is the case where the amount of aid to an individual firm for either of two broad categories of expenditure, namely investment and other activities, together with any other aid received or receivable for the same purpose over a three-year period, will not exceed ECU 50 000 ([3]). Notification is also waived for increases in the authorised budget of an existing aid scheme by not more than 20 % ([4]).

12. The Commission receives notification of general schemes or programmes of aid, as well as of plans to grant aid to individual firms. Once a scheme has been authorised by the Commission,

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([2]) For the definition of 'existing aid' and the scope of the obligation to notify alterations to existing aid arrangements, see paragraph 73 and Case C-44/93 *Namur-Les assurances du crédit SA* v *OND and Belgium* [1994] ECR I-3829 (paragraph 32).

([3]) Paragraph 3.2 of the Community guidelines on State aid for SMEs (OJ C 213, 19.8.1992, p. 2), and letter to the Member States IV/D/6878 of 23 March 1993. Export aid and aid in sectors subject to special rules (namely, agriculture, fisheries, transport, coal, steel, shipbuilding and synthetic fibres) are excluded from the dispensation.

([4]) Notice on standardised notifications and reports, letter to Member States SG(94) D/2472-2494 of 22 February 1994.

individual awards of aid under the scheme need not be notified ([5]).However, under some of the aid codes or frameworks for particular industries or particular types of aid, individual notification is required of all awards of aid, or of awards exceeding a certain amount ([6]). Individual notification may also be required in some cases by the terms of the Commission's authorisation of a given programme.

13. If a government wishes to grant aid outside the framework of any authorised scheme or programme, such one-off awards must be notified.

14. If the Member State subsequently alters the proposal notified, it must notify the Commission of the alteration. The notification of the alteration is regarded as a new notification ([7]). The period allowed for taking a decision begins to run afresh from the date the altered proposal is received.

15. Notification is required whenever there is a sufficient likelihood in the light of the case-law of the Court of Justice and the Commission's practice that a measure involves State aid ([8]). Thus, Member States must also inform the Commission of plans to make financial transfers from public funds to public, or private sector enterprises in circumstances in which capital injections may involve aid ([9]).

1.2.2. Notification formalities

16. Notification should be made by the central government authorities of a Member State, even if the scheme is administered or the aid is to be granted by regional or local authorities. The notification is usually forwarded to the Commission by the Member State's Permanent Representation to the EU in Brussels.

17. The notification should refer to Article 93(3) or to other Community law provisions requiring notification ([10]). It should be sent to one of the following departments of the Commission, depending on the circumstances:

([5]) See Cases 166 and 226/86 *Irish Cement* v *Commission* [1988] ECR 6473; Case C-47/91 *Italy* v *Commission*, not yet reported.

([6]) Namely:
synthetic fibres (OJ C 346, 30.12.1992, p. 2): all awards;
shipbuilding (OJ L 380, 31.12.1990, p. 27 and OJ L 326, 28.12.1993, p. 62):
contracts for which yards in two Member States are competing, Article 4(5), second subparagraph, and Article 11(2)(c);
contracts to be subsidised by overseas development aid, Article 4(7) and Article 11(2)(c);
and awards under general, i.e. non-industry-specific, or regional aid schemes, Article 11(2)(b);
the motor industry (OJ C 123, 18.5.1989, p. 3, OJ C 81, 26.3.1991, p. 4 and OJ C 36, 10.2.1993, p. 17): projects involving investment of over ECU 12 million (paragraph 2.2);
agriculture: awards for investment normally excluded from aid in agricultural product processing and marketing sectors, see Commission notice (OJ C 71, 23.3.1995, p. 3);
fisheries (OJ C 260, 17.9.1994, p. 3): aid for various specified purposes;
steel processing not falling within the ECSC Treaty (OJ C 320, 13.12.1988, p. 3): awards of aid to seamless tube and large-diameter welded pipe manufacturers (paragraph 4(1)(a));
R&D aid (OJ C 83, 11.4.1986, p. 2, paragraph 5.5, and letters to the Member States reference DG/IV (86)3934, 4.11.1986 and SG(90) 1620, 5.2.1990): major projects, including collaborative projects between firms and universities or public research institutes, costing over ECU 20 million and Eureka projects costing over ECU 30 million);
packages of aid for investment projects: see Commission notice on cumulation, (OJ C 3, 5.1.1985, p. 2);
aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 2): all awards to firms larger than small and medium-sized enterprises.

([7]) Cases 91 and 127/83 *Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting* [1984] ECR 3435, 3452-3453 (paragraphs 16-18).

([8]) The Commission is willing to give informal advice on whether notification is required.

([9]) Paragraphs 4.3 and 4.4 of notice on government capital injections, Bull. EC 9-1984, and paragraphs 27-31 of notice on public enterprises OJ C 307, 13.11.1993, p. 3. Financial transfers to public enterprises which clearly do not involve aid are not subject to prior notification but to *ex post* reporting in certain circumstances; notice on public enterprises, paragraphs 35-37.

([10]) Such as paragraph 2.2 of the motor industry aid framework, the synthetic fibres industry aid framework and Article 11(2) of the shipbuilding aid code; see note 6 above and Commission's letter reference SG(81) 12740 of 2.10.1981.

the Secretariat-General if it is proposed to introduce a new aid scheme, alter an existing scheme or to award aid to an individual firm or project outside a scheme or programme;

the responsible Directorate-General, namely Competition, Agriculture, Transport or Fisheries, in the case of notifiable individual awards of aid under schemes authorised by the Commission subject to notification of all or major awards ([11]), or of amendments of existing aid schemes that the Commission has previously authorised which qualify for the accelerated clearance procedure ([12]);

or the Directorate-General for Competition in the case of a new aid scheme for small and medium-sized enterprises that fulfils the conditions for the accelerated clearance procedure ([13]).

Notifications are to be sent direct to the Directorate-General responsible in the cases referred to in the latter two indents in order to save time in processing, since the Commission has set itself shorter time-limits in these cases (see paragraph 32 below).

18. After receipt of the notification, the Secretariat-General or, as the case may be, the responsible Directorate-General sends the Permanent Representation of the Member State concerned an acknowledgment which states the date on which the notification was received and undertakes that the Commission will ask for any further information it may need, should it find the notification to be incomplete, usually within 15 working days from that date ([14]).

19. The date of receipt is the reference date for the calculation of the time limit by which the Commission must make a determination on the case, i.e., decide to approve the aid or to launch a formal investigation under Article 93(2) ([15]).

20. As aid may not be granted until the Commission has authorised it, Member States should notify their plans sufficiently in advance of the planned implementation date to allow time for the Commission to make its decision. The minimum periods of two months for a new scheme, 30 working days for an award made under an approved scheme and 20 working days for the accelerated procedure (see paragraphs 30-32 below) may not suffice if the Commission has to ask for further information or clarification.

1.2.3. Content of notifications and requests for additional information

21. The Commission recommends use of a checklist of standard items of information for notifying aid schemes and individual aid awards ([16]). For the motor industry ([17]) and the advertising of

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([11]) See Commission letters reference SG(81) 12740 of 2.10.1981 and SG(89) D/5521 of 27.4.1989 and the notice on unnotified aid, OJ C 318, 24.11.1983, p. 3. See also Section 4 below on unnotified aid.

([12]) Commission notice on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes, OJ C 213, 19.8.1992, p. 10. Qualifying amendments are extensions in time and minor changes in the conditions. An increase in the budget of a scheme by not more than 20 % of the budget authorised (where the annual budgets were notified) or of the initial one (where the budgets were notified) or of the initial one (where the budgets for some later years were not notified), without any extension in time, need no longer be notified: notice on standardised notifications and reports, letter to Member States reference SG(94) D/2472-2494 of 22.2.1994.

([13]) OJ C 213, 19.8.1992, p. 10. For new SME aid schemes the accelerated procedure is not available for aid in agriculture, fisheries, transport, the motor industry, synthetic fibres, coal or steel.

([14]) Commission letter to Member States reference SG(81) 12740 of 2.10.1981, as amended by letter reference SG(95) 4315 of 4.4.1995. When a Member State gives advance notice of capital injections, the Commission informs the Member State within 15 working days wheter it considers aid is involved, see note 9 above.

([15]) See Commission letter reference SG(81) 12740 of 2.10.1981. If the notification is incomplete, the time limit is only counted from the date of receipt of complete information (see paragraph 23).

([16]) Notice on standardised notifications and reports, letter to Member States reference SG(94) D/2472-2494 of 22.2.1994. This requires additional items of information to be provided for R&D aid.

([17]) See note 6.

agricultural products ([18]), special checklists are laid down. A special checklist is also provided for notifications for the accelerated procedure ([19]) and for information on unnotified aid awards to individual firms ([20]). One of the required pieces of information about schemes that are to run for several years or indefinitely is the budget. If the budgets for later years of a scheme are not indicated in the original notification, they must be notified separately later. This need not be done, however, if the budget is not more than 20 % bigger than the original ([21]).

22. A notification is incomplete when it does not contain all the information the Commission needs in order to form a view of the compatibility of the measure with the Treaty ([22]).

23. If a notification is incomplete, the responsible Directorate-General requests the further information required usually within 15 working days from the date of receipt of the notification. A request for further information cancels the start of the period allowed for processing the notification. The whole period begins to run afresh from the date on which the requested further information is received ([23]).

24. The Commission usually asks for the further information to be supplied within 20 working days. It is requested by, and should be sent directly to, the Directorate-General concerned. If there is no answer or the answer is incomplete, the Directorate-General concerned sends a reminder or a further request for the missing information, usually allowing 15 working days. Letters asking for information remind the Member State of the prohibition against implementing the aid proposal until the Commission has taken a decision (see paragraphs 26-28).

25. The Secretariat-General sends the Member State an acknowledgment of receipt of the further information.

1.3. Prohibition against implementing the aid proposal during the Commission's investigation

26. The last sentence of Article 93(3) provides that the Member State shall not put its proposed measures into effect until the Article 93(2) procedure has resulted in a final decision. In fact, the prohibition against carrying out plans to grant aid without having received clearance from the Commission applies generally: it prohibits the implementation of notified aid proposals before clearance, even in cases where formal proceedings are not opened ([24]).

27. By 'putting into effect' is meant not only the actual granting of aid but the conferment of powers enabling the aid to be granted without further formality ([25]). To avoid breaching this requirement when passing aid legislation, Member States can either notify the legislation while it is still at the drafting stage or, if not, write into it a clause whereby the aid-granting body can only make payments after the Commission has cleared the aid ([26]).

([18]) OJ C 302, 12.11.1987, p. 6.
([19]) See note 12.
([20]) Letter on unnotified aid SG(91) D/17956 of 27.9.1991.
([21]) Notice on standardised notifications and reports, letter to Member States SG(94) D/2472-2494 of 22.2.1994.
([22]) See Commission letter to the Member States SG(81) 12740 of 2.10.1981.
([23]) Ibid. and Commission letter SG(95) D/4315 of 4.4.1995.
([24]) Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, 1481 (paragraph 4); see also Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 595-596; Cases 31 and 53/77R *Commission* v *United Kingdom* [1977] ECR 921, 924 (paragraph 16); Cases 67, 68 and 70/85R *Van der Kooy* v *Commission* [1985] ECR 1315, 1327 (paragraph 35); and Case 310/85 *Deufil* v *Commission* [1987] ECR 901, 927 (paragraph 24); Cases C-278-280/92 *Spain* v *Commission*, [1994] ECR I-4103, paragraphs 12-15; see also the Commission's notices on notification, OJ C 252, 30.3.1980, p. 2, and on unnotified aid, OJ C 318, 24.11.1983, p. 3, respectively and its letter SG(89) D/5521 of 27 April 1989.
([25]) See Commission letter SG(89) D/5521 of 27 April 1989.
([26]) Finance bills setting annual appropriations for transfers to public enterprises are not notifiable, but only the individual financing plans: see paragraph 15.

28. If aid legislation that has been notified is enacted in such a form that the aid can be granted before the Commission has given clearance, the case will be reclassified as 'unnotified aid'. The Commission will then apply the procedure set out in Section 4 below, as in cases when the Member State fails to notify aid at all.

1.4. Withdrawal of notification

29. If the Member State withdraws the notification, the Commission informs it by letter that the file is being closed on the case.

2. Decisions of the Commission to approve notified aid without opening Article 93(2) proceedings

2.1. Commission's duty to make a determination within a reasonable time

30. The Commission has a duty to let the Member State that has notified an aid proposal know of its view within a reasonable time ([27]). The Court of Justice has set a general time limit of two months from notification, and the Commission has set itself shorter time limits in certain cases (see below). In agreement with the Member State concerned, these time limits can be extended. If the Commission, without having obtained an extension, fails to respond to the notification within the two months allowed by the Court, and if the Member State then gives notice of its intention to implement the proposal and the Commission fails to object, the aid can be legally granted and becomes 'existing aid' ([28]).

2.2. Time limits

31. The normal time limit for making a determination on a notification is hence two months ([29]). This applies both to schemes and to individual awards of aid outside of schemes.

32. The Commission has set itself a shorter time limit of:

(i) 30 working days

for notifiable individual awards of aid under schemes already authorised by it ([30]),

and

for significant individual cases of cumulation of aid ([31]), and

(ii) 20 working days

for new aid schemes for small and medium-sized enterprises which qualify for the accelerated clearance procedure ([32]),

and for amendments of authorised aid schemes qualifying for the accelerated clearance procedure ([33]).

The Commission could also set itself shorter time limits for other cases ([34]).

([27]) See Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, 1481, (paragraphs 4 and 5); Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488 (paragraph 12).

([28]) See note 85.

([29]) See Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488 (paragraph 11), and Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, I-4139 and I-4142 (paragraphs 8 and 18-19), referring to Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471; see also the Commission's notices in OJ C 252, 30.9.1980, p. 2 and OJ C 318, 24.11.1983, p. 3 and its letter reference SG(81) 12740 of 2.10.1981.

([30]) See Commission letter reference SG(81) 12740 of 2.10.1981 and its notice in OJ C 318, 24.11.1983, p. 3. The 30-day time limit also applies to notifiable individual awards in industries subject to specific aid codes or frameworks (see note 6). However, in the non-ECSC steel processing industry, the Commission undertakes to deal with all individual cases within 30 working days (paragraph 4.2. of code), while in shipbuilding it does so only for aid awards under Article 4(5) of the directive.

([31]) See Commission notice on cumulation, OJ C 3, 5.1.1985, p. 2.

([32]) See notice in OJ C 213, 19.8.1992, p. 10. The accelerated procedure is not applicable to new SME schemes in agriculture and fisheries or other sectors with special rules, namely transport, coal, steel, shipbuilding, man-made fibres and the motor industry.

([33]) Ibid., and note 11. If the Directorate-General concerned considers that the case does not fulfil the conditions for accelerated clearance, it informs the Member State that the case will be dealt with under the ordinary procedure, sending a copy of the letter to the Secretariat-General.

([34]) For example, it advises Member States whether proposed government capital injections involve aid and therefore need to be notified within 15 working days: paragraph 4.4 of the 1984 notice, see note 9.

2.3. Procedure

33. The Commission can decide to raise no objection to aid notified to it without opening Article 93(2) proceedings ([35]). The decision can be on the grounds that the measure does not involve aid under Article 92(1), that the aid is covered by an authorised scheme or that it is eligible for exemption under Article 92(2) or (3).

34. Before taking a decision to clear aid without opening Article 93(2) proceedings, the Commission is under no obligation to inform the other Member States and interested parties ([36]).

35. The decisions are communicated to the Member State by letter.

36. Like all decisions they must meet the requirements of adequate reasoning laid down in Article 190 ([37]). To inform the other Member States and interested third parties, the Commission publishes a notice on the decision in the *Official Journal of the European Communities* ([38]). The description of the case given in the notice varies in length according to the nature and importance of the case. It usually takes the form of a list of standard items of information ([39]). No notices are at present published on cases cleared by accelerated procedure ([40]).

([35]) A decision to approve notified aid without opening proceedings may not impose conditions: see note 42.

([36]) See Case C-225/91, *Matra* v *Commission* [1993] ECR I-3203, I-3254-3255 and I-3263 (paragraphs 16 and 52-54).

([37]) See paragraph 51.

([38]) See Section 7.

([39]) See Commission letter to Member States of 11.10.1990, reference SG(90) D/28091. The notices are in fact published in the 'C' series of the *Official Journal of the European Communities*. Interested parties contemplating an appeal can obtain further information from the Commission on request, but normally not more than the letter to the Member State announcing the decision. See Case 236/86, *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, 3784 (paragraph 14), and C-180/88, *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, I-4440-4441 (paragraphs 22-24).

([40]) See letter referred to in note 39 and notice on accelerated clearance of SME aid schemes and of amendments of existing schemes, OJ C 213, 19.8.1992, p. 10.

3. Formal investigation procedure under Article 93(2)

3.1. Treaty provisions

37. Article 93(2) states: '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 common market having regard to Article 92, 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'.

3.2. Cases in which the Commission must open an investigation

38. The Commission is obliged to open the procedure provided for in Article 93(2) whenever it has serious difficulty in determining the compatibility of aid with the common market ([41]) or considers that the aid can be authorised but conditions must be imposed ([42]). The procedure is applicable in all types of cases, whether of notified, unnotified, or existing aid, although in the latter case it must be preceded by the proposal of 'appropriate measures' under Article 93(1) ([43]). The Commission must also open Article 93(2) proceedings if it finds that authorised aid is being misused, or further aid granted, in disregard of the terms of the authorisation ([44]).

39. The decision to open proceedings is without prejudice to the final decision, which may still be to find that the aid is compatible with the common market. The purpose of Article 93(2) proceedings is to ensure a comprehensive examination of the case by exploring doubtful matters further with the Member State concerned and by hearing the views of interested parties ([45]).

40. With certain agricultural aid the Commission cannot open Article 93(2) proceedings even when it considers that the aid is incompatible with the common market, but can only make recommendations ([46]).

3.3. Conduct of Article 93(2) proceedings

41. The Member State concerned is informed of the commencement of proceedings by letter. The other Member States and interested parties are informed by notice in the *Official Journal of the European Communities*.

([41]) Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488 (paragraphs 12-19); Case C-198/91 *William Cook* v *Commission* [1993] ECR I-2487, I-2529-2531 (paragraphs 29-31); Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, I-3258-3259 (paragraphs 33-39).

([42]) The need for conditions, i.e., restrictions on the type, amounts, beneficiaries, purposes or duration of aid that were not provided for in the notification and are not generally applicable, implies doubt that otherwise competition might be unduly distorted and points to the need for a fuller investigation. The Commission is willing to advise Member States when aid proposals are unlikely to be authorisable and for this purpose encourages contacts before notification. These often lead to proposals being altered to make them eligible for authorisation, thus avoiding a formal enquiry. See also note 8.

([43]) See paragraphs 77-79 and Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117; and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145.

([44]) In the former case it may also refer the matter directly to the Court of Justice: Case C-294/90 *British Aerospace and Rover Group* v *Commission* [1992] ECR I-493, I-522 (paragraphs 11-13).

([45]) Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488-1489 (paragraph 13); Case C-294/90 *British Aerospace and Rover Group* v *Commission* [1992] ECR I-493, I-521-522 (paragraphs 7-14).

([46]) Under Article 4 of Council Regulation No 26/62, (OJ 30, 20.4.1962, p. 993), only Article 93(1) and the first sentence of Article 93(3) apply to aid granted for certain agricultural products to which the Council has not yet made all the provisions of Articles 92 and 93 applicable under Article 42 of the EC Treaty. A similar situation obtains under Council Regulation 706/73/EEC (OJ L 68, 15.3.1973, p. 1) for trade in agricultural products with the Channel Islands and the Isle of Man.

42. The Commission aims to close the proceedings within six months of their being commenced and for this purpose has laid down target dates for completing the various stages ([47]).

3.3.1. Contacts with Member States

43. The letter serving notice of proceedings states the reasons for the Commission's objections to the aid and invites the Member State to answer these objections within a stated period, usually one month ([48]). The letter reminds the Member State of the ban on putting the aid into effect before the Commission has authorised it ([49]).

44. If the Member State wishes to make oral submissions to the Commission, the meetings for this purpose should be held within three months of the service of notice of proceedings. Written confirmation of information supplied at such meetings, and any additional information or consequent amendments of the aid proposals, should be in the Commission's possession within four months ([50]).

45. The Commission must give the Member State an opportunity to reply to comments and allegations made by other Member States and third parties in response to the public notice it places in the *Official Journal of the European Communities*. For this purpose the Directorate-General responsible sends the Member State a letter enclosing the submissions it has received. Member States are well advised to react to submissions as soon as possible, as the Commission is otherwise free to take the submissions into account in its decision without hearing the Member State's response to them ([51]). Usually, the Commission asks for the Member State's reaction within 15 days.

3.3.2. Comments of other Member States and interested parties

46. The notice to other Member States and interested parties gives them one month from the date of publication to comment. The notice reproduces the letter that the Commission has sent to the Member State concerned, informing it of the opening of proceedings, with any commercially sensitive information deleted ([52]).

47. The rights of third parties in the Article 93(2) procedure flow from the requirement to give 'notice to the parties concerned to submit their comments'. The 'parties concerned', are not only the firm or firms receiving aid but also firms, individuals or associations whose interests might be affected by the grant of the aid, in particular competing firms and trade associations ([53]). The Court of Justice has held that a public notice is an appropriate means of informing all the parties concerned and that Article 93(2) does not require individual notice to be given to particular persons ([54]).

48. In the notice, the Commission states its objections to the aid ([55]).

([47]) Letter reference SG(87) D/5540 of 30.4.1987.
([48]) Ibid.
([49]) If necessary, the Commission can issue an injunction to this effect: Case C-301/87 *France* v *Commission* [1990] ECR I-307, I-356 (paragraph 20).
([50]) Letter reference SG(87) D/5540 of 30.4.1987.
([51]) See paragraph 50.
([52]) Commission letter of 27.6.1989, reference SG(89) D/8546.
([53]) Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, 3826-3827 (paragraph 16).
([54]) Ibid., 3827 (paragraph 17). However, if there is only one beneficiary, notice should be given direct. See also Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, I-806-807 (paragraphs 17-18).
([55]) Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, 3827-3828 (paragraph 21).

3.4. Final decision

49. Unless the aid proposal is withdrawn, the Commission can take either a 'positive' decision on the aid, as in cases where no Article 93(2) proceedings are opened — i.e., it can find that the measure does not involve aid under Article 92(1) or that it is eligible for exemption under Article 92(2) or (3) — or it can take a 'negative' decision. A negative decision states that the Member State may not grant the aid ([56]). A decision can be partly positive and partly negative. Positive decisions taken after Article 93(2) proceedings may impose conditions, i.e. restrictions on the type, amounts, beneficiaries, purposes or duration of the aid that were not provided for in the original aid proposal and are not generally applicable.

50. If the Member State fails to take its opportunity to reply to the opening of proceedings, the Commission is entitled to take a decision on the basis of the information available to it without having heard any counter-argument from the Member State ([57]). However, if it does not have sufficient information, it must first issue an injunction to the Member State ordering it to supply the missing information ([58]).

51. The operative part of a decision has to specify the action the decision requires from the Member State and any other obligations and conditions imposed on it ([59]). Article 93(2) also requires the Commission to set a time limit by which the Member State must carry out the action required. The time limit varies with the circumstances, but is usually one or two months ([60]). Furthermore, Article 190 of the EC Treaty requires that the decision must clearly state the facts and legal considerations on which it is based, so that the parties are aware of them and the Court of Justice can exercise its powers of review ([61]).

52. The Secretariat-General informs the Permanent Representation of the Member State concerned of the decision in a brief letter as soon as the decision is taken ([62]).

53. In accordance with Article 191 of the Treaty, the Commission serves on the Member State concerned the full text of negative or partly negative decisions and decisions laying down conditions and informs the Member State of positive decisions by letter. The full text of a negative, partly negative or conditional decision is published in the 'L' series of the Official Journal. In the case of a positive decision, a notice reproducing the letter informing the Member State of the decision is published in the 'C' series of the Official Journal ([63]).

([56]) In unnotified aid cases, negative decisions can order the recovery of aid already paid: see Section 4.

([57]) See Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, 1010 (paragraph 18); Case C-301/87 *France* v *Commission* (*Boussac*) [1990] ECR I-307, 357 (paragraph 22); Case 102/87 *France* v *Commission* [1988] ECR 4067, 4089 (paragraph 27); Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, 2346-2347 (paragraphs 20 and 22); Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, 2286-2288 (paragraphs 16, 17 and 22) and Commission letters reference SG(91) D/4577 of 4.3.1991 and SG(87) D/5542 of 30.4.1987.

([58]) See Case C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission*, [1994] ECR I-1173. See also note 49 and paragraphs 61-64.

([59]) Case 70/72 *Commission* v *Germany* [1973] ECR 813, 832 (paragraph 23); Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, 277-278 (paragraphs 62-67); and Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, 299-300, 302 (paragraphs 19 and 29-30).

([60]) Obligations to submit restructuring plans may allow up to six months.

([61]) Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, 278-279 (paragraphs 69-76); Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, 823-825 (paragraphs 19 and 22-27); Case 248/84 *Germany* v *Commission* [1987] ECR 4013, 4041-4042 (paragraphs 18 and 21-22); Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, 3828 and 3831-3832 (paragraphs 23 and 35-39); Cases 62 and 72/87 *Exécutif régional wallon* v *Commission* [1988] ECR 1573, 1595 (paragraphs 24 and following); Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, 1015 (paragraph 40); and Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, I-2130 (paragraphs 44-45).

([62]) Commission letter to Member States of 27.6.1989, reference SG(59) D/8546.

([63]) Ibid. See also C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801.

3.5. Failure of Member State to comply

54. If the Member State concerned fails to conform to the decision, or to comply with any conditions that have been imposed, within the period laid down, the Commission may refer the matter directly to the Court in accordance with the second subparagraph of Article 93(2), applying if appropriate for interim measures under Article 186 of the EC Treaty.

4. Unnotified aid cases

4.1. Notion of unnotified aid

55. The notion of 'unnotified aid' covers aid provided or committed without notification for whatever reason (including doubt as to the aid character) and aid that has already been 'put into effect' when it is notified or is 'put into effect' after being notified but before the Commission reached a decision ([64]). Aid granted before authorisation is illegal.

4.2. Procedure in unnotified aid cases

56. The procedure leading up to decisions in unnotified aid cases and the content of decisions is the same as with notifications (see Sections 2 and 3 above), except in the following respects which are a consequence of the illegality of such aid and the possible damage to competitors.

57. Firstly, the Commission has a power of injunction to prevent or stop the payment of aid pending the conclusion of Article 93(2) proceedings and to order the Member State to supply full particulars of suspected illegal aid. Secondly, if the Commission finds that the aid was ineligible for exemption, it orders the Member State to recover the aid, with interest, from the recipient. In the case of agricultural products, the Commission can refuse to charge to the Community budget expenditure which has been artificially increased by national aid measures ([65]). Third, if a Member State were found to be regularly violating its notification obligations, the Commission could commence infringement proceedings against it under Article 169 of the EC Treaty ([66]). The Commission often learns of illegal aid from complaints from third parties ([67]).

58. The Commission has issued notices and has written to Member States warning them and the potential recipients of illegal aid of such consequences ([68]).

4.2.1. Request for information

59. In cases where the supposed aid has not been notified, the Commission first requests the Member States concerned to supply full details of the aid within 15 working days. If there is no answer or the answer is incomplete, the Member State is again asked to give detailed information within another 15 working days ([69]). If this still fails to elicit the required information, the Commission issues an injunction (see next section).

([64]) See paragraph 27 for the interpretation of 'put into effect'.

([65]) See notice in OJ C 318, 24.11.1983, p. 3.

([66]) See notice in OJ C 252, 30.9.1980, p. 2. Note also the possibility now in Article 171 of the EC Treaty to fine Member States for breaches of Community law.

([67]) See paragraphs 85-86. Third parties, especially competitors injured or threatened with injury through illegal aid, can also take action before national courts. The prohibition, against granting aid without authorisation by the Commission is absolute and categorical and, as such, is a directly effective law which can be enforced in national courts: see Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, 1483 (paragraphs 8-9); Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires France*, [1991] ECR I-5505, I-5527-5528 (paragraphs 11-14). Consequently, third parties may be able to obtain an injunction from a national court or a judgment that the decision of the public authorities granting the aid was illegal and unenforceable.

([68]) See notices on unnotified aid in OJ C 318, 24.11.1983, p. 3 and OJ C 252, 30.9.1980, p. 2 and letters of 4.3.1991, reference SG(91) D/4577, and 27.9.1991, reference SG(91) D/17956.

([69]) See letters reference SG(91) D/4574 of 4.3.1991 and SG(91) D/17956 of 27.9.1991. The reference in the March 1991 letter to a 30-day time-limit for replying to requests for information has combined the two 15-day periods into one. A list of standard items of information required on unnotified aid to individual firms is given in an annex to the letter of September 1991. The move to tighten up procedures on unnotified aid was prompted by the Court's *Boussac* judgment, Case C-301/87 *France* v *Commission* [1990] ECR 1-307.

60. If the Commission requires further information about aid that has been put into effect before notification, it will ask the Member State to supply the information within 20 working days, the same as the usual period allowed for supplying additional information in notified aid cases (see paragraph 24 above). A reminder will be sent if necessary.

4.2.2. Injunction ('interim measures')

61. The Commission has the power to issue an injunction ordering the Member State to suspend payment of the aid pending the outcome of the investigation and/or to supply information needed for the Commission to take a decision on the case, which has not been forthcoming despite requests ([70]).

62. Before issuing the injunction, the Commission must give the Member State concerned an opportunity to submit its comments ([71]). It will normally already have opened proceedings against the Member States under Article 93(2) or will do so at the same time (see below).

63. If the Member State fails to suspend payment of the aid, the Commission is entitled, while carrying out the examination on the substance of the matter, to bring the matter directly before the Court and apply for a declaration that such payment amounts to an infringement of the Treaty and/or for an injunction ([72]).

64. The Commission may also use its powers of injunction to order the disclosure of information about aid awards which the Member State maintains are within the terms of an approved aid scheme. If the Commission has doubts, it must ascertain the true facts, if necessary by means of an injunction. Only when it has done so and either is certain that the aid is not covered by the previous aid scheme authorisation or still has serious doubts, can it order aid payments to be suspended ([73]).

4.2.3. Decision to authorise the aid or to open proceedings under Article 93(2) ([74])

65. As in cases of notified aid (see paragraph 33 above), the Commission may decide to raise no objection to the aid on the ground that the measure does not involve aid under Article 92(1), that the aid is covered by an authorised scheme or that it is eligible for exemption under Article 92(2) or (3).

66. On the other hand, if the Member State fails to supply sufficient — or any — information within the 30 working days allowed, the Commission opens proceedings under Article 93(2) immediately and may also issue an injunction.

67. In unnotified aid cases, the Commission is not subject to any binding time-limit for making its determination on whether to raise no objection to the aid or to open Article 93(2) proceedings, but it endeavours to do so within two months of receiving complete information, as in notified cases.

68. If it opens proceedings, in the letter announcing that it has done so the Commission asks the Member State to confirm within 10 working days that any ongoing aid payments are being suspended, failing which an injunction may be issued.

([70]) See Case C-301/87 *France* v *Commission* [1990] ECR I-307, I-356 (paragraphs 18-20); Case C-142/87; *Belgium* v *Commission* [1990] ECR I-959, I-1009-1010 (paragraphs 15-18); Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173; see also paragraph 43.

([71]) *Boussac* judgment, I-356 (paragraph 19).

([72]) Ibid., I-357 (paragraph 23). See also Cases 31/77R and 53/77R *Commission* v *United Kingdom* [1977] ECR 921.

([73]) ECJ, 5.10.1994, Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 33-35.

([74]) Despite the wording of Article 93(3), Article 93(2) proceedings obviously can be opened in unnotified aid cases just as in notified ones. Therefore, the sanction of a prohibition order at the end of Article 93(2) proceedings is available when a Member State fails to notify aid, just as when it has notified the aid. See paragraph 38.

69. If the Member State fails to reply to the opening of proceedings, and to an injunction ordering it to supply the information the Commission needs to take a decision, the Commission can take a decision on the basis of the information available, including that which it may have received form third parties in response to the public notice and which it has communicated to the Member State ([75]).

4.2.4. Recovery orders

70. In negative decisions on cases of unnotified aid, the Commission requires the Member State to reclaim the aid from the recipient ([76]), except in duly justified exceptional cases ([77]).

71. The recovery is to be effected in accordance with national law. However, national law cannot be invoked to frustrate recovery or render it practically impossible ([78]). Nor can the recipients normally invoke legitimate expectations, because they have a duty of care before receiving aid to ensure that it is granted lawfully ([79]), or a Member State refuse to recover the aid on the grounds of the supposed legitimate expectations of the aid recipients ([80]). The Commission monitors the recovery of the aid. If the Member State has difficulties in doing so, it must cooperate with the Commission in finding ways of overcoming the difficulties ([81]).

72. The decision will normally require interest to be charged from the date the unlawful aid was awarded until it is recovered ([82]).

([75]) See Case C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, and paragraph 45. Member States are under a duty to cooperate with the Commission: see C-364/90 *Italy* v *Commission* [1993] ECR I-2097, I-2125 and 2128 (paragraphs 20-22 and 33-35).

([76]) First stated in Case 70/72 *Commission* v *Germany* [1973] ECR 813, 828-829 (paragraphs 10-13); see also Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, 1020 (paragraphs 65-66); ECJ, 2.2.1989, Case 94/87 *Commission* v *Germany* [1989] ECR 175; ECJ, 24.2.1987, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, 927 (paragraph 24); and the many judgments upholding decisions containing recovery orders, for example, Case 40/85 *Belgium* v *Commission* [1986] ECR 2321; Case 234/84 *Belgium* v *Commission* [1986] ECR 2263; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, I-3150 (paragraph 16).

([77]) See, for example, Commission Decision of 25.7.1990, *IOR* [1992] OJ L 183, 3.7.1992, p. 30.

([78]) See Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, 1018-1020 (paragraphs 58-63); Case C-74/89 *Commission* v *Belgium* [1990] ECR I-491; Case 94/87 *Commission* v *Germany* [1989] ECR 175; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, I-3150-3151 (paragraphs 18-19).

([79]) Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, I-3457-3458 (paragraphs 14-17); Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, I-806 (paragraph 13). See however, Case 223/85, *RSV* v *Commission* [1987] ECR 4617, 4659 (paragraph 17).

([80]) Case C-5/89 *Commission* v *Germany*, ibid; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, I-3150-3151 (paragraph 18).

([81]) Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, I-3151 (paragraph 19).

([82]) See letter on unnotified aid SG(91) D/4577 of 4.3.1991.

5. Monitoring of 'existing aid' under Article 93(1), review of general policy and reporting requirements

5.1. Notion of 'existing aid'

73. Existing aid within the meaning of Article 93(1) includes:

(i) old or 'pre-accession' aid, i.e. aid schemes in operation or aid committed, or in the process of being granted before the entry into force of the EEC Treaty (1 January 1958, the relevant date of accession in the case of Member States which joined the Community later, or 1 January 1994 in the case of the EFTA States signatories of the EEA Agreement) which has never been formally investigated and authorised by the Commission;

(ii) authorised aid, i.e. aid schemes or ongoing provisions of aid that have been authorised by the Commission after notification, or after being put into effect without notification ([83]);

and

(iii) aid authorised by default, i.e. legally granted after the Commission has failed to make a determination within the two-month period allowed for examining a notification ([84]) and the Member State has given the Commission notice that it is going ahead, without any reaction from the latter ([85]).

5.2. Purpose of the 'existing aid' procedure

74. The purpose of the 'existing aid' procedure is to provide a means of dealing with all three categories of existing aid. Article 93(1) is designed to enable the Commission to secure the abolition or adaptation of old or pre-accession aid that is incompatible with the common market ([86]) and to review aid schemes or provisions which were authorised in the past but which may no longer be compatible with the common market under the conditions currently prevailing ([87]). The procedure is applied not only to review individual Member State's aid schemes, but also when the Commission wishes to obtain changes to existing aid schemes, for example, as regards particular sectors or particular purposes, in all Member States at once ([88]).

5.3. Treaty provisions

75. Article 93(1) states: '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'.

([83]) Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488 (paragraph 12); Cases 166 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473; Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145; Case C-47/91 *Italy* v *Commission,* [1994] ECR I-4635.

([84]) See paragraphs 30-32 above.

([85]) Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, 1481 (paragraph 4); Case 171/83R *Commission* v *France* [1983] ECR 2621, 2628 (paragraphs 13-15); Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1488 (paragraph 11); Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, I-4139 and I-4142 (paragraphs 8 and 18-19). The Commission understands the case-law to mean that after receiving notice from the Member State that it intends to implement the proposal, the Commission may still, within a reasonably short period (say, two weeks), take a decision to open the Article 93(2) procedure.

([86]) See Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 595-596.

([87]) See *Twentieth Report on Competition Policy* (1990), point 171, and *Twenty-first Report on Competition Policy* (1991), points 240-241.

([88]) See paragraphs 82-84.

76. This provision places obligations both on the Commission and on the Member State concerned. The Commission must keep under constant review, in cooperation with the Member States concerned, all systems of aid existing in the Member States and must propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market. Member States have a duty to cooperate with the Commission.

5.4. Procedure

5.4.1. Initiation of review

77. Whenever the Commission believes that an existing aid scheme may be harming the functioning or development of the common market, it begins a review normally by writing for information to the Member State concerned. The initiation of a review does not require operation of the aid scheme to be suspended.

78. The Member State is under an obligation to provide the information required by the Commission. To enable the review to be carried out with the necessary dispatch, the Commission may set time limits for supplying information similar to those in notified aid cases, as described in paragraph 24 above.

5.4.2. Proposal of 'appropriate measures'

79. Having considered the existing aid scheme in the light of the information supplied by the Member State, the Commission may decide that no change in the scheme is necessary and close the file on the case, or it may propose whatever changes may appear appropriate to bring the scheme into line with current requirements. The proposal of 'appropriate measures' is communicated to the Member State by letter. The appropriate measures may include a recommendation to abolish the scheme. The Commission must give reasons for the measures it proposes ([89]). If the Member State agrees to make the changes recommended, the Commission closes the case.

5.4.3. Article 93(2) proceedings if Member State refuses

80. If, on the other hand, the Member State declines to carry out the appropriate measures proposed and the Commission, having heard its arguments, still considers that they are necessary, the Commission may only require the Member State to comply through the Article 93(2) procedure. The decision requiring the changes is not retroactive and must allow the Member State a reasonable period to comply ([90]).

5.5. General reviews of existing aid schemes concerning particular sectors or for particular purposes

81. As well as for reviewing individual Member State's aid schemes, the Commission also uses the Article 93(1) procedure to secure changes to existing aid schemes in all the Member States at once. For example, if the Commission sees a need to tighten up the control of aid to particular sectors, and for this purpose requires individual notification of aid awards to firms in the sectors even when the

([89]) See Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595, 609 (paragraph 9).
([90]) See Case 173/73 *Italy* v *Commission* [1974] ECR 709, 716-717 (paragraphs 5-7).

aid is granted under existing general or regional schemes, it is more convenient to introduce such changes *erga omnes* than by reviewing each existing scheme individually ([91]). As when reviewing individual schemes, the Commission recommends the proposed changes to Member States as appropriate measures. If they give their consent, the new rules become binding on them. If a Member State declines, the Commission may take a decision under the Article 93(2) procedure, making the rules binding on the country concerned ([92]).

82. The Commission also carries out general reviews of policy on aid for particular purposes and announces new or codified rules on such aid without seeking immediate across-the-board changes in existing schemes to comply with the new rules but instead allowing a certain period of time for adjustment. In such cases, the Commission applies the rules to new or amended schemes as and when they are notified and at the same time reviews individually under Article 93(1) any existing schemes not renotified within a certain period. For such rules, the Commission does not ask for the Member States' consent under Article 93(1) as the introduction of the rules does not of itself involve changes to existing schemes, but they are applied to each scheme individually afterwards ([93]).

83. To discuss proposed new aid rules or codifications and other aid issues, the Commission holds at least twice-yearly multilateral meetings with Member States' aid experts ([94]).

5.6. Member States' reporting requirements

84. To be able to monitor existing aid schemes the Commission requires Member States to supply it with annual reports. For the major schemes detailed reports are required, for the less important schemes the reports may be in abridged form, while only summary reports are to be supplied for schemes treated by accelerated procedure or with an annual budget of under ECU 5 million. Checklists of the various items of information to be included in each type of report — covering the amounts of aid awarded, the number, size, sector and location of firms receiving the aid, etc. — are laid down ([95]). Reports are also sometimes required on individual aid awards, for example in connection with the execution of an investment project or restructuring plan. Decisions ordering the recovery of aid ask for a report within a certain period, often two months, on the arrangements made for reclaiming the money. Special reporting requirements are imposed in some aid frameworks for particular industries ([96]). In relation to agricultural products, reports are only requested on a case-by-case basis as necessary.

([91]) See the motor industry and synthetic fibres aid codes which were applied to aid under authorised regional schemes. See Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145; *Twentieth Report on Competition Policy*, point 249; Case C-313/90, *CIRFS* v *Commission* [1993] ECR I-1125, I-1186 (paragraphs 34-36).

([92]) See, for example *Nineteenth Report on Competition Policy*, point 127; *Twentieth Report on Competition Policy*, point 249.

([93]) See, for example R&D aid framework (OJ C 86, 11.4.1986, p. 2), SME aid guidelines (OJ C 213, 19.8.1992, p. 2), environmental aid guidelines (OJ C 72, 10.9.1994, p. 3), and rescue and restructuring aid guidelines (OJ C 368, 23.12.1994, p. 12).

([94]) See *Twentieth Report on Competition Policy*, point 170.

([95]) See notice on standardised notifications and reports, letter to Member States SG(94) D/2472-2494 of 22.2.1994.

([96]) Namely, motor industry (OJ C 123, 18.5.1990, p. 3, paragraphs 2.2, 2.3 and Annex II), shipbuilding (OJ L 380, 31.12.1990, p. 27, Article 12 and Annex), and non-ECSC steel processing (OJ C 320, 13.12.1988, p. 3, paragraph 4.1).

6. Complaints

6.1. Importance and status

85. Third parties writing to the Commission are an important source of information about State aid, as are press reports. Such information can lead to the detection of unnotified aid and of abuses of aid that have been authorised. However, by no means do all such allegations turn out to be accurate or, even if accurate, actionable by the Commission. If the measure complained of lacks the features of State aid for the purposes of Article 92(1), then the Commission cannot take any action under this provision. In other cases the Commission finds that the aid complained of has already been authorised and that the relevant limits have been observed ([97]).

86. The types of third parties supplying information to the Commission range from private individuals complaining about the waste of taxpayers' money to competitors of the firms allegedly receiving aid. Nevertheless, the Commission examines, and replies to, all complaints ([98]). If it takes a decision on the aid complained of, it sends the complainant a copy of its letter to the Member State announcing the decision.

6.2. Procedure

87. Complaints need not be in any particular form and can be lodged by the individuals or firms concerned or their lawyers, or, for example, through their parliamentary representatives, governments or trade associations. Complaints may be addressed to the Commission in Brussels or to one of its offices in a Member State. An acknowledgement of receipt is sent to the complainant.

88. Unless the complaint clearly lacks foundation, the examining department will write to the Member State concerned for information to verify or refute the allegations. It may also ask the complainant to elaborate on the allegations or to supply further evidence. The Commission keeps the name of the complainant or informant secret unless the latter agrees to their identity being disclosed, and will not divulge to either party information for which the other party claims confidentiality. However, the Member State must be given an opportunity to defend itself against any allegation or piece of evidence which the Commission wishes to use ([99]). If the allegations of unnotified aid or abuse of an aid scheme are found to be proven or at least plausible, the examining department will have the case registered as unnotified aid and thereafter will follow the usual procedure ([100]). This will also be done if no satisfactory reply is received. The complainant will be informed that an unnotified aid case has been opened and will also be advised if the case is later closed.

([97]) See Cases 166 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473.
([98]) See Commission notice OJ C 26, 1.2.1989, p. 7.
([99]) See, for example, *Hoffman-La Roche* v *Commission* [1979] ECR 461, 512 (paragraph 11).
([100]) See Section 4.

7. *Publication of decisions*

7.1. Treaty requirements

89. Article 191 of the EC Treaty provides that decisions of the EC institutions shall be served on their addressees. Article 93(2) of the Treaty also requires the Commission to give interested parties notice of the opening of proceedings. In fact, the Commission publicises its State aid decisions more widely than the Treaty requires. As well as making it easier for interested parties to seek judicial review of final decisions, wider publicity improves the transparency of its policy and fosters voluntary compliance by Member States.

7.2. Practice

90. Member States other than the Member State granting the aid, interested parties and the general public are informed of decisions as follows:

(a) when a case is cleared without opening proceedings under Article 93(2), by a short notice in the form of a list of standard items of information ([101]). The only exceptions from this practice of systematically publishing announcements of such decisions are cases cleared by accelerated procedure;

(b) when Article 93(2) proceedings are opened, by a notice in the 'C' series of the Official Journal, which reproduces the letter the Commission has sent to the Member State concerned ([102]);

(c) on final positive decisions taken after Article 93(2) proceedings, also by a notice in the 'C' series of the Official Journal reproducing the letter to the Member State ([103]);

(d) on final negative decisions or positive decisions imposing conditions taken after Article 93(2) proceedings, by publication of the full text of the decision in the 'L' series of the Official Journal ([104]).

91. A press notice is issued, usually on the day the decision is taken, on virtually all decisions in State aid cases except minor ones. In addition, the more important decisions are reported in the Commission's monthly Bulletin and Annual Reports on Competition Policy.

92. As required by Article 214 of the EC Treaty all published information on State aid cases omits material of a kind covered by the obligation of professional secrecy. This does not include the identity of the aid recipients. When in doubt, the Commission clears intended publications with the Member State concerned beforehand in order to remove any commercially-sensitive material ([105]).

([101]) See paragraph 36.
([102]) See paragraph 45.
([103]) See paragraph 53.
([104]) Ibid.
([105]) See Case 145/84 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, 823 (paragraph 18).

ANNEX 1

ADMINISTRATIVE ARRANGEMENTS IN THE COMMISSION AND COUNTING OF TIME LIMITS

Administrative arrangements

Several departments in the Commission handle State aid cases. The Directorates-General for Agriculture (DG VI), Transport (DG VII) and Fisheries (DG XIV) are in charge of cases in their particular fields and the Directorate-General for Energy (DG XVII) handles aid to the coal industry. In other cases the lead department is the Directorate-General for Competition (DG IV).

The Secretariat-General of the Commission is responsible for allocating notified cases between departments, supervising and coordinating decision-making, service of decisions on the Member State, and publication of decisions in the *Official Journal of the European Communities*. The Secretariat-General keeps a central register of all pending State aid cases. Cases are classified into notified (N), unnotified (NN), existing aid (E) and cases in which formal investigation proceedings have been opened (C). The case number consists of one of these letters followed by the serial number and year of registration in the relevant part of the register, for example, N 162/91, NN 5/92.

The flowchart on the following pages represents the typical paths of cases through the machinery.

Counting of time limits

Time limits are laid down for various kinds of action in State aid cases. They are expressed as a period of months or working days. The period is started by the receipt([106]) of correspondence or the publication of notices.

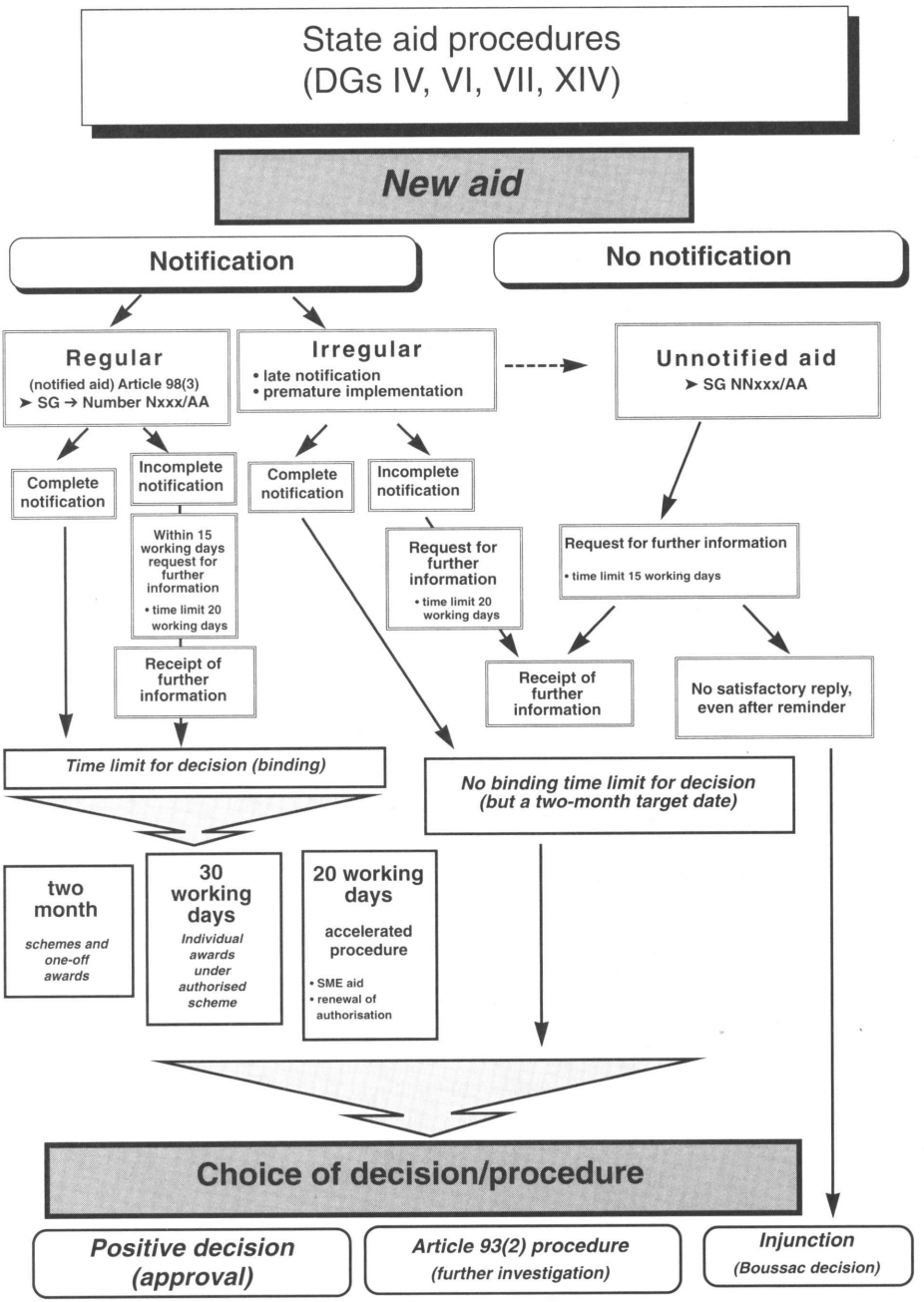
Periods expressed in months end on the same date, n months later, as that on which the correspondence was received or the notice published. For example, the two-month deadline for deciding on a notification received on 5 May is 5 July.

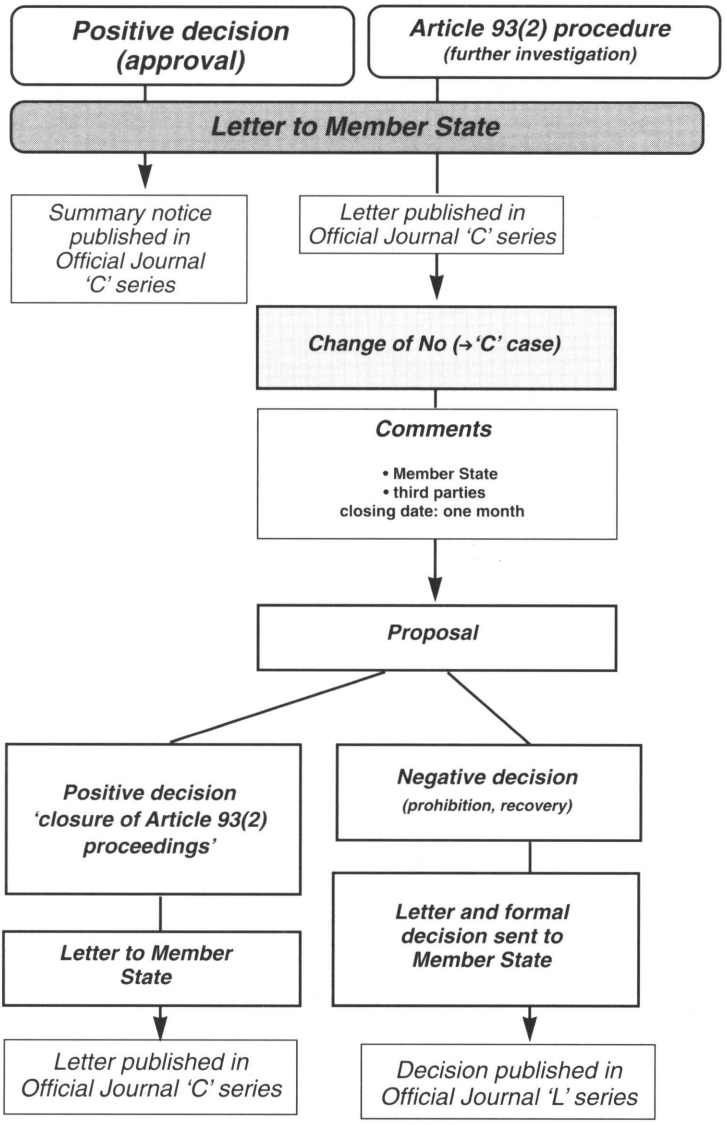
Periods expressed in working days end on the n^{th} working day counted from the working day following that on which the correspondence was received. Weekends and public holidays are thus disregarded([107]). It is the public holidays observed in Member States that count when the time limit is for action by Member States([108]). A list of the public holidays that are not working days for the Commission is published each December for the following year.

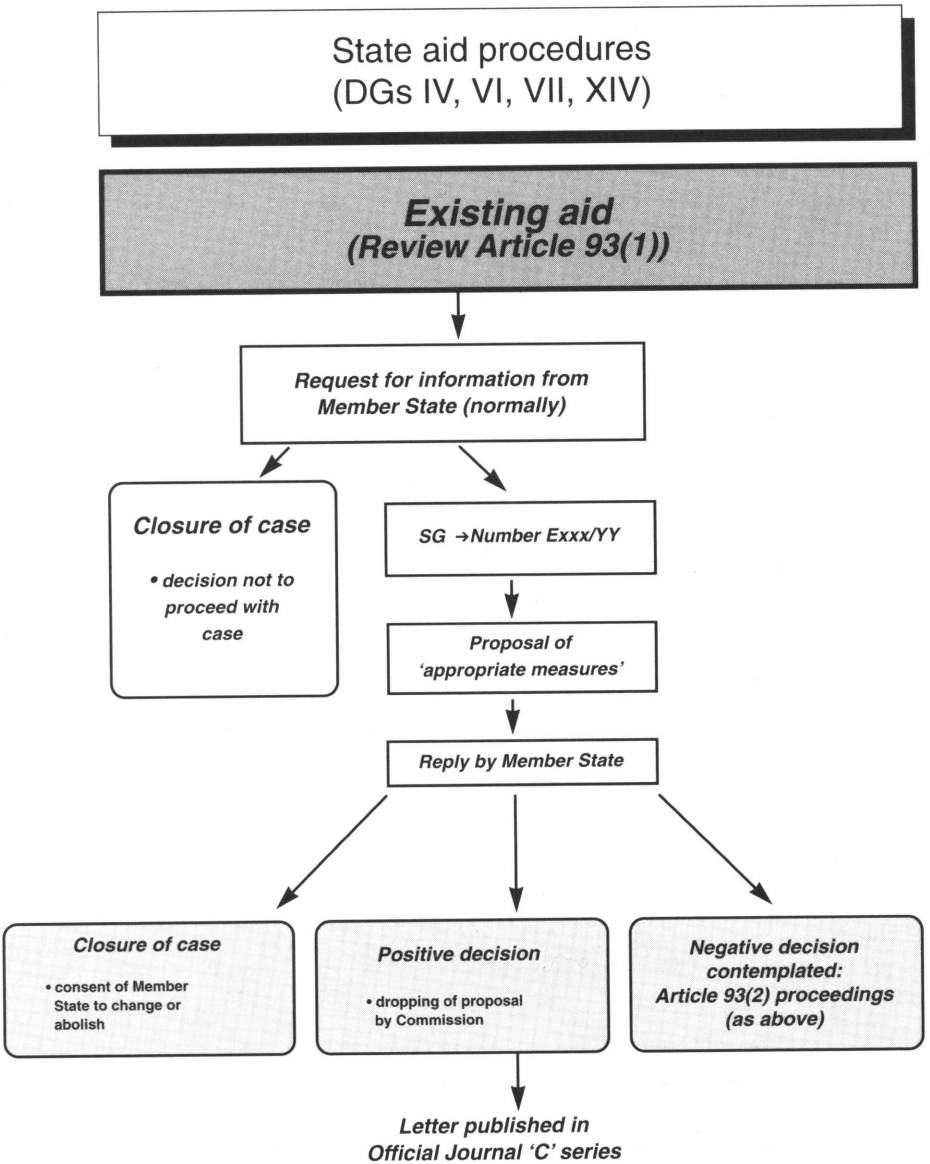
([106]) Or dispatch if the correspondence is faxed. The Commission faxes letters that set Member States a time limit for action starting from the date of dispatch and sends the original afterwards.

([107]) See Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits OJ L 124, 8.6.1971, p. 1.

([108]) A maximum of five working days per week should be counted even in Member States that officially have six working days per week.


State aid procedures
(DGs IV, VI, VII, XIV)
New aid
Notification
No notification
Regular
(notified aid) Article 98(3)
➤ SG → Number Nxxx/AA
Irregular
• late notification
• premature implementation
Unnotified aid
➤ SG NNxxx/AA
Complete notification
Incomplete notification
Complete notification
Incomplete notification
Within 15 working days request for further information
• time limit 20 working days
Request for further information
• time limit 20 working days
Request for further information
• time limit 15 working days
Receipt of further information
Receipt of further information
No satisfactory reply, even after reminder
Time limit for decision (binding)
No binding time limit for decision (but a two-month target date)
two month
schemes and one-off awards
30 working days
Individual awards under authorised scheme
20 working days
accelerated procedure
• SME aid
• renewal of authorisation
Choice of decision/procedure
Positive decision (approval)
Article 93(2) procedure
(further investigation)
Injunction
(Boussac decision)


Positive decision (approval)
Article 93(2) procedure (further investigation)
Letter to Member State
Summary notice published in Official Journal 'C' series
Letter published in Official Journal 'C' series
Change of No (→'C' case)
Comments
• Member State
• third parties
closing date: one month
Proposal
Positive decision 'closure of Article 93(2) proceedings'
Negative decision (prohibition, recovery)
Letter to Member State
Letter and formal decision sent to Member State
Letter published in Official Journal 'C' series
Decision published in Official Journal 'L' series


State aid procedures
(DGs IV, VI, VII, XIV)
Existing aid
(Review Article 93(1))
Request for information from Member State (normally)
Closure of case
• decision not to proceed with case
SG →Number Exxx/YY
Proposal of 'appropriate measures'
Reply by Member State
Closure of case
• consent of Member State to change or abolish
Positive decision
• dropping of proposal by Commission
Negative decision contemplated: Article 93(2) proceedings (as above)
Letter published in Official Journal 'C' series

ANNEX 2

ARRANGEMENTS FOR COOPERATION BETWEEN THE COMMISSION AND THE EFTA SURVEILLANCE AUTHORITY UNDER THE EUROPEAN ECONOMIC AREA (EEA) AGREEMENT ([109])

1. Exchange of information and views on general policy issues (paragraph (a) of Protocol 27 to the EEA Agreement)

The EFTA Surveillance Authority is represented at the Commission's multilateral meetings with observer status, and vice versa. The Authority discusses Commission drafts of notices or recommendations on general policy issues with its Member States at multilateral meetings or consults them in writing. Afterwards it gives its comments and a summary of the comments of the EFTA States in a written submission to the Commission. The Commission informs the Authority how it has taken account of such comments.

In addition, general policy issues are discussed with the EFTA Surveillance Authority at the periodic meetings between it and the Commission departments at various levels.

2. Notice and publication of opening of proceedings (paragraphs (c) and (e) of Protocol 27)

Decisions to open proceedings under Article 93(2) of the EC Treaty and the corresponding provisions of the Surveillance and Court Agreement ([110]) are brought to the notice of the other authority and to interested parties in the EU and EFTA countries party to the EEA Agreement respectively. For this purpose the Commission's Secretariat-General sends the EFTA Surveillance Authority copies of the letter to the Member State announcing the opening of proceedings and of the press release. The EFTA Surveillance Authority correspondingly informs the Commission's Secretariat-General. For proceedings opened by the Commission a short notice referring to the full notice published in the Official Journal is published in the EEA Supplement to the Official Journal in the languages of the EFTA country members of the EEA that are not official EU languages. When the EFTA Surveillance Authority opens proceedings the notice it publishes in the EEA Supplement is reproduced in full in the EU languages in an EEA section of the Official Journal.

3. Information on and publication of final decisions (without opening proceedings or after proceedings), injunctions and proposals of appropriate measures (paragraphs (d) and (e) of Protocol 27)

Copies of the letter to the Member State concerned and the press release, if any, are sent by the Commission's Secretariat-General to the EFTA Surveillance Authority on all the types of decisions referred to above. The EFTA Surveillance Authority does the same for its decisions.

Interested parties in the other group of countries are informed by means of notices published in an EEA section of and the EEA Supplement to the Official Journal, as in point 2 above.

([109]) These arrangements may be changed following the accession of three of the EFTA country members of the EEA to the European Union.

([110]) Article 1(2) of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

4. Provision of information and exchanges of views at the other authority's request on a case-by-case basis (paragraph (f) of Protocol 27)

Such information and views are exchanged both in writing and at the periodic meetings between Commission departments and the EFTA Surveillance Authority.

5. Complaints (Article 109(4) of the EEA Agreement)

Under Article 109(4) of the EEA Agreement, each authority must refer to the other for examination of complaints about alleged aid in the other authority's Member States. The authority responsible replies to the complainant and informs the authority that has referred the complaint of the outcome of the investigation.

II — Communications to Member States and public notices on procedural issues

1. Notification obligation and consequences of breach of obligation

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

Article 93(3) of the EEC Treaty requires that all plans to grant or alter aid by Member States shall be notified to the Commission before they are put into effect and in sufficient time to enable the Commission to submit its comments and, as appropriate, open the administrative procedure provided for in Article 93(2) against the measure proposed. The opening of such a procedure has a suspensive effect and the national measure in question cannot be put into operation unless and until the Commission approves it.

Increasingly in the course of the last months the Commission has become concerned about the extent to which certain Member States do not comply fully with their obligations in this respect either by failing to notify or not notifying in due time. The Court of Justice has laid down in Case 120/73 that Member States must allow the Commission a period of two months to conduct its evaluation of the measure. The Commission has therefore decided to use all measures at its disposal to ensure that Member States' obligations under Article 93(3) are respected. To this end it has written to Member States recalling to them their obligations and informing them of its intention to require due respect thereof in future. The general part of the text of the letter addressed to each Member State is set out below for general information.

On 2 October 1974, at the 306th meeting of the Council of Ministers in Luxembourg, the governments of Member States declared that 'the rules of the EEC Treaty regarding aid (Articles 92 and 93) shall be strictly observed both with respect to existing and future aid measures'. Notwithstanding this declaration, the Commission has become increasingly aware of a growing tendency, particularly marked in the case of certain Member States, not to fulfil the obligations laid down by Article 93(3) in respect of notification of aid cases and their non-implementation during the time allotted to the Commission to evaluate their compatibility with the Treaty.

Cases of non-notification or late notification (i.e. without giving the Commission the benefit of the necessary period to evaluate the aid before it is wished to implement the measure) have ceased to be isolated. Indeed the extent of the tendency towards non-notification or late notification would appear in some cases to indicate the possible existence of a general decision not to respect the provisions in question.

The Commission is aware that, particularly in the recent past, governments have frequently been under extreme pressure to intervene in the normal commercial processes by means of subsidies and that the number of cases which are subject to the notification procedure has grown as a consequence.

(*) OJ C 252, 30.9.1980, p. 2.

However, the Treaty established these aid procedures for a well-founded reason which, in principle, is supported by all concerned, namely that one firm's subsidy may be the unemployment of another's workforce. Repeatedly in the course of its examination of aid cases the Commission is made aware how much competitors resent the granting of subsidies to firms in other Member States. Governments are no less critical of the subsidies granted by others.

I have therefore to inform you that the Commission considers that it is absolutely necessary to apply the provisions of Article 93(3) to their full extent. Thus the Commission insists that plans to grant or alter aid shall be notified in due time, i.e. at least two months or, as the case may be, 30 days before their projected entry into force and that no payments be made in violation of the provisions of Article 93(3). Henceforth, any evidence of a tendency to systematic or flagrant violation of Member States' obligations will be systematically pursued by virtue of Article 169 of the Treaty or other measures envisaged therein.

Further, the Commission would recall that the Court of Justice has held that 'for projects introducing new aids or altering existing ones, the last sentence of Article 93(3) establishes procedural criteria which the national court can appraise' (see Case 77/72 *Capolongo* v *Maya* [1973] ECR 611 at paragraph 6).

Commission communication (*)

Article 93(3) of the EEC Treaty provides that any plans to grant or alter aid are to be notified before implementation to the Commission in sufficient time to enable it to submit its comments and, if necessary, initiate in respect of the proposed measure the administrative procedure provided for in Article 93(2). Initiation of that procedure has suspensory effect and the national measure in question may not be implemented unless and until the Commission approves it.

According to the interpretation of this provision given by the Court of Justice in its judgment of 11 December 1973 (1), the purpose is to prevent aid that is contrary to the Treaty being brought into operation by giving the Commission a period of time for reflection and investigation, which the Court put at two months and the Commission itself reduced to 30 working days where specific instances were involved (this period to be regarded as the preliminary phase of the procedure), to enable it to form an initial opinion as to the full or partial conformity of plans notified to it with the Treaty. According to the Court this means that the prohibition contained in the last sentence of Article 93(3) on putting proposed measures into effect until the procedure provided therein has resulted in a final decision is operative already throughout the preliminary phase of the procedure.

As there is no provision for any exception concerning the obligation to inform the Commission 'in sufficient time', Member States cannot evade this obligation, even if they consider that the measures they plan do not have all the characteristics described in Article 92(1) or that they are compatible with the common market within the meaning of Article 93(2). Consequently, if Member States do not inform the Commission of their plans to grant new aid or alter existing aid, or if the notification is late, i.e. outside the period regarded as adequate for an initial investigation, they infringe the rules of procedures laid down in Article 93(3). They also fail to fulfil their obligation under the last sentence of Article 93(3), as interpreted by the Court if, without notifying the Commission, they put aid into effect, or alter aid, or if, where notification has been given, they put the proposed measure into effect before expiry of the period allotted the Commission for reflection, or if, where the Commission has initiated the procedure involving the two parties provided for in Article 93(2), they put the proposed measure into effect before the final decision. In such cases the aid is illegal in relation to Community law from the time that it comes into operation. The situation produced by such failure to fulfil obligations is particularly serious where, by reason of their substance, the aid measures in question are prohibited under Article 92 of the Treaty and the illegal aid has already been paid to recipients. Here the aid has given rise to effects that are regarded as being incompatible with the common market.

The Commission has not failed to remind Member States repeatedly of their obligations under Article 93(3), most recently in the letter it sent them on 31 July 1980, the gist of which was published in the *Official Journal of the European Communities* (2). The communication published in the Official Journal states that 'the Commission has decided to use all measures at its disposal to ensure that Member States' obligations under Article 93(3) are respected'.

In spite of this formal reminder and the numerous other reminders it has had occasion to deliver in connection with aid under examination, the Commission is obliged to note that illegal aid grants are becoming increasingly common, i.e. aid incompatible with the common market granted without the obligations laid down in Article 93(3) having been fulfilled. This is why the Commission has decided to use all measures at its disposal to ensure that Member States' obligations under Article 93(3) are

(*) OJ C 318, 24.11.1983.

(1) Court of Justice of the European Communities, 11 December 1973 *Lorenz* v *Federal Republic of Germany* Case 120/73 (1973 Court Reports, p. 1471 and following, but also Cases 121/73, 122/73 and 141/73).

(2) OJ C 252, 30.9.1980.

fulfilled; this includes requiring Member States (a possibility given to it by the Court of Justice in its judgment of 12 July 1983 in Case 70/72) to recover aid granted illegally from recipients and, in the agricultural sector, refusing to make EAGGF advance payments or to charge expenditure relating to national measures that directly affect Community measures to the EAGGF budget.

The Commission therefore wishes to inform potential recipients of State aid of the risk attaching to any aid granted to them illegally, in that any recipient of an aid granted illegally, i.e. without the Commission having reached a final decision, may have to refund the aid.

Whenever it becomes aware that aid measures have been adopted by a Member State without the obligations under Article 93(3) having been fulfilled, the Commission will publish a specific notice in the Official Journal warning potential aid recipients of the risk involved.

The Commission also wishes to point out that the Court stated in its judgment of 19 June 1973 in Case 77/72 that 'in respect of plans to grant new aids or alter existing aids, the last sentence of Article 93(3) lays down procedural criteria amenable to assessment by the national courts'.

Commission communication (*)

In its communication of 21 December 1978 on regional aid schemes, the Commission announced its intention of examining with experts from the Member States the question of the cumulation of regional aid with other aid.

Having completed its examination, the Commission has reached the conclusion that significant cases of cumulation of aid should be notified to it to enable it to control the cumulative intensity of the aid and assess its effect on competition and trade between Member States. It therefore proposes to the Member States, under Article 93(1) of the EEC Treaty, that they henceforth notify significant cases of cumulation of aid in accordance with the rules set out below.

I. Notification of significant cases of cumulation of aid

1. The Member States notify in advance to the Commission significant cases of cumulation of aid, which are defined as those projects where the investment exceeds ECU 12 million or where the cumulative intensity of the aid exceeds 25 % net grant equivalent.

2. Cumulation of aid is defined as the application of more than one aid scheme to a given investment project.

An investment programme undertaken by a firm is defined as all investments in fixed assets (whether or not in the same place) necessary to carry out the project.

II. Derogations

The following cases will be exempt from notification:

1. Cases where the investment does not exceed ECU 3 million, whatever the cumulative intensity of the aid.

2. Cases where the cumulative intensity of the aid does not exceed 10 % net grant equivalent, whatever the scale of the investment.

3. Cases where the intensity of all the aid to be granted for the investment project remains below the ceiling for any one of the aid schemes under which aid is being awarded to the project, which ceiling has been laid down or approved by the Commission either in a Community framework or by individual decision.

This exemption is without prejudice to the obligation of Member States to remain within the ceiling for each individual scheme.

The Commission will send each Member State a particular list of the schemes concerned and the relevant ceilings.

4. The Commission may withdraw these exemptions in cases where it finds evidence of distortions of competition.

(*) OJ C 3, 5.1.1985.

III. Legal basis

Notification is made on the basis of Article 93(3) of the EEC Treaty. The Commission is therefore informed in sufficient time to enable it to submit its comments before the proposed aid is put into effect.

The Commission will make a determination on cases notified to it within a maximum of 30 working days.

IV. Aid concerned

1. The aid to be taken into account for the purposes of the notification thresholds laid down in Sections I and II is all aid towards expenditure on fixed assets, whatever form (for example, capital grants, interest subsidies, tax concessions, relief of social security contributions) the aid may take.

The main types of aid schemes concerned are:

general aid

regional aid

sectoral aid

aid for small and medium-sized firms

aid for research, development and innovation

aid for energy conservation and environmental protection.

2. Where investment aid is supplemented by aid for staff training and the latter is prompted by and thus directly linked to the investment, the two types of aid cannot be divorced in considering the intensity of the aid. Such training aid is therefore also taken into account for the purposes of the notification thresholds laid down in Sections I and II.

3. So that the Commission is aware of the full circumstances surrounding notified cases of cumulation of aid, it is also informed of any aid granted to rescue a firm in difficulties or for creating jobs or for marketing — although this aid does not count towards the notification thresholds — and of any other financial intervention by the State or other public authorities where the intervention can be regarded as aid or there is a presumption that it is aid.

The Commission is also informed of aid granted of the types listed in subsection IV.1 above where it is not directly linked to the notified investment project.

V. Technical guidelines

To facilitate the administrative work involved and ensure consistency in the calculation methods used, the Commission will send the Member States technical guidelines explaining, among other things, how the intensity of the various aid is to be calculated.

VI. Entry into force and special rules

The notification rules came into force on 1 March 1985. They do not apply to the products listed in Annex II to the EEC Treaty. They are also without prejudice to the rule contained in point 12 of the 'Principles of coordination of regional aid schemes' [1] and to the Member States' obligations under existing or future provisions laid down by the Commission in decisions on particular general, regional or sectoral aid schemes to notify individual cases [2].

[1] This rule concerns cases where several different types of regional aid are awarded for a given investment project.
[2] For example, all awards of aid to the steel industry (ECSC) are already notified to the Commission.

Commission letter to Member States SG(89) D/5521 of 27 April 1989

Dear Sir

The Commission has repeatedly reminded Member States of their obligation under Article 93(3) of the EEC Treaty to notify it in sufficient time of any plans to grant aid. In particular, it expressed its concern at the growing tendency of Member States to fail to fulfil this obligation in its letters of 31 July 1980 (SG(80) D/9538) and 3 November 1983 (SG(83) D/13342). The gist of those letters was published in OJ C 252 of 30 September 1980, p. 2 and OJ C 318 of 24 November 1983, p. 3 respectively. The Commission considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By 'putting into effect' it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up.

The above provisions form an integral part of the EEC Treaty, which all Member States have undertaken to respect and which they must respect in full.

The Commission for its part is endeavouring to organise its departments in such a way as to ensure that the plans of which it is notified are examined swiftly under its responsibility. In this connection, it would remind you of its letter of 2 October 1981 on the formal notification requirements and on the time limits which it has set itself. The Commission would also remind you of the letter which it sent to all Member States on 30 April 1987 concerning aid in respect of which the procedure laid down in Article 93(2) of the EEC Treaty had been initiated.

The Commission notes that, in 1987 and 1988 (first 11 months), the [...] Government made a special effort to fulfil this obligation, having failed to do so in only [...] instances during that period.

While expressing its satisfaction at this result, the Commission would be grateful if the [...] Government would in future fulfil its abovementioned obligations under the Treaty in full.

Yours faithfully

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)

Dear Sir

1. The Commission has reminded the Member States of the obligations imposed on them under Article 93(3) of the EEC Treaty. With a view to speeding up the scrutiny of aid plans (general aid schemes and individual cases) the Commission has recently adopted certain internal arrangements. Accordingly, the Commission requests the Member States to notify aid plans at the draft stage in accordance with Article 93(3) by supplying all the particulars necessary for their assessment, particularly those included in the Annex to this communication. The Annex is intended to help Member States make a full notification which will in turn help the Commission to deal quickly with notifications. It is proposed without prejudice to the discussions which are under way with Member States with a view to deciding standardised notification and reporting procedures.

2. The Commission has periodically and publicly made known its concern regarding the many cases of aid granted without prior notification, in other words granted unlawfully. As guardian of the Treaty, the Commission is duty-bound to go on employing all the means at its disposal to ensure that the above provisions are respected.

Thus, in cases where aid is granted in infringement of the obligation of prior notification referred to above, the Commission will in future apply the procedures deriving from the Court of Justice judgment of 14 February 1990 in Case C-301/87 (*Boussac*). This will involve the Commission first requesting the Member State concerned to supply full details of the aid in question within 30 days (1).

If the Member State fails to reply or provides an unsatisfactory reply, the Commission may then:

(i) adopt a provisional decision requiring the Member State to suspend forthwith the application of the aid scheme or payment of aid unlawfully authorised and to inform the Commission within 15 days that this decision has been complied with;

(ii) initiate the procedure under Article 93(2), giving the Member State concerned notice to communicate within one month its comments and all the particulars and data necessary to assess the compatibility of the aid with the common market.

Should the Member State, after receiving notice from the Commission, fail to provide the information requested within the time limit set, the Commission may, under the Article 93(2) procedure adopt a final decision finding that the aid is incompatible with the common market on the basis of the information available to the Commission. This decision would entail recovery of the amount of aid already paid unlawfully, to be effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question.

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(1) In urgent cases, the time limit could be shorter.

If the Member State does not comply with the above decisions (provisional decision and final negative decision) the Commission may refer the matter to the Court of Justice direct, in accordance with the second subparagraph of Article 93(2), applying if necessary for an interim order.

It is the Commission's intention to make use of the abovementioned powers whenever required to put a stop to any infringement of the provisions of the Treaty concerning State aid.

Yours faithfully

ANNEX

INFORMATION TO BE SUPPLIED IN AN ARTICLE 93(3) NOTIFICATION

1. Member State: .....

2. Ministry or other administrative body with statutory responsibility for the scheme and its implementation: .....

3. Title of aid scheme: .....

4. Legal basis (attach a copy of the legal basis or the draft legal basis if available at the time of notification)

   Title: .....

   References: .....

5. Is it a new scheme: Yes/No

   If the aid scheme replaces an existing scheme, please state which one: .....

6. If an existing scheme:

   notified to the Commission on: .....

   authorised by the Commission on: .....

   specify which rules and conditions are being changed and why: .....

7. Level at which scheme is administered:

   central government: .....

   regional: .....

   other: .....

8. Aim of scheme: indicate only one category of objectives (8.1 or 8.2 or 8.3)

   8.1. Horizontal

   What is its purpose (e.g. general investment, SMEs, R&D, environment, energy-saving, etc.)? .....

   8.2. Regional

   Which regions, areas (NUTS level 3 or lower) (1) are eligible? .....

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

8.3. Sectoral

Which sectors (NACE three-digit or equivalent national nomenclature (specify)) (2) are eligible? .....

9. Other aid limitations or criteria:

Specify any limits (number of employees, turnover, other) on recipients of aid or any other positive conditions used to determine recipients: .....

10. What are the instruments (or forms) of aid: (delete where not applicable)

direct grant: .....

soft loan (including details of how the loan is secured): .....

interest subsidy: .....

tax relief: .....

guarantee (including details of how the guarantee is secured and any charges made for the guarantee): .....

other (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 or whether there is an element of discretion by the awarding authorities: .....

11. For each aid instrument, please specify the eligible costs on which the aid is calculated (e.g. land, buildings, equipment, personnel, training, consultants' fees, etc.): .....

12. Please give details if any aid is repayable where projects are successful (especially the criteria for 'success'). Penalties (e.g. repayment) should be specified for failure by the recipient to carry out the project: .....

13. Where there is more than one aid instrument, to what extent may a recipient cumulate several instruments? .....

To what extent may the aid in question be cumulated with any other aid schemes in operation? .....

14. Duration of aid scheme:

14.1 Number of years: .....

14.2. Is an existing scheme being extended? Yes/No

For how long? .....

(2) NACE is the general industrial classification of economic activities within the European Communities.

15. Expenditure:

15.1. If a new scheme:

Please give the budgetary provisions for the duration of the scheme, or estimated revenue losses due to tax concessions. If the scheme is open-ended, state estimated annual expenditure over the next three years .....

15.2. If changes to an existing scheme:

Please state budgetary appropriations for the duration of the scheme or an estimate of revenue losses due to a non-automatic fiscal aid .....

If the scheme is open-ended, please provide estimate of annual expenditure:

expenditure in last three years: .....

estimated loss of revenue due to tax concessions in last three years: .....

15.3. Indicate period covered by the financing of the scheme: .....

Is the budget adopted annually? Yes/No

If not, what period does it cover? .....

Other provisions: .....

16. For schemes which do not have specific sectoral objectives and for those which do not have specific regional objectives please specify any resulting sectoral or regional concentrations: .....

17. Estimated number of recipients (delete where not applicable):

under 10

from 10 to 50

from 51 to 100

from 101 to 500

from 501 to 1 000

over 1 000.

18. It would be desirable for Member States to provide a fully reasoned justification as to why the scheme could be considered as compatible with the Treaty where this is not evident from the aid objectives described in the notification owing to the nature of the scheme. This reasoned justification should include, where appropriate, the necessary statistical supporting documents (e.g. for regional aid, socioeconomic data on the recipient regions should be provided) .....

19. Other relevant data: .....

Guidance note on use of the *de minimis* facility provided for in the SME aid guidelines (letter of 23 March 1993, IV/D/6878 from DG IV to the Member States)

On 20 May 1992 the Commission set out its policy on State aid for small and medium-sized enterprises (SMEs) in Community guidelines. The guidelines, which were published in the Official Journal, OJ C 213, 19.8.1992, have introduced a *de minimis* facility. This provides that in future, aid not exceeding ECU 50 000 per firm over three years for a given broad type of expenditure need not be notified to the Commission under Article 93(3) of the EEC Treaty for authorisation. The Commission considers that aid in such small amounts is unlikely to have a perceptible impact on trade and competition between Member States and does not fall within Article 92(1).

However, a lack of effect on trade and competition cannot be assumed if a firm receives ECU 50 000 of aid for many different types of expenditure at once, or if it exceeds the limit for a given type of expenditure when receiving aid from different sources. The guidelines do not specify which types of expenditure are to be counted as separate categories for the purposes of the *de minimis* facility, but only give investment and training as examples. They are also silent about a number of matters of practical importance for applying the limit per type of expenditure, namely the start of the three-year period, the possibility of receiving aid under an authorised scheme as well as aid regarded as *de minimis*, and the quantification of assistance provided otherwise than as grants.

These matters and the general question of monitoring were discussed with representatives of the governments of Member States at a multilateral meeting on 8 December 1992 and it was announced that DG IV would issue interpretative guidance to clarify them. This is the purpose of the present letter to Member States.

The first matter to be clarified concerns the number and identity of categories of expenditure for each of which a firm may receive aid of ECU 50 000 over three years without notification.

Two such categories should be distinguished, namely

(i) investment of any kind and for whatever purpose except R&D;

(ii) other expenditure.

Hence, a given firm may receive a maximum of ECU 100 000 of aid under the two categories over a three-year period without notification. It should be noted that, in accordance with established practice, no aid may be given for exports.

Secondly, the three-year period to which the limit is to be applied should be regarded as beginning on the date the individual firm first receives aid under the *de minimis* facility after the SME aid guidelines were published on 19 August 1992.

On the question of cumulation between aid under the *de minimis* facility and aid under an authorised scheme, the following rule should be applied. If a firm that has received aid under the *de minimis* facility in the past three years for one of the abovementioned two categories of expenditure wishes to accept aid under an authorised scheme for expenditure falling within the same category, the *de minimis* and authorised aid combined must not exceed the maximum award authorised by the Commission for the notified scheme if this is above ECU 50 000. This means that the latter award may have to be reduced so that the total remains within the maximum.

The limit in the *de minimis* facility is expressed as a cash grant of ECU 50 000. In cases where assistance is provided in a form other than as a grant, it must be converted into its cash grant

equivalent value for the purposes of applying the *de minimis* limit. The commonest other forms in which aid with a low cash value is provided are soft loans, tax allowances and loan guarantees. The conversion of aid in these forms into its cash grant equivalent should be done as follows.

The cash grant equivalent should be calculated gross, i.e. before tax if the subsidy is taxable (1).

All aid receivable in the future should be discounted to its present value (2). The discount rate used should be the reference interest rate communicated to the Commission each year by the Member State concerned.

The cash grant equivalent of a soft loan in any year is the difference between the interest due at the reference interest rate and that actually paid. All the interest that will be saved until the loan has been fully repaid should be discounted to its value at the time the loan is granted and added together. An example of how to calculate the cash grant equivalent of a soft loan is given in the Annex. Two variants, with and without a grace period on principal repayments, are illustrated.

The cash grant equivalent of a tax allowance is the saving in tax payments in the year concerned. Again, tax savings to be obtained in the future should be discounted at the reference interest rate to their present value.

For loan guarantees, the cash grant equivalent in any year can be calculated as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor (probability of default) and (b) any premium paid, i.e.:

(guaranteed sum x risk) — premium.

As the risk factor, the experience of default on loans extended in similar circumstances (industry, size of firm, level of general economic activity) should be taken. Discounting to present value should be carried out as before.

Arrangements need to be made in each Member State to monitor use of the *de minimis* facility so that the above rules are complied with. This need not involve an elaborate and staff-intensive system, but certain minimum safeguards are required. It should be noted that the SME aid guidelines themselves state that it has to be an express condition of an aid award, or scheme that is not notified that any further aid the same firm may receive in respect of the same type of expenditure from other sources or under other schemes does not take the total aid the firm receives above the ECU 50 000 limit. Authorities granting aid under the *de minimis* facility should draw this condition to the attention of applicants and require them to declare any previous awards of aid to ensure that they do not exceed the limit. Similar checks should be made by authorities granting aid under authorised schemes.

Under Article 5 of the EEC Treaty, the Member States are required to assist the Commission in performing its tasks. Only the Member States are in a position to monitor the use of the *de minimis* facility to ensure that it is restricted to aid not exceeding the amounts that the Commission considers not to have a significant effect on trade and competition. Under Article 5 of the Treaty, therefore, Member States are requested to communicate to the Commission by 31 May 1993 their arrangements for monitoring compliance with the rules set out above.

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(1) If the subsidy is not taxable, as in the case of some tax allowances, the nominal amount of the subsidy, which is both gross and net, should be taken.

(2) Grants, however, should be counted as a single lump sum even if they are paid in instalments.

ANNEX

CALCULATION OF THE CASH GRANT EQUIVALENT OF A SOFT LOAN

The following guidance note gives an example of how the grant equivalent of a soft loan can be calculated.

A public authority commits itself to paying an interest subsidy on a ECU 500 000 10-year loan to maintain the interest rate to the borrower at 6 %. The official reference interest rate accepted by the Commission for the country concerned in that year is 8 %. In calculating the cash grant equivalent of the subsidy throughout the term of the loan, it may be assumed that the reference interest rate will remain constant over the period. The cash equivalent of the subsidy depends on whether or not a grace period on principal repayments is granted.

1. No grace period

The loan is paid off in linear instalments starting in year one. The cash grant equivalent of the interest subsidy in the first year is the principal sum multiplied by the interest subsidy in per cent, divided by the reference interest rate, thus:

(1) ECU 500 000 x 0.02/1.08 = ECU 9 259

The subsidy in years 2 to 10 is calculated similarly, but at a compound discount rate, i.e.:

(2) ECU 450 000 x $0.02/(1.08)^2$ = ECU 7 716

(3) ECU 400 000 x $0.02/(1.08)^3$ = ECU 6 351

(4) ECU 350 000 x $0.02/(1.08)^4$ = ECU 5 145

(5) ECU 300 000 x $0.02/(1.08)^5$ = ECU 4 083

(6) ECU 250 000 x $0.02/(1.08)^6$ = ECU 3 151

(7) ECU 200 000 x $0.02/(1.08)^7$ = ECU 2 334

(8) ECU 150 000 x $0.02/(1.08)^8$ = ECU 1 621

(9) ECU 100 000 x $0.02/(1.08)^9$ = ECU 1 000

(10) ECU 50 000 x $0.02/(1.08)^{10}$ = ECU 463

The total cash grant equivalent is the sum of the discounted subsidies in each year, i.e. ECU 41 123.

2. With grace period

No principal repayments have to be made in the first two years.

The loan is repaid in linear instalments of ECU 62 500 from the third year onwards. The discounted cash grant equivalent of the interest subsidy in each year is:

(1) ECU 500 000 x 0.02/1.08 = ECU 9 259

(2) ECU 500 000 x 0.02/$(1.08)^2$ = ECU 8 573

(3) ECU 500 000 x 0.02/$(1.08)^3$ = ECU 7 938

(4) ECU 437 500 x 0.02/$(1.08)^4$ = ECU 6 432

(5) ECU 375 000 x 0.02/$(1.08)^5$ = ECU 5 104

(6) ECU 312 500 x 0.02/$(1.08)^6$ = ECU 3 939

(7) ECU 250 000 x 0.02/$(1.08)^7$ = ECU 2 917

(8) ECU 187 500 x 0.02/$(1.08)^8$ = ECU 2 026

(9) ECU 125 000 x 0.02/$(1.08)^9$ = ECU 1 251

(10) ECU 62 500 x 0.02/$(1.08)^{10}$ = ECU 579

In this case the total cash grant equivalent is ECU 48 018.

Commission letter to Member States of 22 February 1995

(Interest rates to be applied when aid granted unlawfully is being recovered)

Sir,

On 4 March 1991 the Commission sent Member States a letter 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); the Commission said then that where State aid which had already been paid out was subsequently found to be incompatible with the common market it would have to be recovered in accordance with national law, and that 'national law' here included 'the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question'.

The Commission has found that in practice such interest is calculated on the basis of a legal rate which usually differs widely from commercial rates.

The Commission takes the view that for the purpose of restoring the status quo commercial rates provide a better measure of the advantage improperly conferred on the recipient.

The Commission would accordingly inform Member States that in any decisions it may adopt ordering the recovery of aid unlawfully granted it will apply the reference rate used in the calculation of the net grant equivalent of regional aid measures as the basis for the commercial rate.

Yours faithfully,

Commission communication to the Member States (*)

Supplementing the Commission's letter SG(91) D/4577 of 4 March 1991 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 EC Treaty.

'In 1991 the Commission sent the Member States the letter referred to above, in which it reiterated its concern at the number of cases in which aid was being granted in breach of Article 93, that is to say without the Commission's prior authorisation.

Citing the findings in recent decisions of the Court of Justice (1), the Commission said then that where aid had been granted unlawfully it would if necessary adopt a provisional decision requiring the Member State to suspend the aid forthwith.

In the judgments cited, the Court did not accept that the Commission had power to find an aid measure incompatible with the common market on the sole ground that it had been granted unlawfully; but it did hold that the Commission could take "measures... to counteract any infringement of Article 93(3) of the Treaty".

The Commission considers that in some cases an order requiring the suspension of aid which has been unlawfully granted will not go far enough: such an order will not always counteract the infringements of the procedural rules which may have been committed, particularly where all or part of the aid has already been paid out.

On the basis of the same judgments, therefore, the Commission would now inform you that in appropriate cases it may — after giving the Member State concerned the opportunity to comment and to consider alternatively the granting of rescue aid, as defined by the Community guidelines — adopt a provisional decision ordering the Member State to recover any moneys which have been disbursed in infringement of the procedural requirements. The aid would then have to be recovered in accordance with the requirements of domestic law; the sum repayable would carry interest running from the time the aid was paid out. The rate of interest to be applied would be the commercial rate referred to in the Commission's letter of 22 February 1995, i.e. the same as that applied in the recovery of aid granted unlawfully and found to be incompatible with the common market.

As was the case with the provisional decisions contemplated in the Commission's letter of 1991, if the Member State fails to comply with an order of this kind the Commission may refer the matter to the Court of Justice direct, by way of an application for interim measures analogous to the applications provided for in the second subparagraph of Article 93(2).

Here too it is the Commission's intention to make use of its powers whenever required to safeguard the effectiveness of Article 93 of the EC Treaty'.

(*) OJ C 156, 22.6.1995, p. 5.
(1) Case C-301/87 *Boussac* [1990] ECR I, p. 307 and Case C-142/87 *Tubemeuse* [1990] ECR I, p. 959.

2. Notifications and standardised annual reports

Commission letter to Member States of 22 February 1994

Dear Sir

When the Commission drew up the surveys on State aid in close cooperation with your government, its efforts to bring about greater transparency were widely supported. The first survey, however, concluded that, in order to increase transparency further and to improve the flow of information to the Commission in the field of State aid, a more standardised system of notifications and annual reports was necessary. The purpose of this letter is to inform all Member States of the arrangements the Commission has adopted following the multilateral meetings on 13 September 1989 and 24 January 1991, bilateral contacts with the Member States which requested them, and Commission letters SG(90) D/1665 of 18 June 1990 and SG(92) D/6743 of 28 February 1992 asking each Member State to make known its comments on the Commission proposals. These comments were taken into account by the Commission wherever possible.

The Commission considers that a more standardised system of notifications of aid proposals (schemes and ad hoc cases) will not only make it easier for Member States to decide what information to include in any notification made under Article 93(3) of the EC Treaty but will also facilitate the analysis of these notifications by the Commission. As a result, and more generally by avoiding the need to request further information, the Commission will be able to reduce the time it needs before taking a decision.

In order not to handicap the Member States required by their domestic budget laws to readopt a scheme's budget each year, the Commission has also decided that Member States will in general no longer have to notify an increase in the annual budget of an authorised scheme if the increase, expressed in ecus, does not exceed 20 % of the initial annual amount and if the scheme is of indefinite duration or the increase takes place during the period of validity of a fixed-duration scheme. However, all extensions of schemes beyond the period originally authorised by the Commission, whether or not involving a change in the budget, must be renotified.

A system of standardised reports is also necessary because, apart from the arrangements already existing for certain sectors such as synthetic fibres, motor vehicles, shipbuilding and steel, scant information is available on the regional impact of aid which is not specifically regional in nature or on the sectoral impact of aid which is not specifically sectoral in nature. Such secondary effects (i.e. the cross-effects of aid), and the resulting distortions of competition, can be significant and could result in certain Community objectives being inadvertently thwarted by the contradictory indirect effects of other measures which, in their own right, may at first appear coherent. This risk is further accentuated by the sheer volume of aid identified in the three surveys on State aid within the Community published to date, and especially those having horizontal objectives (i.e. aid having neither regional nor sectoral objectives). It will be particularly acute in the context of the single market, when aid will be the only remaining form of protectionism and competition will be even fiercer.

In addition, for the analysis and monitoring of aid schemes to be fully effective, more information will be needed on any concentration of expenditure on a small number of recipients and on the cumulative impact of all schemes on those recipients.

More detailed information is also needed on the application of schemes in order to ensure that they do not run counter to what is required by the progressive development or functioning of the common

market. This monitoring is necessary because of changes either in the aid schemes themselves (e.g. small but cumulative increases in spending over a long period) or in the economic circumstances that initially led the Commission to grant a derogation.

Accordingly, the Commission invites your government to adopt the arrangements described in the attached annexes.

Annex I sets out the future procedures for the notification of aid proposals (schemes and ad hoc cases). In the event of failure to comply with these procedures, the Commission would be obliged to decide its position on the proposals in question on the basis of the information it possesses, even if it is incomplete, to request additional information or even to initiate the procedure provided for in Article 93(2) of the EC Treaty, thereby delaying its decision.

As part of its constant review of existing aid schemes provided for in Article 93(1) of the EC Treaty, the Commission proposes, as appropriate measures required by the progressive development of the common market, that Member States should in future supply annual reports in accordance with the procedure, and for the schemes, specified in Annex II.

I would therefore request your government to give its agreement to the procedures set out in Annex II within two months of the date of this letter. Failing such agreement, the Commission reserves the right to initiate the procedure provided for in Article 93(2) of the Treaty.

Yours faithfully

Commission letter to Member States of 2 August 1995 concerning the joint procedure for reporting and notification under the EC Treaty and under the WTO Agreement [and Annexes I and II WTO]

Your Excellency,

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides for the obligation to report on any subsidies granted or maintained within the Member States during the previous calendar year (Article 25). Moreover, the SCM Agreement includes the possibility of notifying subsidy programmes in the field of research and development, regional aid and environmental aid before implementation in order to become non-actionable (Article 8.3).

In order to alleviate the administrative burden of the Member States, the Commission proposed using the existing standardised system of notification and annual reporting of state aid under the EC Treaty (Commission letter of 22.02.1994) also, on a voluntary basis, for the obligation under the SCM Agreement.

After having discussed this proposal at a special multilateral meeting convened at the request of the Member States on 21 June and at the subsequent meeting on 4 July, all the Member States now agree on this proposal of a joint procedure for reporting and notification under the EC Treaty and under the WTO Agreement. The attached standardised annual reporting format (Annex I) and the notification format (Annex II) replace therefore the formats already enclosed with the Commission letter of 22.02.1994.

As concerns the time limit for the receipt of the annual reports for the year 1994, the Member States asked for, and the Commission accepted, an extension until the beginning of September so that the information can be transferred to the WTO before the end of September. For the Member States who have already sent the WTO annual report of subsidies to the Commission the deadline of 30 September is still valid for the annual reporting on State aid under the EC Treaty.

Yours faithfully,

Proposal to Member States to use the existing procedure of standardised notification and reporting for notification to WTO under Articles 25 and 8.3 of the SCM Agreement

Background

The new WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) lays down two distinct notification requirements for subsidies under its Articles 25 and 8.3. Article 25 states that WTO Members have to notify any subsidies granted or maintained within their territories during the previous calendar year. This ex-post notification is obligatory. Article 8.3 provides for the possibility to notify subsidy programmes in the field of research and development, regional aid and environmental aid before implementing them. Subsidies notified under this procedure become non-actionable, i.e. they can no longer be subject to countervailing duties or dispute settlement action. This ex-ante notification is voluntary.

Member States have expressed concern that the new obligation of annual reports to the WTO on all subsidies in addition to the already existing annual reporting obligations under Article 93 of the EC Treaty, could create an excessive administrative burden to them.

Suggested procedure

The Commission shares this concern. Therefore, it proposes that the Member States utilise, on a voluntary basis, the already existing system of standardised notification and annual reporting of State aid under the EC Treaty (letter of the Commission to the Member States of 22.2.1994) also for their notification obligations under the SCM Agreement. The Commission is confident that the use of such a joint notification procedure will considerably alleviate the administrative burden of the Member States. Furthermore, the Commission is also confident that the use of standardised reporting and notification formats by all Member States for their obligation under the SCM Agreement will assure a high level of equality amongst the Member States as concerns the information disclosed to the WTO.

For the compulsory reporting of existing aid schemes under Article 25 of the SCM Agreement, Member States will have to fill in Section A and B of the adapted format for standardised annual reporting (see Annex I) and send it to the appropriate Commission Service. The Commission will subsequently transmit Section B of the format to the WTO. Likewise, if Member States wish to have aid schemes notified under Article 8.3 of the SCM Agreement, they can indicate this to the Commission when notifying such aid under Article 93 of the EC Treaty. They will have to use the adapted standardised notification format (see Annex II), in particular Section B. The Commission will subsequently send this Section B as a notification to the WTO.

This technical proposal is applicable to aid schemes for which the standardised procedures apply. For aid schemes where notification and annual reports are governed by other Community rules (fisheries and coal), for aid covered by the frameworks for steel (ECSC), shipbuilding and motor vehicles, for aid subject to the special procedure adopted by the Commission for aid granted in a Treuhaund context and all the cofinancing schemes for which the Commission has accepted not to have a further annual report besides the one concerning the Community financing, Member States will have to submit to the Commission only the WTO Section of the reporting format (Section B of Annex I).

For aid awarded outside of schemes, so called 'ad hoc cases', there are no annual reporting obligations under the existing standardised notification procedure. In such cases, Member States will also have to fill in the Section B of the standardised reporting format (Annex I) and transmit it to the Commission at the time of the notification of the case. The Commission will collect these formats and transmit them once a year to WTO.

It has to be pointed out that the indication to have an aid also notified to the WTO does in no way influence the normal evaluation procedure of the aid under Article 92/93 of the EC Treaty. Furthermore, the Commission will only transmit notifications to the WTO once the aid concerned has been approved under the EC Treaty. Moreover, the Commission will evaluate whether an aid approved under Community rules has to be notified and, in case of green-light notifications under Article 8.3 of the WTO Agreement, whether such a notification is opportune. Only information necessary for WTO will be transferred to this organism.

Since the information for WTO has to be given in one of the official WTO languages (English, French and Spanish), Member States will have to send the part of information to be transferred to WTO (Section B of the two formats) in one of these languages.

As concerns the time limit for WTO notifications under Article 25, the Commission will have to receive the standardised reports as well as the sectorial reports before the 30th of April of each year for the schemes in application the previous year in order to be able to transmit the relevant information to the WTO before the 30th of June.

ANNEX I

JOINT ANNUAL REPORTING FORMAT ON EXISTING STATE AID UNDER THE EC TREATY AND SUBSIDIES UNDER THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

Explanatory note

Member States have accepted to use this format for their reporting obligations to the Commission under Article 93(1) of the EC Treaty and for their notification obligation under Article 25 of the SCM Agreement. This format is adapted to the two notification requirements and should be used instead of the format which has been sent to the Member States by letter of 22.2.1994.

The information on existing State aid exclusively reserved for the Commission is contained in *Section A* of the joint format. This part can be filled in in any official language of the Union. It is divided into two sub-formats, according to whether detailed reporting (1) (Section A.1) or simplified reporting is required (Section A.2).

The information of which the Commission, under Article 25 of the SCM Agreement, will transfer a copy on behalf of the Member States to the WTO is contained in the *Section B* of the joint format. This part has to be filled in in one of the official languages of the WTO which are English, French and Spanish. This Section B is provisional until the responsible WTO working group has finalised the questionnaire for notifications under Article 25 of the SCM Agreement.

SECTION A: Information under Article 93(1) of the EC Treaty on the aid scheme (Information contained in this section A will not be transmitted to WTO and can be filled in in any official language of the European Union)

A.1. Format of detailed annual report

1. Name of scheme in original language: .....

2. Date of most recent approval by the Commission: .....

3. Expenditure under the scheme

   Separate figures should be provided for each aid instrument in the scheme (e.g. grant, low-interest loans, guarantees). Provide figures on expenditure or commitments, revenue losses and other financial factors relevant to the granting of aid (e.g. period of loan, interest subsidies, default rates on loans net of sums recovered, default payments on guarantees net of premium income and sums recovered).

   These expenditure figures should be provided on the following basis:

   3.1 For year n [1], provide expenditure forecasts or estimated revenue losses due to tax expenditure: .....

(1) See letter from the Commission to the Member States of 22.2.1994 containing the list of the most important schemes.

3.2 For year n-1, indicate:

3.2.1 Expenditure committed, or estimated revenue losses due to tax expenditure, for new assisted projects and actual payments for new and current projects [2]:

3.2.2 Number of new recipients and number of new projects assisted, together with total amount of eligible investments and estimated number of jobs created or maintained.

3.2.3 Regional breakdown of amounts at 3.2.1 (NUTS [3] level 2 or below) [4]: .....

3.2.4 For each major project (estimated investment in excess of ECU 3 million) for which a commitment was made but which was subsequently shelved: amount of investment and aid proposed, and number of jobs concerned: .....

[3.2.5] 3.2.5.1 Sectoral breakdown of total expenditure by recipients' sectors of activity (according to NACE two-digit classification [5] or equivalent national nomenclature, to be specified): .....

3.2.5.2 Complete only if schemes are covered by the framework for State aids for R&D:

— Breakdown of total expenditure by R&D stage (fundamental, basic industrial, applied, etc.): .....

— Specify the number of projects involving Community or international cooperation: .....

— Give breakdown of expenditure by enterprise, research centre and university: .....

3.2.6 To be completed only for schemes not reserved exclusively for SMEs and not involving the automatic granting of aid. Aid is granted automatically where it is necessary only to satisfy all the eligibility conditions in order to qualify for aid or where it is shown that a public authority is not exercising its statutory discretionary right to select recipients.

Provide the following information for each of those recipients, starting with the one receiving the most aid, which account for 30 % of total commitments in year n-1 (with the exception of budget appropriations earmarked for fundamental research by universities and other scientific institutions not covered by Article 92 of the EC Treaty provided such research is not carried out under contract or in cooperation with the private sector):

(i) name: .....

(ii) address: .....

(iii) recipient's sector of activity (following classification referred to in question 3.2.5.1): .....

(iv) amount of aid committed (or authorised where tax aid is involved): .....

(v) eligible cost of project: .....

(vi) total cost of project: .....

The list must contain at least 10, but not more than 50 recipients. This rule takes precedence over the 30 % rule. If there are fewer than 10 recipients in the report year, they must all be listed. If there are several assisted projects per recipient, the information requested should be broken down by project. The information is not required in the case of aid subject to a ceiling where more than 50 recipients reach the ceiling. Only the level of the ceiling and the number of recipients reaching it need be given.

4. Changes (administrative or other) introduced during the year: .....

A.2. Format of simplified annual report to be submitted for all existing schemes not reported under A.1

For new aid schemes covered by the accelerated clearance procedure or schemes with an annual budget of not more than ECU 5 million, give only the information requested in points 1, 2.1, 2.2.1 and 2.2.2 (very simplified report).

1. Name of scheme in original language: .....

2. Expenditure under scheme

Separate figures should be provided for each aid instrument in the scheme (e.g. grant, low-interest loans, guarantees). Provide figures on expenditure or commitments, revenue losses and other financial factors relevant to the granting of aid (e.g. period of loan, interest subsidies, default rates on loans net of sums recovered, default payments on guarantees net of premium income and sums recovered).

These expenditure figures should be provided on the following basis:

2.1 For year n, provide expenditure forecasts or estimated revenue losses due to tax expenditure: .....

2.2 For year n-1, indicate:

2.2.1 Expenditure committed, or estimated revenue losses due to tax expenditure, for new assisted projects and actual payments for new and current projects [6]: .....

2.2.2 Number of new recipients and number of new projects assisted, together with estimated number of jobs created or maintained: .....

2.2.3 Complete only if schemes are covered by the framework for State aids for R&D:

— Breakdown of total expenditure by R&D stage (fundamental, basic industrial, applied, etc.): .....

— Specify the number of projects involving Community or international cooperation: .....

— Give breakdown of expenditure by enterprise, research centre and university: .....

2.2.4 To be completed only for schemes not reserved exclusively for SMEs and not involving the automatic granting of aid. Aid is granted automatically where it is

necessary only to satisfy all the eligibility conditions in order to qualify for aid or where it is shown that a public authority is not exercising its statutory discretionary right to select recipients.

Provide the following information for each of the five recipients to which the largest amounts of aid were committed:

(i) name: .....

(ii) address: .....

(iii) recipient's sector of activity (follow classification referred to in question 3.2.5.1 of Section A.1.): .....

(iv) amount of aid committed (or authorised where tax aid is involved): .....

If there are fewer than five recipients in the report year, they must all be listed. If there are several assisted projects per recipient, the information requested should be broken down by project. The information is not required in the case of aid subject to a ceiling where more than five recipients reach the ceiling. Only the level of the ceiling and the number of recipients reaching it need be given.

3. Changes (administrative or other) introduced during the year: .....

SECTION B: Information of the Annual Report under Article 93(1) of the EC Treaty to be transferred to the WTO for notification under Article 25 of the SCM Agreement. (A copy of this Section B will be transmitted to WTO. It has to be filled in in English, French or Spanish.)

Questionnaire format for subsidy notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994 adopted by the Committee on 21 July 1995 (2)

General rules

1. The following subsidies are subject to notification under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994:

   (a) all specific subsidies, as defined in Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures ('the SCM Agreement'), shall be notified pursuant to Article 25.2 of the SCM Agreement;

   and

   (b) all other subsidies (i.e., *in addition to those described in (a)*), which operate directly or indirectly to increase exports of any product from, or to reduce imports of any product into, the territory of the Member granting or maintaining the subsidies, shall be notified pursuant to Article XVI:1 of GATT 1994.

(2) The Committee agreed that, in light of the fact that this format replaces an existing format for notifications under Article XVI:1 of the GATT 1947 approved by the Contracting Parties (BISD. 9S/193-194). It should be referred to the Council for Trade in Goods for approval by that body.

2. It is understood that notifications made in accordance with the following questionnaire format will satisfy the notification requirements of both Articles 25 of the SCM Agreement and Article XVI of GATT 1994.

3. Any Member considering that there are no measures in its territory requiring notification under the SCM Agreement and Article SCI of GATT 1994 shall so inform the Secretariat in writing.

4. The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidies.

5. It is recognised that notification of a measure does not prejudge either its legal status under GATT 1994 and the SCM Agreement, the effects under the SCM Agreement, or the nature of the measure itself.

6. To the extent that subsidies are provided to specific products or sectors, notifications of those subsidies should be organised by product or sector.

7. To the extent that information called for in any question is not provided, the response to that question shall explain why not.

8. In accordance with Article 25.1 of the SCM Agreement, subsidy notifications shall be submitted no later than 30 June of each year.

9. Members shall submit new and full notifications each third year (with 1995 understood to be the year for the first new and full notifications under Article 25 of the SCM Agreement and under Article XVI of GATT 1994), and shall submit updating notifications in the intervening years.

Information to be provided [3]

1. Title of the subsidy programme, if relevant, or brief description or identification of the subsidy.

2. Period covered by the notification.

3. Policy objective and/or purpose of the subsidy.

4. Background and authority for the subsidy (including identification of the legislation under which it is granted).

5. Form of the subsidy (i.e., grant, loan, tax concession, etc.).

6. To whom and how the subsidy is provided (whether to producers, to exporters, or others; through what mechanism; whether a fixed or fluctuating amount per unit; if the latter, how determined).

7. Subsidy per unit, or in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year). Where provision of per unit subsidy information (for the year covered by the notification, for the previous year, or both) is not possible, a full explanation.

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[3] The information requested in points 1-9 below must be provided in full:
(a) for all subsidies in the case of full notifications
(b) for subsidies notified for the first time in update notifications.
In the case of subsidies which have previously been notified, the information provided in update notifications under points 3, 4, 5, 6 and 8 may be limited to indicating any modifications (or the absence thereof) from the previous notification.

8. Duration of the subsidy and/or any other time limits attached to it, including date of inception/commencement.

9. Statistical data permitting an assessment of the trade effects of the subsidy. The specific nature and scope of such statistics is left to the judgement of the notifying Member. To the extent possible, relevant and/or determinable, however, it is desirable that such information include statistics of production, consumption, imports and exports of the subsidised product(s) or sector(s):

   (a) for the three most recent years for which statistics are available;

   (b) for a previous representative year, which, where possible and meaningful, should be the latest year preceding the introduction of the subsidy or preceding the last major change in the subsidy.

Notes

[1] Year n is the year in which the report is received.

[2] If the figures for actual tax expenditure are not yet available, estimates should be provided and the final figures sent with the next report.

[3] NUTS is the nomenclature of territorial units for statistics in the EC.

[4] The Commission reserves the right to ask for more information at a higher level of disaggregation.

[5] **NACE code**

0 Agriculture, hunting, forestry and fishing

1 Energy and water

- 11 Extraction and briquetting of solid fuels
- 12 Coke ovens
- 13 Extraction of petroleum and natural gas
- 14 Mineral oil refining
- 15 Nuclear fuels industry
- 16 Production and distribution of electricity, gas, steam and hot water
- 17 Water supply: collection, purification and distribution of water

2 Extraction and processing of non-energy-producing minerals and derived products, chemical industry

- 21 Extraction and preparation of metalliferous ores
- 22 Production and preliminary processing of metals
- 23 Extraction of minerals other than metalliferous and energy-producing minerals; peat extraction
- 24 Manufacture of non-metallic mineral products
- 25 Chemical industry
- 26 Man-made fibres industry

3 Metal manufacture; mechanical, electrical and instrument engineering

31 Manufacture of metal articles (except for mechanical, electrical and instrument engineering and vehicles)
32 Mechanical engineering
33 Manufacture of office machinery and data processing machinery
34 Electrical and electronic engineering
34.51 Manufacture of electronic equipment and apparatus
35 Manufacture of motor vehicles and of motor vehicle parts and accessories
35.3 Manufacture of parts and accessories for motor vehicles
36 Manufacture of other means of transport
36.41 Manufacture of aeroplanes and helicopters (including the engines)
37 Manufacture of precision, optical and similar instruments

4 Other manufacturing industries

41/42 Food, drink and tobacco industry
43 Textile industry
44 Leather and leather goods industry (except footwear and clothing)
45 Footwear and clothing industry of which
45.1 Manufacture of footwear
46 Timber and wooden furniture industries
47 Manufacture of paper and paper products; printing and publishing
48 Processing of rubber and plastics
49 Other manufacturing industries

5 Building and civil engineering

6 Distributive trades, hotels, catering, repairs

7 Transport and communication

8 Banking and finance, insurance, business services, renting

9 Other services

[6] If the figures for actual tax expenditure are not yet available, estimates should be provided and the final figures sent with the next report.

ANNEX II

FORMAT FOR STANDARDISED NOTIFICATION UNDER ARTICLE 93(3) OF THE EC TREATY AND UNDER ARTICLE 8.3 OF THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

SECTION A: Information to be supplied in a notification under Article 93(3) of the EC Treaty (Aid schemes and ad hoc cases.) (Information contained in this section will not be transmitted to WTO and can be filled in in any official language of the European Union.)

(To be sent to the Secretariat-General of the Commission)

1. Member State: .....

2. Level at which scheme or ad hoc aid case is administered:
   — central government
   — regional
   — other

3. Ministry or other administrative body with statutory responsibility for the scheme and its implementation:
   Person(s) to contact: .....

4. Title of aid scheme: .....

5. Legal basis (attach a copy of the legal basis or the draft legal basis)
   Title: .....
   References: .....

6. If a scheme:
   Is it a new scheme: YES/NO
   If the aid scheme replaces an existing scheme, please state which one.

7. If an existing scheme:
   — notified to the Commission on: .....
   — aid number: .....
   — authorised by the Commission on: .....
   — reference of Commission letter: .....
   — specify which rules and conditions are being changed and why: .....

8. Aim of scheme or ad hoc case
   Indicate only one category of objective (8.1, 8.2 or 8.3)
   (State secondary aims, if any)

   8.1 — Horizontal
   What is its purpose (e.g. general investment, SMEs, R&D(1), environment, energy-saving, etc.)?

(1) If it is an R&D scheme, complete and return the attached supplementary questionnaire on R&D.

In case of R&D or environmental aid: if it is wished that this notification be transmitted to the WTO under Article 8.3 of the SCM Agreement, the relevant part of the Section B has to be filled in in one of the WTO official languages (English, French or Spanish).

8.2 — Regional
Which regions (areas) (NUTS level 3 or lower) [2] are eligible?
Is/are the regions (areas) partly or fully eligible under Objectives 1, 2 or 5b? In the case of aid to agriculture, does it comprise areas defined in Directive 75/268/EEC?
If it is wished that this notification be transmitted to the WTO under Article 8.3 of the SCM Agreement, the relevant part of the Section B has to be filled in in one of the WTO official languages (English, French or Spanish).

8.3 — Sectoral
Which sectors (NACE three-digit or equivalent national nomenclature (specify)) [3] are eligible? If agriculture, which products?

9. Other aid limitations or criteria:
Specify any restrictions (number of employees, turnover, balance sheet totals, share of capital held by large enterprises) [4] on recipients of aid or any other positive conditions used to determine recipients: .....

10. What are the instruments (or forms) of aid? (delete where not applicable)
— grant
— low-interest loan (including details of how the loan is secured)
— interest subsidy
— tax relief
— guarantee (including details of how the guarantee is secured and any charges made for the guarantee)
— aid tied to an R&D contract concluded with industrial firms (specify)
— other (specify):

For each aid instrument, a precise description of its rules and conditions of application should be given, including in particular its intensity, its tax treatment and whether the aid is granted automatically once certain objective criteria are fulfilled or whether there is an element of discretion for the competent authorities:

11. For each aid instrument, the eligible costs on which the aid is calculated should be specified (e.g. land, buildings, equipment, personnel, training, consultants' fees, etc.): .....

12. Details should be given of any aids repayable where projects are successful (especially the criteria for 'success') and of repayment arrangements. Penalties (e.g. repayment) should be specified for failure by the recipient to comply with the conditions on which aid was granted.

13. Where there is more than one aid instrument, to what extent may a recipient combine several instruments?
To what extent may the aid in question be combined with other aid schemes in operation?

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(2) NUTS is the nomenclature of territorial units for statistics in the European Communities.
(3) NACE is the general industrial classification of economic activities within the European Communities.
(4) See SME guidelines: not more than 25 % may be owned by one or more companies not falling within the SME definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors (OJ C 213, 19.8.1992).

14. If a scheme:
Duration of aid scheme

14.1 Number of years:

14.2 Is an existing scheme being extended?
YES/NO
For how long?

15. Expenditure

15.1 Give budgetary appropriations for the duration of the scheme or ad hoc case or an estimate of revenue losses due to tax expenditure.

If an existing scheme is to be altered, give for the last three years:

— expenditure in the form of commitments made
or, in the case of tax expenditure,
— estimated revenue losses.

15.2 Indicate financing schedule.
Is the budget adopted annually? YES/NO
If not, what period does it cover?
Other provisions: .....

15.3 For schemes covered by the R&D framework, give breakdown of budget by enterprise, research centre and university.

16. For schemes which do not have a specific sectoral or regional objective, specify any resulting sectoral or regional concentrations:

17. If a scheme, give:
Estimated number of recipients (delete as appropriate):
— fewer than 10
— from 10 to 50
— from 51 to 100
— from 101 to 500
— from 501 to 1 000
— more than 1 000.

18. Information/control measures envisaged to ensure that assisted projects comply with statutory objectives: .....

Measures taken to inform the Commission of the application of the scheme: .....

19. It would be desirable for Member States to provide a fully reasoned justification as to why the aid proposal could be deemed compatible with the Treaty where this is not evident from the aid objectives described in the notification owing to the nature of the scheme or ad hoc case. This reasoned justification should include, where appropriate, the necessary supporting statistical documents (e.g. for regional aid, socioeconomic data on the recipient regions).

20. Other relevant information, including estimated number of jobs created or maintained: .....

Supplementary Questionnaire on R&D

Additional information normally to be supplied in a notification of State aid for R&D under Article 93(3) of the EC Treaty (schemes and ad hoc cases)

(To be attached to general questionnaire)

1. Aims

   Detailed description of the aims of the measure and the type or nature of R&D to be assisted: .....

2. Description of R&D phases benefiting from aid:

   2.1 Definition phase or feasibility studies: .....
   2.2 Fundamental research: .....
   2.3 Basic industrial research: .....
   2.4 Applied research: .....
   2.5 Development: .....
   2.6 Pilot or demonstration projects: .....

3. Details of cost elements eligible for aid:

   3.1 Personnel costs: .....
   3.2 Supplies, materials (current costs), etc.: .....
   3.3 Equipment and instruments: .....
   3.4 Land and buildings: .....
   3.5 Consultancy and equivalent services, including acquisition of research results, patents and know-how, licensing rights, etc.: .....
   3.6 Overheads directly attributable to the R&D: .....

Please specify the aid intensity levels where they vary according to cost elements.

4. Cooperative research

   4.1 Are projects carried out in cooperation between a number of firms eligible for aid? On special terms?
   If so, what are the terms? .....

   4.2 Does the aid proposal provide for cooperation between enterprises and other bodies such as research institutes or universities? On special terms? If so, describe the terms and conditions: .....

5. Multinational aspects

   Does the proposal (ad hoc case/scheme/programme) have any multinational aspects (e.g. Esprit, Eureka projects)? If so: .....

   5.1 Does the proposal involve cooperation with partners in other countries?
   If so, indicate:
   (a) which other Member States: .....
   (b) which other non-member countries: .....
   (c) which enterprises in other countries: .....

5.2 Total cost of proposal (ad hoc case/scheme/programme): .....
5.3 Give breakdown of total cost by partner: .....

6. Application of results

6.1 Who will own the R&D results in question? .....
6.2 Are any conditions attached to the granting of licences in respect of the results? .....
6.3 Are there any rules governing the general publication or dissemination of R&D results? .....
6.4 Indicate the measures planned for the subsequent use/development of results: .....

SECTION B: Standard Format for notification under the first sentence of Article 8.3 of the Agreement on Subsidies and Countervailing Measures. (This Format has to be filled in in English, French or Spanish.)

Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures

Introduction

The purpose of this standard format is to assist WTO Members in making notifications under the first sentence of Article 8.3 of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'). In view of the statement in Article 8.3 that notifications under this provision must be 'sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2', the questions in this standard format seek information relevant to an assessment of notified assistance in light of the relevant legal requirements in Article 8.2 and do not seek information on trade effects of subsidies or on statistics on production, consumption, imports and exports. It should be noted in this regard that the standard format pertains only to notifications under the first sentence of Article 8.3 and not to annual updates of these notifications referred to in the third sentence of that provision.

Each section below includes several questions of a general nature on issues such as the objectives of a programme, the level of government involved and the institutional framework for the implementation of the programme and the financing instruments used in the programme. In addition, there are more specific questions designed to generate information relevant to an evaluation of whether assistance under a particular programme meets the conditions of Article 8.2 of the SCM Agreement.

With regard to the questions in this standard format on arrangements which may exist for monitoring, auditing and evaluation of assistance under a notified programme, it should be stressed that this standard format does not add to or detract from the relevant legal requirements in Article 8.2 of the SCM Agreement.

As provided in footnote 34 to Article 8.3, Members are not required to provide confidential information, including confidential business information.

I. Assistance for research activities

(a) Describe the policy of the assistance, including, if applicable, any sectoral objectives.

(b) Provide a copy of the law, regulation and/or other legal instrument under which the assistance is provided. If these documents are not in a WTO language, provide a translation in English, French or Spanish of (i) the specific legal provisions which are related to the subsidies granted

for research activities, including the conditions under which those subsidies are granted, and (ii) the table of contents or chapter headings of the law, regulation and/or other legal instrument.

(c) Identify the level(s) of government involved in the provision of assistance for research activities which is notified and provide a detailed description of the institutional framework for the implementation of the programme, including, if applicable, a description of the role of non-governmental entities.

(d) Identify the specific financing instrument(s) used in the programme and provide a detailed description of the incidence and duration of assistance under each instrument.

(e) Identify the assisted research areas and, if possible, the assisted research projects. Provide a technical description of the specific goals of the research activities and explain how these activities fall within the definition of 'industrial research' and 'pre-competitive development activity' in footnotes 28 and 29 of the SCM Agreement.

(f) In the case of industrial research, to the extent practicable in the context of an advance notification of a programme, explain what new knowledge is being sought and what new products, processes or services or improvements in existing products, processes or services are intended to be developed using this knowledge. To the extent possible describe the end result of the industrial research.

(g) In the case of pre-competitive development activity, to the extent practicable in the context of an advance notification of a programme, describe the end result of the pre-competitive development activity and explain how existing products, production lines, manufacturing processes, services or other on-going operations will be affected as a result of this activity.

(h) If a prototype is being developed, to the extent practicable in the context of an advance notification of a programme, describe how the prototype will be developed and describe what modifications are foreseen which would be required to make the prototype capable of commercial use.

(i) Describe the industries and entities, to the extent known, whose research activities will be eligible under the programme.

(j) If the programme covers research activities conducted on a contract basis, explain, to the extent practicable in the context of an advance notification of a programme, the nature of the contractual arrangements in question. If possible, provide a model contract (in English, French or Spanish).

(k) Specify the total amount of assistance budgeted under the programme.

(l) Provide a breakdown of expenditure by project, or, if not possible, by research area.

(m) Specify the amounts of assistance permitted under the programme for (a) industrial research and (b) pre-competitive development activity.

(n) Explain how it is ensured that the assistance does not cover more than 75 per cent of the costs of industrial research, 50 per cent of the costs of pre-competitive development activity or, in situations referred to in footnote 30, 62.5 per cent of both of these costs. Describe the methodology used in calculating these costs.

(o) Describe the specific types of costs covered by the assistance. Explain how it is ensured that the assistance is limited exclusively to the costs mentioned in items (i)-(v) of Article 8.2(a) of the SCM Agreement. Describe the methodology used in calculating these costs.

(p) Describe any arrangements which may exist for monitoring, auditing and evaluation.

II. Assistance to disadvantaged regions within the territory of a Member

(a) Describe the general framework of regional development, as provided for in footnote 31, pursuant to which the assistance is granted. In this connection, explain how the regional development policy of which the programme forms part is internally consistent and generally applicable and describe how the programme is intended to contribute to regional development.

(b) Provide a copy of the law, regulation and/or other legal instrument under which the assistance is provided. If these documents are not in a WTO language, provide a translation in English, French or Spanish of (i) the specific legal provisions which are related to the subsidies granted to disadvantaged regions, including the conditions under which those subsidies are granted, and (ii) the table of contents or chapter headings of the law, regulation and/or other legal instrument.

(c) Identify the level(s) of government involved in the implementation of the regional assistance programme and provide a detailed description of the institutional framework for the implementation of the programme, including, if applicable, a description of the role of non-governmental entities.

(d) Identify the regions eligible for assistance under the programme. Explain how these regions are contiguous geographical areas with a definable economic and administrative identity.

(e) Identify the criteria on the basis of which the regions have been designated as disadvantaged. Provide a copy of the relevant law, regulation or other official document in which such criteria are spelled out.

(f) Describe the measurements of economic development which have been included in these criteria. Explain how any composite measurement of economic development was determined and calculated. Provide for a period of three years the relevant statistical data for the region and for the territory as a whole of the Member used in determining that a region is disadvantaged.

(g) Identify the specific financing instrument(s) used in the programme and provide a detailed description of the incidence and duration of assistance under each instrument.

(h) Describe the criteria for determining the eligibility of the beneficiaries of the assistance and the procedures regarding applications for assistance under the programme. Provide (in English, French or Spanish) a copy of a standard application form or instructions, if any.

(i) Specify the total amount of assistance budgeted under the programme. Describe the specific types of costs covered by the assistance.

(j) Specify the ceilings, expressed in terms of investment costs or costs of job creation, on the amount of assistance to individual projects. Explain the methodology used for calculating the investment costs and the costs of job creation. Explain how such ceilings have been differentiated according to the different levels of development of the assisted regions.

(k) Describe any provisions which may exist under the programme to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

(l) Explain how it is ensured that the amount of the assistance does not exceed the ceilings.

(m) Describe any arrangements which may exist for monitoring, auditing and evaluation.

III. Assistance to promote adaptation of existing facilities to new environmental requirements

(a) Describe the policy objectives of the programme, including, if applicable, any sectoral objectives.

(b) Provide a copy of the law, regulation and/or other legal instrument under which the assistance is granted. If these documents are not in a WTO language, provide a translation in English, French or Spanish of (i) the specific legal provisions which are related to the subsidies granted to promote adaptation of existing facilities to new environmental requirements, including the conditions under which those subsidies are granted, and (ii) the table of contents or chapter headings of the law, regulation and/or other legal instrument.

(c) Identify the level(s) of government involved in the implementation of the environmental assistance programme and provide a detailed description of the institutional framework for the implementation of the programme, including, if applicable, a description of the role of non-governmental entities.

(d) Explain how the environmental requirements in question are 'new' requirements. Provide a copy of the law of regulation which imposes the new environmental requirements. Explain which nuisances and pollutants are intended to be reduced by these requirements. Identify the level of government at which these requirements are imposed.

(e) Describe the time frame for the application of the new environmental requirements to existing facilities.

(f) To the extent practicable in the context of an advance notification of a programme, provide a technical description of the adaptation of existing facilities necessary to meet the new environmental requirements and identify those facilities. Explain how these requirements would result in a reduction of the specific nuisances and pollutants and explain how these requirements result in greater constraints and financial burdens on firms.

(g) Identify the specific financing instrument(s) used in the programme and provide a detailed description of the incidence and duration of assistance under each instrument.

(h) Explain whether the assistance is provided on the total cost of the reduction of the nuisances or pollutants or on an individual phase of implementation of the new environmental requirements. Identify any legal provision and/or provide other relevant information which explains how the one time, non-recurring condition is met.

(i) Specify the total amount of assistance budgeted under the programme.

(j) Describe the criteria for determining the eligibility of beneficiaries of the environmental assistance and the procedures regarding applications for environmental assistance. Provide (in English, French or Spanish) a copy of a standard application form or instructions, if any.

(k) Explain how it is ensured that the assistance is limited to the adaptation of existing facilities. Describe the methodology used for calculating the costs of adaptation of existing facilities to the new environmental requirements. Describe the specific types of costs covered by the assistance. Explain how it is ensured that the assistance does not cover more than 20 per cent of the costs of this adaptation.

(l) Explain how it is ensured that the assistance is directly linked and proportionate to a firm's planned reduction of nuisances and pollution and that the assistance does not cover any manufacturing cost savings which may be achieved.

(m) Describe any arrangements which may exist for monitoring, auditing and evaluation.

3. Time limits for decision

Commission letter to Member States SG(81) 12740 of 2 October 1981

Dear Sir

1. Article 93(3) of the EC Treaty requires Member States to inform the Commission of any plans to grant or alter aid, so as to enable it to submit its comments in sufficient time.

2. To carry out an initial assessment of the plan notified, the Commission must complete its investigation and consideration of the case within a period set at two months by the Court of Justice of the European Communities. The Commission has itself set a shorter time limit, of 30 working days, for individual cases of application of general schemes already approved by it. Proposed measures may not be put into effect within these periods.

3. The Commission has already set out the rules for the notification of aid plans, and the procedures it applies internally, in a letter of 5 January 1977 (SG(77) D/122, attached). I would like to remind you of these rules, and to draw your attention particularly to the fact that the periods mentioned above begin to run only from the date on which the Commission receives a notification correctly made which can be considered complete.

(a) For a notification to be correctly made it is important:

(i) that it should refer expressly to Article 93(3) (EC Treaty) or to another Community instrument requiring the notification;

(ii) that it should be sent to the Secretariat-General of the Commission, and not to the responsible Commission department; however, individual cases of application of general aid schemes already approved by the Commission should be notified direct to the Directorate-General for Competition.

The Commission calculates the time available to it from the point at which the notification is actually received by the Secretariat-General or the Directorate-General for Competition as the case may be. To inform you of the point at which time starts to run the Commission will continue to send you an acknowledgment of receipt showing the relevant date, as it has done in the past.

(b) A notification is incomplete when it does not contain all the information which the Commission departments need in order to form an initial view of the compatibility of the measure with the Treaty; the Commission then has 15 working days from the notification to request further information. Time then begins to run only from the date on which such further information is received. An acknowledgment of receipt is sent showing the relevant date.

4. In seeking strict observance of these rules, the Commission's sole concern is to facilitate the procedure for prior notification and scrutiny of planned State aid, so that it can itself observe the time limits to which it is subject, thus improving the procedural guarantees for the benefit of Member States.

Yours faithfully,

Commission letter to Member States of 30 April 1987

(Procedure under Article 93(2) of the EEC Treaty — Time limits)

Dear Sir

Over the last few years the Commission has observed that when the procedure laid down in Article 93(2) of the EEC Treaty is initiated in respect of a State aid measure the time which elapses between initiation and the final decision on the case has for various reasons been growing longer. This is not in the interests of the Member States, of the recipient firms or of the Commission. The Commission has therefore instructed its departments to deal with State aid cases more rapidly.

Of course this will require very close cooperation on the part of the Member States, which are called upon to supply information in the course of the procedure. In particular, in order to allow the Commission to take a decision in full knowledge of the facts, Member States should submit their comments, in full, within the period of one month which is generally stated in the letter informing them that the procedure has been initiated.

If it should prove necessary to supply oral observations to the Commission, the meetings for the purpose must be held within three months, at the latest, of receipt of the letter stating that the procedure has been initiated. Written confirmation of information supplied at such meetings, and any additional information or amended plan, must be in the Commission's possession within four months of the date of receipt of that letter.

Given the mutual advantage of speeding up procedures, I am sure your Government will cooperate constructively here. For their part the Commission departments have been instructed to comply scrupulously with the time limits I have outlined. The Commission will then be able to take a decision on the basis of the information received, even if that information is incomplete as a result of any lack of diligence on the part of the Member State, the Court of Justice accepted that the Commission was entitled to act in this way in Cases 234/85 and 40/85 *Belgium* v *Commission.*

Yours faithfully

4. Accelerated procedure

Commission communication to the Member States (*) on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes

(adopted by the Commission on 2 July 1992)

The Commission has amended its earlier decision (1) on the notification of aid schemes of minor importance as follows:

In principle the Commission will not object to new or modified existing aid schemes notified pursuant to Article 93(3) of the EC Treaty meeting the following criteria:

1. New aid schemes, excluding those supporting industrial sectors covered by specific Community policy statements (2) as well as aid in the agricultural, fisheries, transport and coal sectors.

   The schemes must be limited to small and medium-sized enterprises, defined as any firm which:

   (i) has no more than 250 employees, and

   either

   (a) an annual turnover not exceeding ECU 20 million, or

   (b) a balance sheet total not exceeding ECU 10 million, and

   (ii) is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

   The schemes must also satisfy one of the following criteria:

   (i) where the scheme has specific investment objectives, the aid intensity must not exceed 7.5 % of the investment cost, or

   (ii) where the scheme is designed to lead to job creation, the aid must not amount to more than ECU 3 000 per job created, or

   (iii) in the absence of specific investment or job creation objectives the total volume of aid a beneficiary may receive must not be more than ECU 200 000.

   All the above figures are before any calculation for tax effects, i.e. gross.

   Member States must ensure that the beneficiary does not receive more aid than allowed by the above criteria for the same project through repeated notification of aid schemes

(*) OJ C 213, 19.8.1992, p. 10.
(1) OJ C 40, 20.2.1990, p. 2.
(2) Presently steel, shipbuilding, synthetic fibres and motor vehicles.

meeting these criteria or such schemes being added to any other aid under general, regional or sectoral aid schemes.

Such aid may be paid on a national, regional, or local basis.

All aid to exports in intra-Community trade or operating aid are excluded from the procedure.

2. Modifications of existing aid schemes which the Commission has previously approved, except in specific cases where the Commission strictly limited its authorisation to the period, budget and conditions then notified.

The amendment may involve any of the following:

(i) prolongation over time without increase in budgetary resources;

(ii) increase in budget available up to 20 % of original sum but no prolongation;

(iii) prolongation over time with budget increases up to 20 % of original sum;

(iv) tightening the criteria of application of the scheme.

A simplified form for notification to be used for both new and existing schemes is set out below.

The Commission will decide on notifications within 20 working days.

ANNEX

1. Member State: .....

2. Title of scheme: .....

3. Is it a new scheme? .....

   3.1. Level of government responsible for scheme:

   — central government: .....

   — region: .....

   — local authority: .....

   — other: .....

   3.2. Is it:

   — a general scheme?

   — for what purpose(s)? (e.g. R&D, innovation, environment, energy conservation, etc.): .....

   — a regional scheme?

   for which area(s)? .....

   — a sectoral (industry-specific) scheme?

   for which sector(s)? .....

   3.3. Form of aid (specify conditions):

   — grant: .....

   — soft loan: .....

   — interest subsidy: .....

   — tax relief: .....

   — loan guarantee: .....

   — other: .....

   3.4. Budget: .....

   3.5. Duration: .....

   3.6. Beneficiaries of aid:

— firms employing up to ..... persons (maximum 250) and having an annual turnover of up to ..... (maximum ECU 20 million) or a balance sheet total of up to ..... (maximum ECU 10 million) and not more than ..... (maximum 25 %) owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

3.7. Scale of aid:

3.7.1. If the scheme is for investment, what is the intensity of the aid? ..... (maximum 7.5 % of the investment cost): .....

3.7.2. If the scheme is to stimulate employment, what is the maximum amount of aid per job created? (maximum ECU 3 000): .....

3.7.3. In other cases what is the maximum aid per firm? ..... (maximum ECU 200 000): .....

4. In the case of an existing scheme:

— when was the scheme notified to the Commission? .....

— when was it approved by the Commission? (date and reference of letter, aid case number): .....

— how is the scheme to be amended? (duration, budget, conditions, etc.): .....

5. Remarks: .....

6. Action proposed by DG IV (to be left blank): .....

Accelerated procedure for processing notifications of employment aid (*)
Standard notification form

On 19 July 1995 the Commission adopted guidelines on aid to employment (1). Chapter V of the guidelines provides that, for the processing of notifications of plans to grant employment aid pursuant to Article 93(3) of the EC Treaty, the Commission adopts an accelerated procedure and a standard notification form.

The text of the standard notification form is set out below.

(*) OJ C 218, 27.7.1996, p. 4.
(1) OJ C 334, 12.12.1995, p. 4.

ANNEX

INFORMATION TO BE SUPPLIED IN NOTIFICATIONS UNDER ARTICLE 93(3) OF THE EC TREATY WITH REGARD TO EMPLOYMENT AND TRAINING AID SCHEMES IN ORDER TO BENEFIT FROM THE ACCELERATED PROCEDURE

1. Member State: .....

2. Title of scheme: .....

3. Level of government responsible for scheme:

   — central .....

   — regional: .....

   — local: .....

   — other: .....

4. Ministry or other administrative department responsible for initiating and implementing the measure: .....

   Official responsible: .....

5. Is it a:

   new scheme ❑ existing aid scheme ❑

6. In the case of an existing aid scheme:

   — notified to the Commission on: .....

   — aid case number: .....

   — approved by the Commission by letter dated .....,

     reference SG(...) D/ .....

   — how is the scheme to be amended (duration, budget, conditions, etc.)? .....

7. In the case of a new scheme:

   7.1. Objective:

   job creation ❑ maintenance of employment ❑

   targeted recruitment ❑ training ❑

   self-employment ❑

7.2. Is the scheme limited to

— certain regions: .....

These regions are: fully ❑ partially ❑

— eligible for regional aid under Article 92(3)(a) of the EC Treaty ❑

— eligible for regional aid under Article 92(3)(c) of the EC Treaty ❑

— not eligible for regional State aid ❑

If necessary, specify: .....

— certain sectors: .....

— certain activities: .....

— size of enterprise: (please state if it concerns an SME within the meaning of the Community definition): .....

— certain categories of workers: .....

7.3. Form of aid (specify conditions):

— non-repayable grant: .....

— soft loan: .....

— interest subsidy: .....

— tax relief: .....

— exemption from social security contributions: .....

employer ❑ employee ❑

— guarantee: .....

— other: .....

7.4. Budgets: .....

of which Community co-financing: .....

7.5. Duration of scheme: .....

7.6. Scale of aid:

7.6.1. If the scheme is to assist job creation:

— what is the maximum amount of aid per job created (in figures and/or percentage of average wage costs)? .....

— duration of the aid? .....

— is the aid tied to an investment? .....

— what are the terms of the employment contract (duration, training, etc.)? .....

7.6.2. If the scheme is to help maintain employment:

— what is the maximum amount of aid per job under threat (in figures and/or percentage of average wage costs)? .....

— duration of the aid? .....

— what are the circumstances linked to the aid (natural catastrophe, worksharing, restructuring, reconversion, Article 92(3)(a) region)? .....

— what conditions are attached to the granting of aid? .....

7.6.3. In the case of training aid: .....

— what is the maximum amount of aid (in figures per enterprise/person trained and/or as a percentage of training costs excluding wage costs)? .....

— what are the circumstances connected with the aid (introduction of new technologies, new activities of the enterprise, mobility within the enterprise, apprenticeships, etc.)? .....

— what is the purpose of the training (general/specific technical training, languages, management, work organisation, etc.)? .....

7.6.4. If the scheme is to assist the creation of self-employed activities:

— what is the maximum amount of aid per beneficiary (in figures and/or as a percentage of certain costs, to be specified)? .....

— duration of the aid? .....

— is the aid connected with an investment? .....

— what are the beneficiary's conditions? .....

8. Possibility of cumulation with other aid schemes? .....

9. Remarks: .....

10. Action proposed by DG IV (to be left blank): .....

5. Publication

Commission letter to Member States of 27 June 1989

(Procedure of Article 93(2) of the EEC Treaty — Notice to Member States and other parties concerned to submit their comments)

Dear Sir

1. When opening the procedure of Article 93(2) of the EEC Treaty the Commission has, up to now, met the obligation to give notice to the parties concerned, as therein provided, in the following way:

(i) a letter incorporating the Commission's decision to open this procedure, and giving the reasons for it, is immediately dispatched to the Member State concerned;

(ii) a copy of the abovementioned letter is subsequently sent to all other Member States;

(iii) a communication summarising the abovementioned letter appears in a C edition of the Official Journal.

2. The Commission has undertaken a review of these procedures intended to attain the objectives of overall acceleration of information to Member States and to all others concerned. It has concluded that these objectives would best be attained by streamlining existing procedures as set out below:

- following upon the decision to open the procedure of Article 93(2) the Member State is, as heretofore, immediately informed;

- the contents of the letter to that Member State, giving notice of the opening of the procedure, are subsequently rapidly published in the Official Journal (C edition).

Notice of the conclusion of the procedure of Article 93(2) of the EEC Treaty will moreover be given in the same way, that is, by immediate notice to the Member State concerned, followed by publication of the relevant text setting out the Commission's decision, in the Official Journal (L edition).

In all cases, the General-Secretariat of the Commission will inform the Permanent Representations, by means of a brief and standardised communication, of the foreseen date of publication in the relevant Official Journal.

3. The system set out above will be applied as from 1 July 1989.

Yours faithfully

Commission letter to the Member States of 11 October 1990

(Notice to Member States and other parties about aid cases not objected to by the Commission)

Dear Sir

1. When the Commission decides, pursuant to Article 93(3), to raise no objections in respect of a notified aid, it informs the Member State concerned of its position in a brief letter. In most cases, no information on the aid is sent to the other Member States and interested parties.

2. The Commission has decided that in future it will publish a description, varying in length according to the importance of the case concerned, of all aid awards to which it has no objection. The description will be published in the Official Journal and the monthly *Bulletin of the European Communities*.

Although it is not required to do this by any of the ECSC or EEC Treaty provisions on State aid, the Commission hopes that it will thus be responding to a general demand for information on aid requiring a decision on its part and will thus increase the transparency of its policy in this area. While the Member States have a legitimate desire to be better informed about this aspect of the Commission's activities, the same is true of a number of socio-professional circles and especially of the competitors of firms that have received State aid. It is because of this last factor and for reasons of legal certainty that the Commission has decided to publish the decisions in question in the L series of the Official Journal. It will also see to it that the publishing deadlines are appreciably shortened.

Yours faithfully

SHORT DESCRIPTION

Member State: .....

Region: .....

Case No: ..... Title of scheme: .....

National legal basis (in original language): .....

Objective (brief summary): .....

Budget: .....

Intensity of aid: .....

Duration: .....

Conditions: .....

6. Cooperation

Notice on cooperation between national courts and the Commission in the State aid field (*)

The purpose of this notice is to offer guidance on cooperation between national courts and the Commission in the State aid field. The notice does not in any way limit the rights conferred on Member States, individuals or undertakings by Community law. It is without prejudice to any interpretation of Community law which may be given by the Court of Justice and the Court of First Instance of the European Communities. Finally, it does not seek to interfere in any way with the fulfilment by national courts of their duties.

I. INTRODUCTION

1. The elimination of internal frontiers between Member States enables undertakings in the Community to expand their activities throughout the internal market and consumers to benefit from increased competition. These advantages must not be jeopardised by distortions of competition caused by aid granted unjustifiably to undertakings. The completion of the internal market thus reaffirms the importance of enforcement of the Community's competition policy.

2. The Court of Justice has delivered a number of important judgments on the interpretation and application of Articles 92 and 93 of the EC Treaty. The Court of First Instance now has jurisdiction over actions by private parties against the Commission's State aid decisions and will thus also contribute to the development of case-law in this field. The Commission is responsible for the day-to-day application of the competition rules under the supervision of the Court of First Instance and the Court of Justice. Public authorities and courts in the Member States, together with the Community's courts and the Commission each assume their own tasks and responsibilities for the enforcement of the EC Treaty's State aid rules, in accordance with the principles laid down by the case-law of the Court of Justice.

3. The proper application of competition policy in the internal market may require effective cooperation between the Commission and national courts. This notice explains how the Commission intends to assist national courts by instituting closer cooperation in the application of Articles 92 and 93 in individual cases. Concern is frequently expressed that the Commission's final decisions in State aid cases are reached some time after the distortions of competition have damaged the interests of third parties. While the Commission is not always in a position to act promptly to safeguard the interests of third parties in State aid matters, national courts may be better placed to ensure that breaches of the last sentence of Article 93(3) are dealt with and remedied.

II. POWERS (1)

4. The Commission is the administrative authority responsible for the implementation and development of competition policy in the Community's public interest. National courts are responsible for the

(*) OJ C 312, 23.11.1995, p. 8.

(1) The Court of Justice has described the roles of the Commission and the national courts in the following way:

'9. As far as the role of the Commission is concerned, the Court pointed out in its judgment in Case 78/96 *Steinlike and Weinlig* v *Germany* [1977] ECR 595, at paragraph 9, that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion.

protection of rights and the enforcement of duties, usually at the behest of private parties. The Commission must examine all aid measures which fall under Article 92(1) in order to assess their compatibility with the common market. National courts must make sure that Member States comply with their procedural obligations.

5. The last sentence of Article 93(3) (in bold below) has direct effect in the legal order of the Member States.

'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 92, 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.'

6. The prohibition on implementation referred to in the last sentence of Article 93(3) extends to all aid which has been implemented without being notified ([2]) and, in the event of notification, operates during the preliminary period and, if the Commission sets in motion the contentious procedure, until the final decision ([3]).

7. Of course a court will have to consider whether the 'proposed measures' constitute State aid within the meaning of Article 92(1) ([4]) before reaching a decision under the last sentence of Article 93(3). The Commission's decisions and the Court's case-law devote considerable attention to this important question. Accordingly, the notion of State aid must be interpreted widely to encompass not only subsidies, but also tax concessions and investments from public funds made in circumstances in which a private investor would have withheld support ([5]). The aid must come from the 'State', which includes

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10. As far as the role of national courts is concerned, the Court held in the same judgment that proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure.

11. The involvement of national courts is the result of the direct effect which the last sentence of Article 93(3) of the Treaty has been held to have. In this respect, the Court stated in its judgment of 11 December 1973 in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471 that the immediate enforceability of the prohibition on implementation referred to in that Article extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and if the Commission sets in motion the contentious procedure, until the final decision.

14. ... The principal and exclusive role conferred on the Commission by Articles 92 and 93 of the Treaty, which is to hold aid to be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3) of the Treaty. Whilst the Commission must examine the compatibility of the proposed aid with the common market, even where the Member State has acted in breach of the prohibition on giving effect to aid, national courts do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by the last sentence of Article 93(3).'

Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* v *France* [1991] ECR I-5505, paragraphs 9, 10, 11 and 14, at pp. 5527 and 5528.

([2]) With the exception of 'existing' aid, such aid may be implemented until the Commission has decided that is it incompatible with the common market: see Case C-387/92 *Banco de Crédito Industrial*, now *Banco Exterior de Espana* v *Ayuntamiento de Valencia* [1994] ECR I-877 and Case C-44/93 *Namur — Les Assurances du Crédit* v *Office National du Ducroire and Belgium* [1994] ECR I-3829.

([3]) Case C-354/90, cited at footnote 1, paragraph 11 at p. 5527.

([4]) See the Court of Justice's judgment in Case 78/76 *Steinlike and Weinlig* v *Germany* [1977] ECR 595, paragraph 14: '...a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure'.

([5]) For a recent formulation, see Advocate-General Jacob's opinion in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, 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'.

all levels, manifestations and emanations of public authority (6). The aid must favour certain undertakings or the production of certain goods: this serves to distinguish State aid to which Article 92(1) applies from general measures to which it does not (7). For example, measures which have neither as their object nor as their effect the favouring of certain undertakings or the production of certain goods, or which apply to persons in accordance with objective criteria without regard to the location, sector or undertaking in which the beneficiary may be employed, are not considered to be State aid.

8. Only the Commission can decide that State aid is 'compatible with the common market', i.e. authorised.

9. In applying Article 92(1), national courts may of course refer preliminary questions to the Court of Justice pursuant to Article 177 of the EC Treaty and indeed must do so in certain circumstances. They must also request assistance from the Commission by asking it for 'legal or economic information' by analogy with the Court's Delimitis (8) judgment in respect of Article 85 of the EC Treaty.

10. The national court's role is to safeguard rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3). The court should use all appropriate devices and remedies and apply all relevant provisions of national law to implement the direct effect of this obligation placed by the Treaty on Member States (9). A national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which that law confers on individuals; it must therefore set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule (10). The judge may, as appropriate and in accordance with applicable rules of national law and the developing case-law of the Court of Justice (11), grant interim relief, for example by ordering the freezing or return of monies illegally paid, and award damages to parties whose interests are harmed.

11. The Court of Justice has held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible (12); the principle whereby a State must be liable for loss and damage

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(6) The Court of Justice held in Case 290/83 *Commission* v *France* [1985] ECR 439, that '...The prohibition contained in Article 92 covers all aid granted by a Member State or through State resources and 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 the aid' (paragraph 14 at p. 449).

(7) A clear statement of this distinction is to be found in Advocate-General Darmon's opinion in Joined Cases C-72 and C-73/91 *Sloman Neptun* [1993] ECR I-887.

(8) Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935; Commission notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ C 39, 13.12.1993, p. 6). See Advocate-General Lenz's opinion in Case C-44/93, cited at footnote 2 (paragraph 106). See also Case C-2/88 *Imm, Zwartveld* [1990] ECR I-3365 and I-4405: 'the Community institutions are under a duty of sincere cooperation with the judicial authorities of the Member States, which are responsible for ensuring that Community law is applied and respected in the national legal system' (paragraph 1 at p. I-3366 and paragraph 10 at pp. 4410 and 4411, respectively).

(9) As the Court of Justice held in Case C-354/90, cited at footnote 1, paragraph 12 at p. 5528: '...the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93(3) of the Treaty. National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.'

(10) Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629 (paragraph 21 at p. 644). See also Case C-213/89 *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd et al.* [1990] ECR I-2433, at p. 2475.

(11) Joined Cases C-6/90 and C-9/90 *Andrea Francovich et al.* v *Italy* [1991] ECR I-5357. Other important cases are pending before the Court concerning the responsibilities of national courts in the application of Community law: Case C-48/93 *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd. and others* (OJ C 94, 3.4.1993, p. 13); Case C-46/93 *Brasserie du Pêcheur SA* v *Germany* (OJ C 92, 2.4.1993, p. 4); Case C-312/93 *SCS Peterbroeck, Van Campenhout & Cie* v *Belgian State* (OJ C 189, 13.7.1993, p. 9); Cases C-430 and C-431/93 *J. Van Schindel and J. N. C. Van Veen* v *Stichting Pensioenfonds voor Fysiotherapeuten* (OJ C 338, 15.12.1993, p. 10).

(12) *Francovich*, cited at footnote 11, paragraph 33 at p. 5414.

caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty ([13]); a national court which considers, in a case concerning Community law, that the sole obstacle precluding it from granting interim relief is a rule of national law, must set aside that rule ([14]).

12. These principles apply in the event of a breach of the Community's competition rules. Individuals and undertakings must have access to all procedural rules and remedies provided for by national law on the same conditions as would apply if a comparable breach of national law were involved. This equality of treatment concerns not only the definitive finding of a breach of directly effective Community law, but extends also to all legal means capable of contributing to effective legal protection.

III. THE COMMISSION'S LIMITED POWERS

13. The application of Community competition law by the national courts has considerable advantages for individuals and undertakings. The Commission cannot award damages for loss suffered as a result of an infringement of Article 93(3). Such claims may be brought only before the national courts. National courts can usually adopt interim measures and order the termination of infringements quickly. Before national courts, it is possible to combine a claim under Community law with a claim under national law. This is not possible in a procedure before the Commission. In addition, courts may award costs to the successful applicant. This is never possible in the administrative procedure before the Commission.

IV. APPLICATION OF ARTICLE 93(3)

14. Member States are required to notify to the Commission all plans to grant aid or to alter aid plans already approved. This also applies to aid that may qualify for automatic approval under Article 92(2), because the Commission has to check that the requisite conditions are met. The only exception to the notification obligation is for aid classed as *de minimis* because it does not affect trade between Member States significantly and thus does not fall within Article 92(1) ([15]).

15. The Commission receives notification of general schemes or programmes of aid, as well as of plans to grant aid to individual firms. Once a scheme has been authorised by the Commission, individual awards of aid under the scheme do not normally have to be notified. However, under some of the aid codes or frameworks for particular industries or particular types of aid, individual notification is required of all awards of aid or of awards exceeding a certain amount. Individual notification may also be required in some cases by the terms of the Commission's authorisation of a given scheme. Member States must notify aid which they wish to grant outside the framework of an authorised scheme. Notification is required in respect of planned measures, including plans to make financial transfers from public funds to public or private sector enterprises, which may involve aid within the meaning of Article 92(1).

16. The first question which national courts have to consider in an action under the last sentence of Article 93(3) is whether the measure constitutes new or existing State aid within the meaning aid of Article 92(1). The second question to be answered is whether the measure has been notified either individually or under a scheme and if so, whether the Commission has had sufficient time to come to a decision ([16]).

([13]) *Francovich*, cited at footnote 11, paragraph 35 at p. 5414.

([14]) *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd. et al.*, cited at footnote 10.

([15]) See point 3.2 of the Community guidelines on State aid for SMEs (OJ C 213, 19.8.1992, p. 2) and the letter to the Member States ref. IV/D/06878 of 23 March 1993, *Competition law in the European Communities*, Volume II.

([16]) Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471.

17. With respect to aid schemes, a period of two months is considered by the Court of Justice to be 'sufficient time', after which the Member State concerned may, after giving the Commission prior notice, implement the notified measure ([17]). This period is reduced by the Commission voluntarily to 30 working days for individual cases and 20 working days under the 'accelerated' procedure. The periods run from the time the Commission is satisfied that the information provided by the Member State is sufficient to enable it to reach a decision ([18]).

18. If the Commission has decided to initiate the procedure provided for in Article 93(2), the period during which the implementation of an aid measure is prohibited runs until the Commission has reached a positive decision. For non-notified aid measures, no deadline exists for the Commission's decision-making process, although the Commission will act as speedily as possible. Aid may not be awarded before the Commission's final decision.

19. If the Commission has not ruled on an aid measure, national courts can always be guided, in interpreting Community law, by the case-law of the Court of First Instance and the Court of Justice, as well as by decisions issued by the Commission. The Commission has published a number of general notices which may be of assistance in this regard ([19]).

20. National courts should thus be able to decide whether or not the measure at issue is illegal under Article 93(3). Where national courts have doubts, they may and in some cases must request a preliminary ruling from the Court of Justice in accordance with Article 77.

21. Where national courts give judgment finding that Article 93(3) has not been complied with, they must rule that the measure at issue infringes Community law and take the appropriate measures to safeguard the rights enjoyed by individuals and undertakings.

V. EFFECTS OF COMMISSION DECISIONS

22. The Court of Justice has held ([20]) that a national court is bound by a Commission decision addressed to a Member State under Article 93(2) where the beneficiary of the aid in question seeks to question the validity of the decision of which it had been informed in writing by the Member State concerned and where it had failed to bring an action for annulment of the decision within the time limits prescribed by Article 173 of the EC Treaty.

VI. COOPERATION BETWEEN NATIONAL COURTS AND THE COMMISSION

23. The Commission realises that the principles set out above for the application of Articles 92 and 93 by national courts are complex and may sometimes be insufficiently developed to enable them to carry out their judicial duties properly. National courts may therefore ask the Commission for assistance.

24. Article 5 of the EC Treaty establishes the principle of loyal and constant cooperation between the Community institutions and the Member States with a view to attaining the objectives of the Treaty,

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([17]) Case 120/73 *Lorenz* v *Germany*, cited at footnote 16, paragraph 4 at p. 1481; see also Case 84/42 *Germany* v *Commission* [1984] ECR 1451, paragraph 11 at p. 1488.

([18]) The Commission has issued a guide to its procedures in State aid cases: see *Competition law in the European Communities*, Volume II.

([19]) The Commission publishes and updates from time to time a compendium of State aid rules (*Competition law in the European Communities*, Volume II).

([20]) Case C-188/92 *TWD Textilwerke Deggendorf GmbH* v *Germany* [1994] ECR I-833; see also Case 77/72 *Capolongo* v *Maya* [1973] ECR 611.

including implementation of Article 3(g), which provides for the establishment of a system ensuring that competition in the internal market is not distorted. This principle involves obligations and duties of mutual assistance, both for the Member States and for the Community institutions. Under Article 5, the Commission has a duty of cooperation with the judicial authorities of the Member States which are responsible for ensuring that Community law is applied and respected in the national legal order.

25. The Commission considers that such cooperation is essential in order to guarantee the strict, effective and consistent application of Community competition law. In addition, participation by the national courts in the application of competition law in the field of State aid is necessary to give effect to Article 93(3). The Treaty obliges the Commission to follow the procedure laid down in Article 93(2) before it can order reimbursement of aid which is incompatible with the common market ([21]). The Court has ruled that Article 93(3) has direct effect and that the illegality of an aid measure, and the consequences that flow therefrom, can never be validated retroactively by a positive decision of the Commission on an aid measure. Application of the rules on notification in the field of State aid therefore constitutes an essential link in the chain of possible legal action by individuals and undertakings.

26. In the light of these considerations, the Commission intends to work towards closer cooperation with national courts in the following manner.

27. The Commission is committed to a policy of openness and transparency. The Commission conducts its policy so as to give the parties concerned useful information on the application of competition rules. To this end, it will continue to publish as much information as possible about State aid cases and policy. The case-law of the Court of Justice and Court of First Instance, general texts on State aid published by the Commission, decisions taken by the Commission, the Commission's annual reports on competition policy and the monthly Bulletin of the European Union may assist national courts in examining individual cases.

28. If these general pointers are insufficient, national courts may, within the limits of their national procedural law, ask the Commission for information of a procedural nature to enable them to discover whether a certain case is pending before the Commission, whether a case has been the subject of a notification or whether the Commission has officially initiated a procedure or taken any other decision.

29. National courts may also consult the Commission where the application of Article 92(1) or Article 93(3) causes particular difficulties. As far as Article 92(1) is concerned, these difficulties may relate in particular to the characterisation of the measure as State aid, the possible distortion of competition to which it may give rise and the effect on trade between Member States. Courts may therefore consult the Commission on its customary practice in relation to these issues. They may obtain information from the Commission regarding factual data, statistics, market studies and economic analyses. Where possible, the Commission will communicate these data or will indicate the source from which they can be obtained.

30. In its answer, the Commission will not go into the substance of the individual case or the compatibility of the measure with the common market. The answer given by the Commission will not be binding on the requesting court. The Commission will make it clear that its view is not

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([21]) The Commission has informed the Member States that '...in appropriate cases it may — after giving the Member State concerned the opportunity to comment and to consider alternatively the granting of rescue aid, as defined by the Community guidelines — adopt a provisional decision ordering the Member State to recover any monies which have been disbursed in infringement of the procedural requirements. The aid would have to be recovered in accordance with the requirements of domestic law; the sum repayable would carry interest running from the time the aid was paid out.' (Commission communication to the Member States supplementing the Commission's letter SG(91) D/4577 of 4 March 1991 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 EC Treaty), not yet published.

definitive and that the court's right to request a preliminary ruling from the Court of Justice pursuant to Article 177 is unaffected.

31. It is in the interests of the proper administration of justice that the Commission should answer requests for legal and factual information in the shortest possible time. Nevertheless, the Commission cannot accede to such requests unless several conditions are met. The requisite data must actually be at its disposal and the Commission may communicate only non-confidential information.

32. Article 214 of the EC Treaty requires the Commission not to disclose information of a confidential nature. In addition, the duty of loyal cooperation under Article 5 applies to the relationship between courts and the Commission, and does not concern the parties to the dispute pending before those courts. The Commission is obliged to respect legal neutrality and objectivity. Consequently, it will not accede to requests for information unless they come from a national court, either directly, or indirectly through parties which have been ordered by the court concerned to request certain information.

VII. FINAL REMARKS

33. This notice applies *mutatis mutandis* to relevant State aid rules, in so far as they have direct effect in the legal order of Member States, of:

— the Treaty establishing the European Coal and Steel Community and provisions adopted thereunder, and

— the Agreement on the European Economic Area.

34. This notice is issued for guidance and does not in any way limit the rights conferred on Member States, individuals or undertakings by Community law.

35. This notice is without prejudice to any interpretation of Community law which may be given by the Court of Justice and Court of First Instance of the European Communities.

36. A summary of the answers given by the Commission pursuant to this notice will be published annually in the Report on Competition Policy.

7. *Reference and discount rates*

Commission letter to Member States of 18 August 1997 on the method for setting the reference and discount dates

Dear Sir,

For the purposes of Community monitoring of State aid as required by the EC Treaty, the Commission uses various parameters, including the reference and discount rates.

The reference/discount rates are used to measure the grant equivalent of aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. They are also used in implementing the *de minimis* rule and for the repayment of illegal aid (1).

In its decision of 10 July 1996, which was communicated to you by letter of 2 August 1996, the Commission amended the method for setting and updating the reference/discount rates. Since 1 August 1996, the reference rate has been calculated on the basis of the rate on 10-year State bonds, as harmonised by the European Monetary Institute, plus a specific premium for each Member State.

The Commission also had a study carried out on the method of setting the reference rates in the context of aid schemes for businesses within the European Union. One of the objects of the study was to check the level of current premiums and to propose their revision if necessary, with a view to possible harmonisation and closer alignment on markets. The study was also supposed to assess the desirability of replacing the EMI rates by the rates of yield on medium-term (five-to seven-year) state bonds.

The study was carried out by KPMG, Frankfurt, on the basis of a survey of over 70 banks in the 15 Member States. The main results of the study are set out below.

KPMG looked separately at the question of the choice of the base rate, currently the EMI rate, and of the calculation of the adjustment premiums.

Base rate

KPMG takes the view that, if it is to be used to determine the reference rate, the base rate must be:

— a market rate whose monthly movement can be easily followed;

— similar in maturity to ordinary public loans;

— used if possible by the banks for determining the charges on their loans to businesses.

The EMI rates do not fulfil all the above-mentioned conditions: they have a longer maturity (10 years) than most of the public loan regimes examined by the Commission, whose duration (2) hardly exceeds five to six years. Nor are they used by the banks in determining the charges on their loans to businesses.

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(1) See the Commission's letter to the Member States No 1971 of 22 February 1995 and the Commission communication to the Member States published in OJ C 156, 22.6.1995.

(2) Duration is used to mean the average period over which the capital is repaid.

The fact that the reference rate does not correspond to the maturity of the loans examined by the Commission may lead to errors in aid assessment. For example, the rate on a public loan having a duration of five years may be lower than the EMI rate and yet not contain any aid element.

This phenomenon is partly offset by the adjustment premiums, as long as the yield curve does not vary over time.

As regards the base rate, the consultants recommend use of the five-year interbank swap rates instead of the EMI 10-year rates. This is because the five-year rates correspond more to the average capital-repayment period for ordinary public loans.

KPMG also recommends that the Commission follow the short-term rates (of the Libor one-year type) and the EMI 10-year rates.

Adjustment premiums

KPMG examined the suitability of the old reference-rate definitions which served as a basis for calculating the current adjustment premiums.

It concluded that these definitions are generally imprecise and heterogeneous as regards the maturity of the loans and their amounts. The amounts usually relate to the cost of indebtedness of firms (stock concept) rather than the cost of their new borrowings (flow concept).

Lastly, the statistics are in general aggregates that do not allow precise measurement of the aid elements contained in the interest subsidy schemes or, *a fortiori*, in individual awards of aid.

As regards the level of the premiums to be applied to the base rate, KPMG have provided brackets that take account of the diversity of situations, notably the different debtor risks, and of the amount of the loan.

In the case of smaller loans (less than ECU 5 million), generally contracted by SMEs, KPMG observed wide differences from one Member State to another and wide disparities within one and the same country. In its view, such disparities are due to the diversity of the risks covered and to the lack of transparency/competition on the relevant markets.

KPMG did not find that such disparities existed in the case of large loans, generally contracted by large firms on highly competitive markets. In the case of this type of loan, KPMG recommends the use of a single premium of 0.75 to 1 percentage point for all the Member States except Italy, Portugal and Greece.

In view of these factors, the Commission has decided that a single adjustment premium of 0.75 point (75 basis points) should be applied to all Member States except Italy, Portugal and Greece. This premium corresponds to the average level of premiums for loans of an amount in excess of ECU 5 million.

This choice is based on the following considerations:

— large loans run a greater risk of significantly affecting intra-Community trade;

— the premiums noted for this type of loan are sufficiently homogeneous to be used. Conversely, the premiums noted for smaller loans correspond to situations which are too diverse, in terms of debtor risk, to be used as references;

— the choice of a single, moderate, premium for most of the Member States reduces the risk of dispute or discrimination. It anticipates the achievement of Economic and Monetary Union, which should result in greater competition in banking and a levelling down of interest rates, including those for SMEs.

Commission decision

In view of the above factors, the Commission has decided that the reference rate should in future be calculated on the basis of the five-year interbank swap rate (one-year interbank swap rate in the case of Greece) plus a premium of 75 basis points (200 basis points in the case of Italy and Portugal and 300 basis points in the case of Greece).

The new system will enter into force on 1 August 1997. As from that date, the reference rates will be determined as follows:

— the indicative rate is defined as the five-year interbank swap rate (offer rate) in the relevant currency (Athibor 1-year rate, in drachmas, in the case of Greece) plus an additional premium of 75 basis points (200 basis points in the case of Italy and Portugal and 300 basis points in the case of Greece);

— the reference rate is deemed equal to the average of the indicative rates recorded in September, October and November of the previous year;

— the reference rate is adjusted again in the course of the year if it differs by more than 15 % from the average of the indicative rates recorded over the last known three months.

Under this method, the reference rate for your country is **XXX %** as from 1 August 1997. At each updating, the Commission will inform you of the adjusted rate and will post it on the Internet at the following site:

http://europa.eu.int/comm/dg04/aid/tauxref.htm

Yours faithfully,

Commission notice on the method for setting the reference and discount rates (*)

(This notice replaces the previous notices on the method for setting the reference and discount rates, and in particular the Commission notice (1) of 10 August 1996)

For the purposes of Community monitoring of State aid as required by the EC Treaty, the Commission uses various parameters, including the reference and discount rates.

Those rates are used to measure the grant equivalent of aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes for loans. They are also used in implementing the *de minimis* rule (2) and for the repayment of illegal aid (3).

The reference rates are supposed to reflect the average level of interest rates charged, in the various Member States, on medium and long-term loans (five to ten years) backed by normal security.

The Commission has decided to replace the current system of setting the reference rates, and to use instead one based on the five-year interbank swap rates, plus a premium.

As from 1 August 1997, the reference rates will be set as follows:

— in the case of all Member States except Italy, Portugal and Greece, the indicative rate is defined as the five-year interbank swap rate, in the relevant currency, plus a premium of 0.75 point (75 basis points),

  In the case of Italy and Portugal, the indicative rate is defined as the five-year interbank swap rate, in the relevant currency, plus a premium of 200 basis points.

  In the case of Greece, the indicative rate is defined as the one-year interbank rate (Athibor), in drachmas, plus a premium of 300 basis points;

— the reference rate is deemed to be equal to the average of the indicative rates recorded in the preceding September, October and November,

— the reference rate is adjusted again in the course of the year if it differs by more than 15 % from the average of the indicative rates recorded over the last known three months.

It should also be noted that:

— the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan,

— the Commission reserves the right, if necessary for examining certain cases, to use a shorter base rate (for example, Libor one-year rate) or a longer base rate (for example, the rate on ten-year bonds) than the five-year interbank swap rate,

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(*) OJ C 273, 9.9.1997, p. 3.
(1) OJ C 232, 10.8.1996, p. 10.
(2) OJ C 68, 6.3.1996, p. 9.
(3) OJ C 156, 22.6.1995, p. 5.

— in cases where the five-year interbank swap rate is not available, the base rate will be set at the level of the rate of yield on five-year State bonds, plus a premium of 25 basis points.

Reference rates will be made known by the Commission on the Internet at the following address:

http://europa.eu.int/comm/dg04/aid/tauxref.htm

8. Enabling regulation

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;

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

(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 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 fullfil 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.

9. Proposal for a procedural regulation

Proposal for a Council regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty (*)

COM(98) 73 final — 98/0060(CNS)

(Submitted by the Commission on 24 February 1998)

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,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

(1) Whereas, for the purpose of applying Articles 77 and 92 of the Treaty, the Commission has specific competence under Article 93 of the Treaty 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 accordance with Article 93(3) of the Treaty, all 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;

(5) Whereas in accordance with Article 5 of the Treaty, the 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;

(6) Whereas the period within which the Commission is to conclude the preliminary examination of notified aid should be set at two months; whereas, for reasons of legal certainty, that examination should be closed by a decision;

(7) Whereas in all cases where, as a result of the preliminary examination, the Commission cannot find the aid to be 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;

(*) OJ C 116, 16.4.1998, p. 13.

(8) 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;

(9) 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;

(10) 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;

(11) 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;

(12) 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 the suspensive effect of remedies under national law would render the immediate execution of the decision practically impossible and would allow the recipient to continue to benefit from the unlawful aid; whereas for reasons of equal treatment, a recovery decision should have the same effect in all Member States; whereas therefore it is necessary for the efficient functioning of the entire system of prior notification as provided for by the Treaty and for the effectiveness of the Commission decision, that remedies under national law should not have suspensive effect; whereas this is without prejudice to the possibility for the Court of Justice to order that the application of the Commission decision be suspended pursuant to Article 185 of the Treaty;

(13) 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 opening of the formal investigation procedure should have no automatic suspensive effect and the Commission should not be allowed to use a recovery injunction with regard to misuse of aid;

(14) Whereas in accordance with Article 93(1) of the Treaty, the Commission is under an obligation, in cooperation with the 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;

(15) 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;

(16) Whereas, in order to allow the Commission to monitor in an effective manner 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;

(17) 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 compliance; whereas for this purpose on-site monitoring visits are an appropriate instrument as far as conditional decisions are concerned; whereas for the same purpose and in accordance with Article 5 of the Treaty as well as with the principle of subsidiarity as laid down in Article 3b of the Treaty, it is appropriate to allow the Commission to request assistance from competent national independent supervisory bodies, which will allow the Commission to establish whether conditional decisions, negative decisions, suspension injunctions and recovery injunctions are being complied with;

(18) 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 summaries of all decisions which might affect the interests of interested parties and to make copies of such decisions available to interested parties; 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;

(19) 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, the following definitions shall apply:

(a) 'aid': any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;

(b) 'existing aid':

(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 State, that is to say, aid schemes and individual aid which were put into effect before, and provide for payments 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;

(c) 'new aid': all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) 'aid scheme': 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;

(e) 'individual aid': 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': new aid put into effect in contravention of Article 93(3) of the Treaty;

(g) 'misuse of aid': aid put into effect, awarded or used in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this regulation and which does not constitute unlawful aid;

(h) 'interested party': 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;

(i) 'complete notification': notification satisfying the requirements of Article 2(2) of this regulation.

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.

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.

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 of this article.

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 (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 (decision to initiative 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 period can be extended with the consent of both the Commission and the Member State concerned.

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 paragraph 4 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.

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 request, asks the Commission to consider the notification to be complete because the additional information requested does not exist or has already been provided. Where the Commission, having received such a request, considers the notification to be complete, it shall inform the Member State thereof. In that case, the period referred to in Article 4(5) shall begin on the day following receipt of the request.

Article 6

Formal investigation procedure

1. The decision to initiate proceedings pursuant to Article 4(4) shall summarise the relevant issues of fact and law, shall include a preliminary assessment from 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 on the Member State concerned and on 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, its identity shall not be disclosed to 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 (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 lay down obligations to enable compliance with the decision to be monitored (conditional decision).

5. Where the Commission finds that the notified measure is not compatible with the common market, it shall decide that the measure shall not be put into effect (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.

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(2) or (3) or Article 7.

2. In cases where the Commission has 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) or (5), where it was based on incorrect information provided during the procedure which was a determining factor for the decision. The Commission may open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1) and Article 14 shall apply *mutatis mutandis*.

CHAPTER III — PROCEDURE REGARDING UNLAWFUL AID

Article 10

Examination, request for information and injunction for information

1. Where the Commission has in its possession information from whatever source regarding possible 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 (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 (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 (recovery injunction). Recovery shall be effected in accordance with the procedure set out in Article 14(2) and (3).

Article 12

Non-compliance with an injunction decision

If the Member State fails to comply with an injunction decision as referred to in Article 11, 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 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 pursuant to Article 4(4), 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, the Commission shall not be bound by the time limit set out in Article 4(5).

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 (recovery decision).

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 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. Remedies under national law shall not have suspensive effect.

CHAPTER IV — PROCEDURE REGARDING MISUSE OF AID

Article 15

Misuse of aid

Without prejudice to Article 22, 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) and Article 14 shall apply *mutatis mutandis*.

CHAPTER V — PROCEDURE REGARDING EXISTING AID SCHEMES

Article 16

Cooperation pursuant to Article 93(1) of the Treaty

1.In the review of existing aid schemes pursuant to Article 93(1) of the Treaty, the Commission shall obtain all necessary information from the Member State concerned.

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 17

Proposal for appropriate measures

Where the Commission, in the light of the information submitted by the Member State pursuant to Article 16, 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 18

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. 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 taking 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 — MONITORING

Article 19

Annual reports

1. The 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 17 with regard to the aid scheme concerned.

Article 20

On-site monitoring

1. In cases where the Commission has serious doubts as to whether conditional decisions within the meaning of Article 7(4) are being complied with, the Member State concerned shall allow the Commission to undertake on-site monitoring visits.

2. The officials authorised by the Commission shall be empowered, depending on the conditions of the conditional 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 against 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, at the request of the Member State or of the Commission, be present at the monitoring visit.

5. Where an undertaking opposes a monitoring visit ordered 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 one year after the entry into force of this regulation.

Article 21

Cooperation with national independent supervisory bodies

1. In cases where the Commission has serious doubts as to whether conditional decisions under Article 7(4), negative decisions either under Article 7(5) or under Article 7(5) in conjunction with Article 14(1), suspension injunctions under Article 11(1) and recovery injunctions under Article 11(2) are being complied with, it may invite the competent national independent supervisory body to provide the Commission with a report on the execution of the decision concerned.

2. The Member State shall inform the Commission which national independent supervisory body it has designated for the purpose of this cooperation procedure. To enable the supervisory body to obtain all necessary information and to report to the Commission, the Member State shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this regulation.

Article 22

Non-compliance

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 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, the Commission may pursue the matter in accordance with the provisions of Article 171 of the Treaty.

CHAPTER VII — COMMON PROVISIONS

Article 23

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 is covered by the obligation of professional secrecy.

Article 24

Addressee of decisions

Decisions taken pursuant to Chapters II, III, IV, V and VI of this regulation shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay.

Article 25

Information for interested parties and publication of decisions

1. The Commission shall send a copy of a decision pursuant to Article 7 to any interested party which has submitted comments pursuant to Article 6 and to any beneficiary of individual aid.

2. 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), Article 7(2), (3), (4) and (5), and Article 17 in conjunction with Article 18(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

3. The Commission shall publish in the *Official Journal of the European Communities* the decisions which it takes pursuant to Article 4(4) in the authentic language versions. It shall also publish in all the other official languages of the Community a summary notice of those decisions. For the purpose of submitting comments pursuant to Article 6, a copy of the decision may be requested in any official language of the Community within a period of 15 working days following the date of publication of the summary notice.

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 shall publish decisions pursuant to the third subparagraph of Article 93(2) in the *Official Journal of the European Communities*.

Article 26

Implementing provisions

The Commission acting in accordance with the procedure laid down in Article 27 shall have the power to adopt implementing provisions, in particular concerning the form, content and other details of notifications, the form, content and other details of annual reports, time limits and the calculation of time limits, and the interest rate referred to in Article 14(2).

Article 27

Advisory committee on State aid

1. The Commission shall be assisted by an advisory committee on State aid, hereinafter referred to as 'the committee', composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken pursuant to Article 26. 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.

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 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 28

Entry into force

This regulation shall enter into force on the 20th 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.

C — Rules on the assessment of certain financial transfers and transactions as State aid

I — Government capital injections

Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings

(Bulletin EC 9-1984)

(Public authorities' holdings in company capital)

The Commission's position

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 agencies (1) 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 2320/81/ECSC of 7 April 1981 establishing Community rules for aid to the steel industry (2): 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 shipbuilding (3): 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 penalise 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.

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(1) 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).
(2) OJ L 228, 13.8.1981.
(3) OJ L 137, 23.5.1981.

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;

(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 non-viable operations ([4]) 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 know-how) 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.

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

([4]) Excluding the straightforward takeover of the assets of a company which has become insolvent or gone into liquidation.

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 authorised aid measures which also include the acquisition of holdings in certain circumstances. The various procedural clauses in the authorisation 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.

II — Financial transfers to public enterprises

COMMISSION DIRECTIVE 80/723/EEC (*) OF 25 JUNE 1980

on the transparency of financial relations between Member States and public undertakings

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90(3) thereof,

Whereas public undertakings play a substantial role in the national economy of the Member States;

Whereas the Treaty in no way prejudices the rules governing the system of property ownership in Member States and equal treatment of private and public undertakings must therefore be ensured;

Whereas the Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aid incompatible with the common market;

Whereas, however, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty;

Whereas 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;

Whereas 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;

Whereas Article 90(1) confers certain obligations on the Member States in respect of public undertakings; whereas Article 90(3) requires the Commission to ensure that these obligations are respected, and provides it with the requisite means to this end; whereas this entails defining the conditions for achieving transparency;

Whereas it should be made clear what is to be understood by the terms 'public authorities' and 'public undertakings';

Whereas 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;

(*) OJ L 195, 29.7.1980.

Whereas the provision of public funds to public undertakings may take place either directly or indirectly; whereas transparency must be achieved irrespective of the manner in which such provision of public funds is made; whereas 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;

Whereas Member States may through their public undertakings seek ends other than commercial ones; whereas in some cases public undertakings are compensated by the State for financial burdens assumed by them as a result; whereas transparency should also be ensured in the case of such compensation;

Whereas certain undertakings should be excluded from the application of this directive by virtue either of the nature of their activities or of the size of their turnover; whereas this applies to certain activities which stand outside the sphere of competition or which are already covered by specific Community measures which ensure adequate transparency, to public undertakings belonging to sectors of activity for which distinct provision should be made, and to those whose business is not conducted on such a scale as to justify the administrative burden of ensuring transparency;

Whereas this directive is without prejudice to other provisions of the Treaty, notably Articles 90(2), 93 and 223;

Whereas, the undertakings in question being in competition with other undertakings, information acquired should be covered by the obligation of professional secrecy;

Whereas this directive must be applied in close cooperation with the Member States, and where necessary be revised in the light of experience,

HAS ADOPTED THIS DIRECTIVE:

Article 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.

Article 2

For the purpose of this directive:

'public authorities' means: the State and regional or local authorities,

'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:

(a) hold the major part of the undertaking's subscribed capital;

or

(b) control the majority of the votes attaching to shares issued by the undertakings;

or

(c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

Article 3

The transparency referred to in Article 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

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) public undertakings, as regards activities carried on in any of the following areas:

water and energy, including in the case of nuclear energy the production and enrichment of uranium, the reprocessing of irradiated fuels and the preparation of materials containing plutonium,

posts and telecommunications,

transport;

(c) public credit institutions;

(d) public undertakings whose turnover excluding taxes has not reached a total of ECU 40 million during the two financial years preceding that in which the funds referred to in Article 1 are made available or used.

Article 5

1. Member States shall ensure that information concerning the financial relations referred to in Article 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, where the Commission considers it necessary so to request, supply to it the information referred to in paragraph 1, together with any necessary background information, notably the objectives pursued.

Article 6

1. The Commission shall not disclose such information supplied to it pursuant to Article 5(2) as is of a kind covered by the obligation of professional secrecy.

2. Paragraph 1 shall not prevent publication of general information of surveys which do not contain information relating to particular public undertakings to which this directive applies.

Article 7

The Commission shall regularly inform the Member States of the results of the operation of this directive.

Article 8

Member States shall take the measures necessary to comply with the directive by 31 December 1981. They shall inform the Commission thereof.

Article 9

This directive is addressed to the Member States.

COMMISSION DIRECTIVE 85/413/EEC (*) OF 24 JULY 1985

amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90(3) thereof,

Whereas Article 4(b) and (c) of Commission Directive 80/723/EEC (1) excludes from its scope public undertakings carrying on activities in the sectors of water and energy, posts and telecommunications, transport and public credit institutions;

Whereas public undertakings operating in these sectors play an important role in the economies of the Member States; whereas the need for transparency of financial relations between the Member States and public undertakings in certain sectors previously excluded has proved greater than before in view of developments in the competitive situation in the sectors concerned and the progress made towards closer economic integration;

Whereas equal treatment of public and private undertakings must also be ensured in these sectors; whereas in particular transparency of financial relations between the Member States and public undertakings in these sectors must be established for the same reasons and to the same extent as for the undertakings covered by Directive 80/723/EEC;

Whereas the Commission is required by the Treaty to ensure that Member States do not grant undertakings, whether public or private, in the said sectors, aid incompatible with the common market;

Whereas the Commission advised the Member States when notifying Directive 80/723/EEC to them that the exclusion of these sectors was only temporary;

Whereas by virtue of Article 232(1) of the EEC Treaty the provisions of that Treaty shall not affect those of the ECSC Treaty; whereas the ECSC Treaty contains special provisions governing the obligations of Member States as far as public undertakings and aid are concerned; whereas Article 90 of the EEC Treaty is therefore inapplicable to public undertakings carrying on activities coming under the ECSC Treaty;

Whereas by virtue of Article 232(2) of the EEC Treaty the provisions of that Treaty shall not derogate from those of the Euratom Treaty, but whereas the latter does not contain any special provisions on public undertakings or aid; whereas Article 90 of the EEC Treaty therefore applies to the nuclear energy field;

Whereas the transparency of the Member States' financial relations with public undertakings in the rail, road and inland waterway transport sectors is already regulated to a considerable extent by legislation enacted by the Council, whereas this directive is without prejudice to that legislation;

Whereas Directive 80/723/EEC contains provisions, particularly in Articles 3 and 5, which may facilitate the Commission's task in meeting the obligations it has assumed under the said Council

(*) OJ L 229, 28.8.1985.
(1) OJ L 195, 29.7.1980.

legislation, in particular as regards the preparation of periodical reports on the performance of those public undertakings;

Whereas the scope of Directive 80/723/EEC should therefore be extended to cover all the transport sector;

Whereas Member States' financial relations with credit institutions belonging to the public sector are also covered by this directive; whereas, however, the directive should not apply to Member States' relations with central banks which are responsible for the conduct of monetary policy;

Whereas public authorities often deposit short-term funds with public credit institutions on normal commercial terms; whereas such deposits do not confer special advantages on the credit institutions and should therefore not be covered by the directive;

Whereas the economic importance of credit institutions does not depend on their turnover but on their balance-sheet total; whereas the threshold laid down in Article 4(d) of Directive 80/723/EEC should therefore be set as far as credit institutions are concerned by reference to that criterion,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Article 4 of Directive 80/723/EEC is hereby replaced by the following:

'Article 4

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 and the Institut monétaire luxembourgeois;

(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 turnover before tax over the period of the two financial years preceding that in which the funds referred to in Article 1 are made available or used has been less than ECU 40 million. However, for public credit institutions the corresponding threshold shall be a balance-sheet total of ECU 800 million'.

Article 2

Member States shall take the necessary measures to comply with this directive by 1 January 1986. They shall inform the Commission thereof.

Article 3

This directive is addressed to the Member States.

COMMISSION DIRECTIVE 93/84/EEC (*) OF 30 SEPTEMBER 1993

amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90(3) thereof,

Whereas Commission Directive 80/723/EEC (1), as amended by Directive 85/413/EEC (2), introduced a system whereby Member States were placed under an obligation to ensure that financial relations between public authorities and public undertakings are transparent; whereas that directive required certain financial information to be retained by Member States and supplied to the Commission when requested;

Whereas Directive 80/723/EEC contains provisions, particularly in Articles 3 and 5, which may facilitate the Commission's task in meeting the obligations it has assumed;

Whereas public undertakings play an important role in the economies of Member States; whereas the need for transparency of financial relations between the Member States and their public undertakings has proved greater than before, on account of developments in the competitive situation in the common market, especially as the Community is moving towards close economic integration and social cohesion;

Whereas the Member States have adopted a Single European Act which in turn has led to the creation of the single market with effect from 1 January 1993; whereas this will lead to greater competitive pressures and to a need for the Commission to be vigilant in ensuring that the full benefits of the single market are achieved; whereas the single market makes it increasingly necessary to ensure that an equality of opportunity exists between both public and private undertakings;

Whereas it has been established that a significant part of the financial flows between a State and its public undertakings pass through a variety of forms of financial transfers and do not simply take the form of capital or quasi-capital injections;

Whereas it is predominantly in the manufacturing sector that the Commission has established that a considerable amount of aid has been granted to undertakings but not notified pursuant to Article 93(3) of the Treaty; whereas the first (3), second (4) and third (5) State aid surveys confirm that large amounts of State aid continue to be granted illegally;

Whereas a reporting system based on *ex post facto* checks of the financial flows between public authorities and public undertakings will enable the Commission to fulfil its obligations; whereas that system of control must cover specific financial information; whereas such information is not always publicly available and, as it is found in the public arena, is insufficiently detailed to allow a proper evaluation of the financial flows between the State and public undertakings;

(*) OJ L 254, 12.10.1993, p. 16.
(1) OJ L 195, 29.7.1980, p. 35.
(2) OJ L 229, 28.8.1985, p. 20.
(3) ISBN 92-825-9535.
(4) ISBN 92-826-0386.
(5) ISBN 92-826-4637.

Whereas all of the information requested can be regarded as being proportional to the objective pursued, taking account of the fact that such information is already subject to the disclosure obligations under the fourth Council Directive 78/660/EEC (6), concerning the annual accounts of companies, as last amended by Directive 90/605/EEC (7);

Whereas, 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; whereas the presentation of consolidated reports is to be permitted; whereas incompatible aid to major undertakings operating in the manufacturing sector will have the greatest distortive effect on competition in the common market; whereas, therefore, such a reporting system may at present be limited to undertakings with a yearly turnover of more than ECU 250 million;

Whereas, although the Commission, when notifying the Directive in 1980, took the view that movements of funds within a public undertaking or group of public undertakings were not subject to the requirements of Directive 80/723/EEC, the inclusion of such information is called for, by the new requirements of economic life, which is often influenced by State intervention via public undertakings; whereas as has been underlined in the case-law of the Court of Justice since 1980 (8), infringements of the provisions of Article 93(3) by Member States have increased appreciably, thereby making the Commission's monitoring tasks in the field of competition more and more difficult; whereas the Commission's powers of vigilance must therefore be increased,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 80/723/EEC is amended as follows:

1. In Article 2, the following indent is added:

'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 to be included in Section D — Manufacturing (being subsection DA up to and including subsection DN) of the NACE (Rev. 1) classification (*).

(*) OJ L 83, 3.4.1993.'

2. Article 5a is inserted as follows:

'Article 5a

1. Member States whose public undertakings operate in the manufacturing sector shall supply the financial information as set out in paragraph 2 to the Commission on an annual basis within the timetable contained in paragraph 4.

(6) OJ L 222, 14.8.1978, p. 11.
(7) OJ L 317, 16.11.1990, p. 60.
(8) See, for example, the judgments in Case 290/83 *Commission* v *France* [1985] ECR 439 (agriculture credit fund), Joined Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, Case 303/88 *Italy* v *Commission* [1991] ECR I-1433 (ENI-Lanerossi) and Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603 (IRI, Finmeccanica and Alfa Romeo).

2. The financial information required for each public undertaking operating in the manufacturing sector and in accordance with paragraph 3 shall be as follows:

(i) the annual report and annual accounts, in accordance with the definition of Council Directive 78/660/EEC (*). 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 following details, in so far as they are not disclosed in the annual report and annual accounts of each public undertaking, shall also be provided:

(ii) 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);

(iii) non-refundable grants, or grants which are only refundable in certain circumstances;

(iv) 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;

(v) guarantees given to the enterprise by public authorities in respect of loan finance (specifying terms and any charges paid by enterprises for these guarantees);

(vi) dividends paid out and profits retained;

(vii) any other forms of State intervention, in particular, the forgiving 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.

3. The information required by paragraph 2 shall be provided for all public undertakings whose turnover for the most recent financial year was more than ECU 250 million.

The information required above shall be supplied separately for each public undertaking including those located in the Member States, and shall include, where appropriate, details of all intra- and inter-group transactions between different public undertakings, as well as transactions conducted direct between public undertakings and the State. The share capital referred to in paragraph 2 (ii) shall include share capital contributed by the State direct 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. Similarly, the reports required in paragraph 2 shall be provided for each individual public undertaking separately, as well as for the (sub)holding company which consolidates several public undertakings in so far as the consolidated sales of the (sub)holding company lead to its being classified as 'manufacturing'.

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.

4. The information required under paragraph 2 shall be supplied to the Commission on an annual basis. The information in respect of the financial year 1992 shall be forwarded to the Commission within two months of publication of this directive.

For 1993 and subsequent years, 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.

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, within two months of publication of this directive. The list is to be updated by 31 March of each year.

5. This Article is applicable to companies owned or controlled by the Treuhandanstalt only from the expiry date of the special reporting system set up for Treuhandanstalt investments.

6. 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.

(*) OJ L 222, 14.8.1978, p. 11.'

Article 2

Member States shall adopt the provisions necessary to comply with this directive by 1 November 1993. They shall inform the Commission thereof immediately.

When Member States adopt these provisions, they shall contain a reference to this directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 3

This directive is addressed to the Member States.

Commission communication to the Member States (*)

Following the annulment of the Commission's communication, concerning 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, 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.

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 aid 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.

(*) OJ C 307, 13.11.1993, p. 3.
(1) OJ L 254, 12.10.1993.

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, in 1980, the Commission adopted a directive on the transparency of financial relations between Member States and public undertakings ([2]). 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 transparence in question applied to all public funds, the following were particularly mentioned as falling within its scope:

(i) the setting-off of operating losses,

(ii) the provision of capital,

([2]) Directive 80/723/EEC (OJ L 195, 29.7.1980, p. 35) as amended by Directive 85/413/EEC (OJ L 229, 28.8.1985, p. 20) which included previously excluded sectors.

(iii) non-refundable grants or loans on privileged terms,

(iv) the granting of financial advantages by forgoing profits or the recovery of sums due,

(v) the forgoing of a normal return on public funds used,

(vi) 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 (3).

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'.

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

(3) Joined Cases 188 to 190/80 *France, Italy and the United Kingdom* v *Commission* [1982] ECR 2545.

Treaty, the Court stated that (paragraph 24), 'it should be emphasised 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 not 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:

(i) making financial relations transparent and the provision, on request, of information under the directive is necessary and respects the principle of proportionality;

(ii) the directive respects the principle of neutrality of treatment of public and private undertakings;

(iii) 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;

(iv) 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 (4). 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.

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 authorised 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

(4) See also paragraphs 32 and 33 below.

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 aid to the steel industry ([5]), and secondly it approved, by a qualified majority, the shipbuilding code ([6]). 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 ([7]), and in 1990 in the case of shipbuilding ([8]). 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 ([9]).

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 ([10]).

([5]) Decision 81/2320/ECSC of 7 August 1981 (OJ L 228, 13.8.1981, p. 14). See, in particular, the second recital and Article 1.
([6]) Council Directive 81/363/EEC of 28 April 1981 (OJ L 137, 23.5.1981, p. 39). See, in particular, the last recital and Article 1(e).
([7]) Commission Decision 322/89/ECSC of 1 February 1989 (OJ L 38, 10.2.1989, p. 8).
([8]) Council Directive 90/684/EEC of 21 December 1990, (OJ L 380, 31.12.1990, p. 27).
([9]) OJ L 86, 31.3.1989, p. 76.
([10]) See, for example, OJ C 28, 9.2.1981, p. 23 and OJ C 7, 12.1.1987, p. 320.

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 ([11]). 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' (paragraph 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...' ([12]). This policy has been applied consistently over a number of years. More recently in the *CDF* v *Orkem* decision ([13]), 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 ([14]), 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' ([15]). There have also been a number of cases where the Commission 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 ([16]).

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* ([17]), 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 ([18]).

([11]) Communication to the Member States concerning public authorities holdings in company capital. (Bull. EC 9-1984).

([12]) OJ L 277, 29.9.1982, p. 15.

([13]) OJ C 198, 7.8.1990, p. 2.

([14]) OJ L 16, 20.1.1989, p. 52.

([15]) Decisions *Meura* (OJ L 276, 19.10.1984, p. 34), *Leeuwarden* (OJ L 277, 29.9.1982, p. 15), *Intermills I* (OJ L 280, 2.10.1982, p. 30), *Boch* v *Noviboch* (OJ L 59, 27.2.1985, p. 21), *Boussac* (OJ L 352, 15.12.1987, p. 42), *Alfa-Fiat* (OJ L 394, 31.5.1989, p. 9), *Pinault-Isoroy* (OJ L 119, 7.5.1988, p. 38), *Fabelta* (OJ L 62, 3.3.1984, p. 18) *Ideal Spun* (OJ L 283, 27.10.1984, p. 42), *Renault* (OJ L 220, 11.8.1988, p. 30), *Veneziana Vetro* (OJ L 166, 16.6.1989, p. 60), *Quimigal* (OJ C 188, 28.7.1990, p. 3) and *IOR* v *Finalp* (OJ L 183, 3.7.1992, p. 30) where the same reasoning can be found.

([16]) Decisions *CDF* v *Orkem*, in parts, (op. cit.), *Quimigal*, in parts, (op. cit.), *Intermills II* (Bull. EC 4-1990, point 1.1.34) and *Ernaelsteen* (Eighteenth Competition Report, points 212 and 213).

([17]) OJ L 185, 28.7.1993, p. 43.

([18]) OJ L 227, 19.8.1983, p. 1. See also, in particular, cases relating to *Arbed, Sidmar, ALZ, Hoogovens, Irish Steel, Sacilor* v *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* v *ILVA* case — see paragraph 26 below.

19. It is noteworthy that in many of the above described cases the capital injected into the public undertakings 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 ([19]) *(Boch)*, the Court stated (paragraph 13):

'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 ([20]), 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) ([21]). 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)* ([22]). 'It is necessary to make clear that the behaviour of a private investor with which the intervention of the public investor... must be compared, while 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 parent 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

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([19]) *Belgium* v *Commission* [1986] ECR 2321.

([20]) Case C-301/87 [1990] ECR I-307.

([21]) See also *Intermills* Case 323/82, *Leeuwarden* Joined Cases 296/318/82, *Meura* Case 234/84 where the same reasoning can be found.

([22]) Cases C-305/89 and C-303/88 respectively [1991] ECR I-1603 and I-1433.

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 ([23]), 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 ([24]), 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:

(i) to public undertakings in all situations, not just those making losses as is the case at present,

(ii) 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 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:

(i) 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;

(ii) it has proved itself practical to the Commission in numerous cases;

(iii) it has been confirmed by the Court (see particularly paragraphs 20 and 21 above), and

(iv) 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 is 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 ([25]).

([23]) Case 78/76.
([24]) Case 290/83.
([25]) 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.

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 ([26]) which imposed conditions on the enterprise in question to ensure that its viability would be reestablished, 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 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 call for public undertakings and public authorities, just as they do for private undertakings and the private providers of finance, to analyse the risk and the likely outcome of the project.

In turn, the Commission realises 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

([26]) OJ 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 Fourteenth 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.

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 subnormal rate of return or even be a complete failure. This is also the case for private investors whose investment can result in subnormal 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-subsidisation 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-subsidisation in public holding companies the Commission will take account of similar strategic goals. Such cross-subsidisation 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 characterised 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 ([27]). 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 ([28]). 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 ([29]). 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 scrutinised 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 recognises 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

([27]) This may be particularly important for public undertakings that have been deliberately under-capitalised by the public authority owner for reasons extraneous to commercial justifications (e.g. public expenditure restrictions).

([28]) 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.

([29]) 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.

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 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 ([30]). 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.

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.

([30]) This list is not exhaustive.

A market economy investor would normally provide equity finance if the present value([31]) 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 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([32]). It regards all guarantees given by the State directly or by way

([31]) Future cash flows discounted at the company's cost of capital (in-house discount rate).
([32]) Communication to all Member States dated 5 April 1989, as amended by letter of 12 October 1989.

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 paragraph 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 ([33]). 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.

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 paragraph 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

([33]) See paragraph 24 above.

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 ([34]). 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 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 paragraph 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 subsidised 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.

([34]) The foregoing of a normal return on public funds falls within the scope of the transparency directive.

Duration

45. 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.

III — State guarantees

Commission letter to Member States SG(89) D/4328 of 5 April 1989

Dear Sir

The Commission has the honour to inform you of its decision to examine in future State guarantees under the following conditions.

It regards all guarantees given by the State directly or given by the State's delegation through financial institutions as falling within the scope of Article 92(1) of the EEC Treaty.

Each case of the granting of State guarantees has to be notified under Article 93(3) of the EEC Treaty whether the granting is done in application of an existing general guarantee scheme or in application of a specific measure.

The Commission will accept the guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting undertaking or any similar procedure. These conditions will have to be agreed at the initial, and only, examination by the Commission of the proposed guarantee/State aid within the normal procedures of Articles 93(3), at the granting stage.

Should the occasion arise that a Member State wants to mobilise the guarantee under different conditions than those initially agreed at the granting stage, the Commission will then consider the mobilisation of the guarantee as creating a new aid which has to be notified under Article 93(3) of the EEC Treaty.

From the point of view of controlling the effect of guarantees on competition and intra-Community trade, the Commission believes that the above decision will enable it to be in a position where it can prevent large amounts of State aid with possibly high intensity being granted to certain undertakings at the mobilisation level of guarantees.

Yours faithfully

Commission letter to Member States SG(89) D/12772 of 12 October 1989

Dear Sir

By letter dated 5 April 1989, I sent you a Commission communication concerning State guarantees.

Several Member States have since told the Commission that the communication appears to oblige Member States to notify all cases where a guarantee is given. I should therefore like to make it clear that the Commission intends only to examine schemes establishing guarantees and not every case in which a guarantee is granted under the scheme, except where a guarantee is granted outside a scheme.

As specified in the communication, the Commission will approve the award of guarantees only if it is contractually subject to specific conditions. If the latter are correctly provided for in the schemes, the Commission will accept such awards without prior notification.

Yours faithfully

IV — *De minimis*

Commission notice on the *de minimis* rule for State aid (*)

Article 92(1) of the EC Treaty imposes a general ban, subject to certain exceptions, on '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'. Clearly, any financial assistance given by the State to one firm distorts or threatens to distort, to a greater or lesser extent, competition between that firm and its competitors which have received no such aid; but not all aid has an appreciable effect on trade and competition between Member States. This is particularly true where the amount of aid involved is small. And it is small amounts of aid which are usually — but not always — granted to SMEs, mainly under schemes administered by local or regional authorities.

In 1992, in an effort to reduce the administrative burden on the Member States and on the Commission itself — which ought to be left to concentrate its resources on cases of real importance to the Community — and in order to simplify matters for SMEs, the Commission introduced what is known as a *de minimis* rule: this sets a threshold figure below which Article 92(1) can be said not to apply, so that a measure need no longer be notified in advance to the Commission under Article 93(3) (1). It has since become clear that the rule as then stated does not cover some aid measures which quite clearly do not threaten to distort competition and trade between Member States to any perceptible degree; and it has proved difficult to establish that the conditions laid down are being met, particularly where aid of this kind is combined with aid under other schemes approved by the Commission. The Commission has accordingly decided to amend the *de minimis* rule as follows:

— the ceiling for aid covered by the *de minimis* rule will now be ECU 100 000 over a three-year period beginning when the first *de minimis* aid is granted (2),

— the ceiling will apply to the total of all public assistance considered to be *de minimis* aid and will not affect the possibility of the recipient obtaining other aid under schemes approved by the Commission,

— the ceiling will apply to aid of all kinds, irrespective of the form it takes or the objective pursued, with the exception of export aid, which is excluded from the benefit of the *de minimis* rule (3).

The public assistance which is allowed up to the ECU 100 000 ceiling comprises all aid granted by the national, regional or local authorities, regardless of whether the resources are provided from

(*) OJ. C 68, 6.3.1996, p. 9.

(1) Community guidelines on State aid for small and medium-sized enterprises (SMEs), point 3.2: OJ C 213, 19.8.1992, p. 2.

(2) The method for calculating the grant equivalent of aid paid otherwise than as a grant was explained in the letter the Commission sent to Member States on 23 March 1993 (ref. D/06878); that method continues to apply.

(3) 'Export aid' means any aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to current expenditure linked to the export activity. It does not include 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.

domestic sources or whether the measures are part-financed by the Community from the Structural Funds, and more especially the European Regional Development Fund (ERDF).

The rule will be of interest primarily to SMEs, though it applies irrespective of the size of the recipient. It does not apply to the industries covered by the ECSC Treaty, to shipbuilding, to transport or to aid towards expenditure in connection with agriculture or fisheries.

The limit in the *de minimis* facility is expressed as a cash grant of ECU 100 000. In cases where assistance is provided otherwise than as a grant, it has to be converted into its cash grant equivalent value for the purposes of applying the *de minimis* limit. Of the other forms in which aid with a low cash value is given, the commonest are soft loans, tax allowances and loan guarantees. The conversion of aid in these forms into its cash grant equivalent is to be carried out as follows:

The cash grant equivalent should be calculated gross, i.e. before tax, if the aid is taxable. If the aid is not taxable, as in the case of some tax allowances, the amount to be taken is the nominal amount of the aid, which is both gross and net.

All aid receivable in the future should be discounted to its present value. The discount rate used should be the reference interest rate which applies at the time the aid is granted. However, a cash grant is to be counted as a single lump sum even if it is to be paid in instalments.

The cash grant equivalent of a soft loan in a given year is the difference between the interest due at the reference interest rate and that actually paid. All the interest that will be saved until the loan has been fully repaid should be discounted to its value at the time the loan is granted and added together.

The cash grant equivalent of a tax allowance is the saving in tax payments in the year concerned. Again, tax savings which are to be obtained in the future should be discounted to their present value using the reference interest rate.

For loan guarantees, the cash grant equivalent in a given year can be either:

— calculated in the same way as the cash grant equivalent of a soft loan, once the premiums paid have been deducted, the interest subsidy representing the difference between the reference interest rate and the rate obtained thanks to the state guarantee, or

— taken to be the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and (b) any premium paid, i.e.

(guaranteed sum x risk) — premium

The risk factor should reflect the experience of default on loans extended in similar circumstances (sector, size of firm, level of general economic activity). Discounting to present value should be carried out in the same way as before.

The Commission has a duty to satisfy itself that Member States are not giving their enterprises aid which is incompatible with the common market (4). The Member States are under an obligation to facilitate the achievement of this task by establishing machinery to ensure that, where aid is given to the same recipient under separate measures all of which are covered by the *de minimis* rule, the total

(4) The Commission also reserves the right to take appropriate action against any aid which complies with the *de minimis* rule but infringes other provisions of the Treaty.

amount of the aid does not exceed ECU 100 000 over a period of three years. In particular, any decision granting *de minimis* aid or the rules of any scheme providing for aid of this kind must include an explicit stipulation that any additional aid granted to the same recipient under the *de minimis* rule must not raise the total *de minimis* aid received by the enterprise to a level above the ceiling of ECU 100 000 over a period of three years. The machinery established must also enable the Member State to answer any questions the Commission might wish to ask.

V — Public land sales

Commission communication on State aid elements in sales of land and buildings by public authorities (*)

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-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value

(*) OJ C 209, 10.7.1997, p. 3.

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-publicised' 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 is a person of good repute who:

— has obtained an appropriate degree at a recognised 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 recognised 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 recognised 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 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.

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(1) Article 49(2) of Council Directive 91/674/EEC (OJ L 374, 31.12.1991, p. 7).

3. Notifcation

Member States should consequently notify to the Commission, without prejudice to the *de minimis* rule [2], the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.

(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.

[2] OJ C 68, 6.3.1996, p. 9.

VI — Export-credit insurance

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. INTRODUCTION

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).

1.2. Export subsidies directly affect competition in the market place between rival potential suppliers of goods and services. Recognising 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 harmonisation of export aid. Secondly, it 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 controlling aid has been achieved under the Treaty's trade provisions and in the OECD and WTO.

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.

1.4. 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

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(*) OJ C 281, 17.9.1997, p. 4.

(1) *Source*: Fifth survey on State aids in the European Community, European Commission, 1997, p. 20. From 1992 onwards the cutbacks in subsidised 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.

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 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 harmonise 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 (6) 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 categorised 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 (7) 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

(6) 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.

(7) Or with equivalent reinsurance arrangements.

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 recognised 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 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]) 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, 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.

([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.

([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.

'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 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 insurers 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 than 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 equalisation reserve) and must have obtained authorisation in accordance with Article 6 *et seq.* of Directive 73/239/EEC,

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([10]) *Inter alia*, the Commission will call on the help of the Council (for example, its Export Credits Group).

([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).

— 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.

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, 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 harmonisation of equalisation reserves for insurance companies, which exempted export-credit insurance operatings 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 penalise 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.

([15]) See communication of the Commission to the Member States concerning public authorities' holdings in company capital (EC Bulletin 9-1984) and communiction 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).

([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 Tesauro, 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.

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

(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 underpricing 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 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.

([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).

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	*Countries which are members of the OECD and which are considered to be marketable risk countries*
Austria	Australia
Belgium	Canada
Denmark	Iceland
Finland	Japan
France	New Zealand
Germany	Norway
Greece	Switzerland
Ireland	United States of America
Italy	
Luxembourg	
Netherlands	
Portugal	
Spain	
Sweden	
United Kingdom	

D — Rules on the assessment for approval of State aid with horizontal objectives

I — Research and development (R&D) aid

Community framework for State aid for research and development (*)

1. THE ROLE OF RESEARCH AND DEVELOPMENT IN IMPROVING GROWTH, COMPETITIVENESS AND EMPLOYMENT

1.1. Article 130(1) of the EC Treaty states that the Community and the Member States are to take action aimed at 'fostering better exploitation of the industrial potential of policies of innovation, research and technological development'.

In addition, Article 130(3) stipulates that the Community is to contribute to the achievement of that objective 'through the policies and activities it pursues under other provisions of this Treaty'. Accordingly, this framework for aid to research aims to implement the competition rules while contributing to that objective.

1.2. Research and development can contribute to renewing growth, strengthening competitiveness and boosting employment. The Single European Act introduced *inter alia* Article 130f of the EC Treaty outlining the Community objective of strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive internationally. The Maastricht Treaty confirmed that objective, along with the need for the Community to encourage cooperation on research and technological development between firms, research centres and universities.

1.3. One way to advance these goals is through the multiannual Research and Technological Development (RTD) framework programmes. The fourth framework programme (1994 to 1998), which has been adopted by the European Parliament and the Council (1), comprises four main areas of activity:

(a) implementation of research, technological development and demonstration programmes, by promoting cooperation with and between companies, research centres and universities;

(b) promotion of cooperation in the field of Community research, technological development and demonstration with third countries and international organisations;

(c) dissemination and optimisation of the results of activities in Community research, technological development and demonstration;

(d) stimulation of the training and mobility of research workers throughout the Community.

1.4. The White Paper on growth, competitiveness and employment (2) identified the challenges and ways forward into the 21st century. It proposes a broad range of measures and actions to be taken jointly by the Member States and the Community in order to tackle unemployment in the European Union.

(*) OJ C 45, 17.2.1996, p. 5.
(1) OJ L 126, 18.5.1994, p. 1.
(2) Bull. EC, Supplement 6/93.

It underscores the importance of general measures to promote RTD investment by firms, including favourable tax treatment and measures to enhance the effectiveness of research. In particular, it advocates 'transferring a higher proportion of research spending to the private sector and [...] shifting government intervention from direct support to indirect instruments'.

1.5. However, the White Paper indicates that most of the spending on R&D in the Community is carried out by Member States. The Community's research budget currently accounts for only about 4 % of total public civil research spending by the Member States. What is more, only 13 % of research spending within the Union is devoted to the coordination of research between firms from several Member States.

1.6. As the White Paper also points out, the Community invests proportionately less than some of its competitors in research and technological development. According to data collected since the implementation of the 1986 framework, and particularly the data covering the period 1990 to 1992, notified aid intended primarily for industrial R&D accounted for less than 5 % of total State aid.

1.7. It is also stressed that, reflecting the principle laid down in Article 3(g) of the EC Treaty, measures taken by the Member States have to be compatible with the common market and the rules governing State aid, which are based on Articles 92 and 93 of the EC Treaty.

1.8. One aim of competition policy is to improve the international competitiveness of Community industry and thereby contribute to the achievement of the objectives set out in Article 130(1) of the EC Treaty. The competition rules must therefore be applied constructively to encourage cooperation which helps new technology to be developed and disseminated in the Member States, while observing the rules on intellectual property rights. In the control of State aid, regard must be paid to the need for resources to be made available to those sectors which will contribute to improving the competitiveness of Community industry.

1.9. Traditionally, the Commission has taken a favourable view of State aid for R&D. This favourable attitude is justified on several counts: the aims of such aid, the often considerable financial requirements and risks of R&D operations and, given the distance from the market place of such projects, the reduced likelihood that such aid will distort competition and trade.

1.10. The Commission has expressed this favourable attitude in more than 500 decisions taken on the basis of the Community framework for State aid for R&D ('the framework') [3]. It has been able to do so because Member States have always respected the restrictions set by the framework.

1.11. This revised version of the framework seeks to take account of recent developments and the experience gained over the years.

One such development is the Agreement on Subsidies and Countervailing Measures (SCM), which comes under the GATT 1994 Agreement. The SCM Agreement takes account of the special characteristics of research aid. Article 8 of the Agreement stipulates *inter alia* the conditions subject to which assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms are to be non-actionable. The framework also takes appropriate account of the other objectives and policies of the Union.

2. APPLICABILITY OF THE STATE AID RULES TO AID FOR R&D (ARTICLE 92(1) OF THE EC TREATY)

2.1. Article 92(1) of the EC 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

[3] OJ C 83, 11.4.1986.

certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

2.2. The closer the R&D is to the market, the more significant may be the distortive effect of the State aid. In order to determine the proximity to the market of the aided R&D, the Commission makes a distinction between fundamental research, industrial research and precompetitive development activity. Definitions of these various stages of R&D, which correspond to those laid down in the Agreement on Subsidies and Countervailing Measures, are set out in Annex I to the framework.

2.3. Innovation does not qualify as a separate category of R&D. Aid for activities that could be regarded as innovative but do not correspond to the categories mentioned in point 2.2 can benefit from State aid only if it conforms with the Commission policy on investment aid.

2.4. Public financing of R&D activities by public non-profit-making higher education or research establishments is normally not covered by Article 92(1) of the EC Treaty.

Where the results of publicly financed R&D projects carried out by such establishments are made available to Community industry on a non-discriminatory basis, the Commission will assume that State aid within the meaning of Article 92(1) of the EC Treaty is not normally involved.

Where R&D is carried out by public non-profit-making, higher education or research establishments on behalf of or in collaboration with industry, the Commission will assume that State aid within the meaning of Article 92(1) of the EC Treaty is not involved either:

(a) where the public non-profit-making higher education or research establishments contribute to research projects as a commercial firm would, e.g. in return for payment at the market rate for the services they provide;

(b) or

— where the industrial participants in the research bear the full cost of the project, or

— where the results which do not give rise to intellectual property rights may be widely disseminated and any intellectual property rights to the R&D results are fully allocated to the public non-profit-making establishments, or

— where the public non-profit-making establishments receive from the industrial participants compensation equivalent to the market price for the intellectual property rights which result from the research project and which are held by those industrial participants, and where the results which do not give rise to intellectual property rights may be widely disseminated to interested third parties.

2.5. Public authorities may commission R&D from firms or buy the results of R&D directly from them. If there is no open tender procedure, the Commission will assume that there might be State aid within the meaning of Article 92(1). If these contracts are awarded according to market conditions, in particular after an open tender procedure in accordance with Council Directive 92/50/EEC [4], it will normally be assumed that no State aid within the meaning of Article 92(1) of the EC Treaty is involved.

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[4] OJ L 209, 24.7.1992.

3. COMPATIBILITY OF AID FOR R&D (ARTICLE 92(3)(B) AND (C) OF THE EC TREATY)

3.1. Where it satisfies the tests of Article 92(1) of the EC Treaty and therefore has to be examined by the Commission, aid granted to firms for R&D may be regarded as compatible with the common market by virtue of one of the derogations provided for in Article 92(3).

3.2. In all cases where, after examination, the Commission concludes that the purpose of the aid in question is to promote the execution of an important project of common European interest, that aid may qualify for the derogation contained in Article 92(3)(b).

3.3. The common European interest must be demonstrated in practical terms: for example, it must be proved that the project represents a major advance over specific Community R&D programmes or that it enables significant progress to be made towards achieving specific Community objectives.

3.4. In the past, the Commission has applied the derogation contained in Article 92(3)(b) in a limited number of cases. It has transpired that, as regards R&D, this derogation may apply particularly to transnational projects of major qualitative and, in principle, quantitative significance (e.g. projects related to the formulation of industrial standards that could enable the Community's industries to secure the full benefit of the single market). Thus, the Commission decided to regard a number of Eureka projects in the field of electronics (EU 127 JESSI, EU 102 EPROM, EU 147 DAB, EU 43 ESF) or high definition television (EU 95 HDTV) as being of common European interest.

3.5. If State aid for R&D does not qualify for the derogation provided for in Article 92(3)(b), it may nevertheless be compatible with the Treaty by virtue of Article 92(3)(c), which provides a derogation for aid that facilitates the development of certain economic activities as long as it does not adversely affect trading conditions to an extent contrary to the common interest.

3.6. When examining whether or not Article 92(3)(c) of the EC Treaty is applicable, the Commission will pay special attention to the type of research carried out, the beneficiaries, the aid intensity, the accessibility to the results and other relevant factors as mentioned in Sections 5 and 6.

4. NOTIFICATION OF PROPOSED STATE AID FOR R&D (ARTICLE 93 OF THE EC TREATY)

4.1. State aid for R&D has to be notified to the Commission pursuant to Article 93(3) of the EC Treaty. In order to assist the Member State, as well as the Commission departments, notification should be made by means of the standard form sent out in the Commission's letter to the Member States dated 22 February 1994, on standardised notifications and reports, as amended by the Commission's letter to the Member States dated 2 August 1995. The supplementary questionnaire on R&D, contained in Part A of Annex 2 to the letter dated 2 August 1995 (Information normally to be supplied in a notification of State aid for R&D under Article 93(3) of the EC Treaty) is replaced by the new questionnaire annexed to this framework (Annex III).

4.2. The Commission aims to achieve the highest possible degree of transparency in the application of aid schemes. This means that there must be a clear statement of the objectives to be achieved, the beneficiaries, etc. The different categories of costs which the aid is designed to reduce must be specified and the aid must be granted in such a form that the intensity of the aid in relation to these costs, as listed in Annex II, can be calculated.

4.3. In these case of R&D projects, all types of aid may be authorised. Member States must nevertheless make it possible for the Commission to calculate the grant equivalent of the aid if the latter is not paid in the form of an outright grant and must consequently provide sufficient information to enable the Commission to do this.

4.4. Where a Member State is of the opinion that Article 92(3)(b) of the EC Treaty is applicable, it must examine whether the relevant conditions are met and demonstrate to the Commission, in its notification, that they are met.

4.5. The Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes on standardised notifications and reports ([5]) applies in full to State aid for R&D, as does the *de minimis* rule ([6]).

4.6. To date, the Commission, in response to its letter of 22 February 1994 (as amended on 2 August 1995), has received a significant number of notifications involving only the refinancing and/or extension of aid schemes consistent with the current Community framework for State aid for research and development and compatible with the common market. The Commission has never raised any objections to such notifications.

In the light of the experience it has acquired, the Commission considers therefore that a notification of the increase in the annual budget of an authorised scheme is no longer necessary if, expressed in ecus, it is not more than 100 % (in nominal terms) of the initial annual amount, provided that the scheme is of unlimited duration or that the increase takes place within the period of validity of a scheme of limited duration.

Extensions with or without a budgetary increase (up to the abovementioned limit of 100 %), without changes in the conditions for implementing the previously approved aid schemes and consistent with the new framework need be renotified only from the fifth year following the expiry of the validity of the original scheme. The Member States, however, are obliged to inform the Commission of such refinancing/extensions in advance and to continue to submit an annual report to it on the application of the schemes in question.

4.7. Individual grants of aid under an R&D scheme that has been authorised by the Commission do not, in principle, need to be notified. However, in order to allow the Commission to assess significant amounts of aid under approved schemes and the compatibility of such aid with the common market, the Commission requires prior notification of any individual research project costing more than ECU 25 million and for which it is proposed to provide aid with a gross grant equivalent of more than ECU 5 million.

This new notification rule must be regarded as an appropriate measure within the meaning of Article 93(1) of the EC Treaty. Its substance was examined by the representatives of the Member States at a multilateral meeting.

The Commission intends to amend the existing notification procedure or Eureka projects at a later stage and will propose appropriate measures to that effect (Article 93(1) of the EC Treaty).

4.8. Individual grants of aid outside the scope of authorised R&D schemes are to be notified pursuant to Article 93(3) of the EC Treaty unless they constitute *de minimis* awards.

([5]) OJ C 213, 19.8.1992, p. 10.

([6]) The *de minimis* rule currently applied is stated in point 3.2 of the Community guidelines on State aid for SMEs (OJ C 213, 19.8.1992, p. 2).

5. AID INTENSITY

5.1. The allowable intensity of aid will be determined by the Commission on a case-by-case basis. The Commission assessment in each case will take into consideration the nature of the project or programme, overall policy considerations relating to the competitiveness of European industry, the risk of distortion of competition and the effect on trade between Member States. A general evaluation of such risks leads the Commission to consider that fundamental research and industrial research may qualify for higher levels of aid than precompetitive development activities, which are more closely related to the market introduction of R&D results and, if aided, could therefore more easily lead to distortions of competition and trade.

5.2. The public financing of fundamental research that is normally independently carried out by non-profit-making higher education or research establishments does not constitute State aid within the meaning of Article 92(1) of the EC Treaty.

In exceptional cases where fundamental research is carried out by or for firms, the aid would fall within Article 92(1) of the EC Treaty but, since this type of research is far from the market and its results are in principle widely available for exploitation on a non-discriminatory basis and at market rates, it may be awarded at a gross aid intensity of up to 100 %.

To qualify as fundamental research, the work should not be linked to any industrial or commercial objectives of a particular enterprise, and a wide dissemination of the results of the research must be guaranteed.

5.3. As a general rule, the gross aid intensity for industrial research must not exceed 50 % of the eligible costs of the project (as defined in Annex II).

5.4. Technical feasibility studies preparatory to industrial research activities may qualify for aid amounting to 75 % of study costs, while such studies preparatory to precompetitive development activities may qualify for support amounting to 50 % of study costs; these ceilings have been set in the light of the negligible impact of such aid on competition and trade conditions.

5.5. Precompetitive development activities are close to the market and there is a greater risk that any such aid will distort competition and intra Community trade.

In line with Commission practice established over the past years, the permissible gross aid intensity is fixed at 25 % of the eligible costs for the project (as defined in Annex II).

5.6. As stated in point 4.3 of the framework, Member States are free to use all instruments of aid to support R&D. In the case of advances that are repayable only in the event of a successful outcome of research activities, the permissible aid intensity (in gross grant equivalent) is that stipulated by this framework for the various stages of research. In the event of failure of the research concerned, the Commission, in line with past practice, may allow a higher level of aid intensity since the project's failure reduces the risk of competition and trade being distorted.

When notifying reimbursable aid, Member States are required to inform the Commission of the amounts and exact procedures for repayment, with the proposed conditions being assessed by the Commission on a case-by-case basis.

5.7. With a view to encouraging dissemination of research results, the Commission considers that aid in support of patent applications and renewals by SMEs (within the meaning of the current Community definition) may be granted up to the same level as that for the research activities which first led to the patents concerned.

5.8. In the case of State aid for an R&D project being carried out in collaboration between public research establishments and enterprises, the combined aid deriving from direct government support for a specific research project and, where they constitute aid (see point 2.4), contributions from public research establishments to that project may not exceed the abovementioned aid ceilings.

5.9. In cases of R&D activity spanning industrial research and precompetitive development activities, the permissible aid intensity will not normally exceed the weighted average of the permissible aid intensities applicable to the two types of research.

5.10. Without prejudice to the case-by-case assessment, which, as indicated in point 5.1, will normally be made, the aid intensities specified in points 5.3 to 5.8 of the framework may be exceeded in the following situations:

5.10.1. Where the aid is to be given to SMEs ([7]): an extra 10 percentage points;

5.10.2. Where the research project is carried out in an Article 92(3)(a) region: an extra 10 percentage points;

Where the research project is carried out in an Article 92(3)(c) region: an extra 5 percentage points;

The abovementioned regional bonuses may be exceeded, taking into account the ceilings applicable to regional investment aid and the need to stimulate intangible investment in conformity with Commission policy, without however exceeding the limits set out in point 5.10.6.

5.10.3. Where the research project is in accordance with the objectives of a specific project or programme undertaken as part of the Community's current framework programme for R&D, it will qualify for an extra 15 percentage points.

That figure will rise to 25 percentage points where the project also involves effective cross-border cooperation between firms and public research bodies or between at least two independent partners in two Member States and where its results are widely disseminated and published, whilst observing intellectual and industrial property rights.

5.10.4. Where the research project is not in accordance with the objectives of a specific project or programme undertaken as part of the Community's current framework programme for R&D, the Commission will allow increases of up to 10 percentage points provided that at least one of the following conditions is satisfied:

(a) the project involves effective cross-border cooperation between at least two independent partners in two Member States, particularly in the context of coordinating national RTD policies;

(b) the project involves effective cooperation between firms and public research bodies, particularly in the context of coordination of national RTD policies;

(c) the project's results are widely disseminated and published, patent licences are granted or other appropriate steps are taken under conditions similar to those for the dissemination of Community RTD results (Article 130j of the EC Treaty).

5.10.5. The Member State concerned must provide the Commission with sufficient information to enable it to assess whether these criteria are met.

([7]) The definition currently applied is that in the Community guidelines on State aid for SMEs (OJ C 213, 19.8.1992, p. 10).

5.10.6. The combination of the increases described at points 5.10.1 to 5.10.4 with the percentages specified at points 5.3 and 5.8 may not exceed a maximum gross intensity of 75 % for industrial research and 50 % for precompetitive development activities. These limits must be respected in all cases.

5.11. Where State aid for R&D qualifies for the derogation laid down in Article 92(3)(b) of the EC Treaty, the gross aid intensity must not exceed the limits authorised by the WTO's Subsidies Code (75 % for industrial research, 50 % for precompetitive development activities).

5.12. The ceilings laid down above in respect of R&D aid apply to State aid.

However, when examining R&D aid, the Commission must take into account the effect on competition and trade of a combination of State aid with Community financing.

Where Community financing and State aid are combined, total official support may not exceed 75 % in the case of industrial research and 50 % in the case of precompetitive development activities.

5.13. Gross intensities of 75 % for industrial research and 50 % for precompetitive development activities (maximum intensities authorised by the WTO's Agreement on Subsidies and Countervailing Measures for non actionable subsidies may be authorised if similar projects or programmes of competitors located outside the European Union have received (in the last three years), or are going to receive, aid of an equivalent intensity for the two types of research.

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 offset the competitive advantage enjoyed by a third-country competitor.

If the Commission has evidence (official publication, notification to the WTO, OECD data, budgetary documents, etc.) that aid granted or proposed by a third country attains a rate that justifies a higher aid intensity, it will give its opinion on the notification requesting such alignment within 30 working days for an individual case and within two months for a scheme.

If there is only circumstantial evidence, the Commission, having collected all appropriate information from the Member States, will give its opinion on the advisability of alignment within two months.

The abovementioned time limits will run from the receipt of a detailed request from one or more Member States.

6. INCENTIVE EFFECT OF R&D AID

6.1. State aid for R&D should serve as an incentive for firms to undertake R&D activities in addition to their normal day-to-day operations. It may also encourage firms not carrying out research and development to undertake such activities. Where this incentive effect is not evident, the Commission may consider such aid less favourably than it usually does.

6.2. In order to verify that the planned aid will induce firms to pursue research which they would not otherwise have pursued, the Commission must take particular account of quantifiable factors (such as changes in R&D spending, in the number of people assigned to R&D activities and in R&D spending as a proportion of total turnover), market failures, additional costs connected with cross-border cooperation and other relevant factors indicated by the Member State that made the notification. Proposed aid may also be permitted if it contributes towards expanding the scope of research or speeding it up.

6.3. Accordingly, the Commission calls on Member States, both when notifying R&D aid and when submitting annual reports on the implementation of approved aid schemes, to demonstrate that the aid is necessary as an incentive, and is on no account operational aid.

6.4. The Commission may assume that the aid provides a necessary incentive if the recipient is an SME within the meaning of the current Community definition.

6.5. The Commission will attribute particular importance to the conditions at points 6.2 and 6.3:

— in the case of individual, close-to-the-market research projects to be undertaken by large firms,

— in all cases in which a significant proportion of the R&D expenditure has already been made prior to the aid application.

7. ANNUAL REPORTS

For each authorised aid scheme, the Commission will generally request an annual report on implementation. On the basis of these reports, the Commission will be in a position to monitor the allocation of aid and, if necessary, propose appropriate measures if it considers that the scheme is distorting, or is likely to distort, competition contrary to the common interest, e.g. by undue concentration on specific sectors or firms.

These reports have to be in accordance with the requirements set out in the Commission's letter to the Member States dated 22 February 1994, as amended on 2 August 1995, on standardised notifications and reports.

8. IMPLEMENTATION

8.1. The framework will be implemented in accordance with other Community policies on State aid, the provisions of other European treaties and legislation adopted pursuant to those Treaties. This applies in particular to State aid in the nuclear field, which is still covered by Article 232(2) of the EC Treaty, by the provisions of the Euratom Treaty and, where defence aspects are concerned, by Article 223 of the EC Treaty.

8.2. Once the regulation implementing the OECD Agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry enters into force, State aid for R&D activities in the shipbuilding and ship repair sector will no longer be covered by the framework but will be evaluated in accordance with the provisions of that regulation.

9. DURATION

The Commission will review the framework in five years' time. It may also decide to amend it at any time, in cooperation with the Member States, should it prove necessary for reasons connected with competition policy or to take account of other Community policies and international commitments.

ANNEX I

DEFINITION OF THE STAGES OF R&D FOR THE PURPOSES OF ARTICLE 92 OF THE EC TREATY

The framework is intended to cover R&D aid linked directly to the subsequent production and marketing of new products, processes or services in so far as it meets the conditions of Article 92(1) of the EC Treaty. The following definitions are designed to help Member States to formulate their notifications. They are intended to be indicative not normative.

— By **fundamental research** is meant an activity designed to broaden scientific and technical knowledge not linked to industrial or commercial objectives.

— By **industrial research** is meant planned research of critical investigation aimed at the acquisition of new knowledge, the objective being that such knowledge may be useful in developing new products, processes or services or in bringing about a significant improvement in existing products, processes or services.

— By **precompetitive development activity** is meant the shaping of the results of industrial research into a plan, arrangement of design for new, altered or improved products, processes or services, whether they are intended to be sold or used, including the creation of an initial prototype which could not be used commercially. This may also include the conceptual formulation and design of other products, processes or services and initial demonstration projects or pilot projects, provided that such projects cannot be converted or used for industrial applications or commercial exploitation. It 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.

ANNEX II

ELIGIBLE R&D COSTS FOR THE PURPOSE OF CALCULATING THE AID INTENSITY

The costs set out below will be regarded as eligible for the purposes of calculating the intensity of R&D aid (where generated by other activities as well — in particular other R&D activities — they must be broken down by type of activity):

— personnel costs (researchers, technicians and other supporting staff employed solely on the research activity),

— costs of instruments, equipment, and land and premises used solely and on a continual basis (except where transferred commercially) for the research activity,

— cost of consultancy and equivalent services used exclusively for the research activity, including the research, technical knowledge and patents, etc. bought from outside sources,

— additional overheads incurred directly as a result of the research activity,

— other operating expenses (e.g. costs of materials, supplies and similar products) incurred directly as a result of the research activity.

ANNEX III

ADDITIONAL INFORMATION NORMALLY TO BE SUPPLIED IN THE NOTIFICATION PROVIDED FOR BY ARTICLE 93(3) OF THE EC TREATY OF STATE AID FOR R&D (SCHEMES, CASES OF AID GRANTED UNDER AN APPROVED SCHEME AND AD HOC AID CASES)

(To be attached to the general questionnaire in Part A of Annex II to the letter of 2 August 1995 addressed by the Commission to the Member States concerning notifications and standardised annual reports)

1. Objectives

Detailed description of the aims of the measure and of the type/nature of the R&D to be assisted.

2. Description of the R&D stages eligible for aid

2.1. Fundamental research

2.2. Definition stage or feasibility studies

2.3. Industrial research

2.4. Precompetitive development activity

2.5. Pilot or demonstration projects.

3. Details of cost items eligible for aid

3.1. Personnel costs (researchers, technicians and other supporting staff employed solely on the research activity).

3.2. Cost of instruments, equipment and land and premises used solely and on a continual basis (except where transferred commercially) for the research activity.

3.3. Cost of consultancy and equivalent services used exclusively for the research activity, including the research, technical knowledge and patents, etc. bought from outside sources.

3.4. Additional overheads incurred directly as a result of the research activity.

3.5. Other operating expenses (e.g. costs of materials, supplies and similar products) incurred directly as a result of the research activity.

4. Type and intensity of the aid

4.1. Description of the type and intensity of the aid for each R&D stage qualifying for aid.

4.2. Detailed description of any bonuses applicable, and maximum aid intensity.

4.3. Specify whether the R&D activities eligible for aid are wholly or partly located in an assisted region (Article 93(3)(a) or 92(3)(c)).

5. Cooperative research

5.1. Are projects carried out in cooperation between a number of firms eligible for aid? On special terms? If so, what are the terms?

5.2. Does the aid proposal provide for cooperation between enterprises and other bodies, such as research institutes and universities? On special terms? If so, please describe.

5.3. If research institutes receive aid for a specific research project, what is the amount and intensity of that aid?

6. Multinational aspects

Does the proposal (ad hoc case/scheme/programme) have any multinational aspects (e.g. Esprit or Eureka projects)? If so:

6.1. Does the proposal involve cooperation with partners in other countries? If so, state:

(a) which other Member States

(b) which other third countries

(c) which enterprises or research centres in other countries

6.2. What is the total cost of the proposal (ad hoc case/scheme/programme)?

6.3. Give the breakdown of the total cost by partner.

7. Application of the results

7.1. Who will own the R&D results in question?

7.2. Are any conditions attached to the granting of licences in respect of the results?

7.3. Are there any rules governing the general publication/dissemination of the R&D results?

7.4. Indicate the measures planned for the subsequent use/development of the results.

8. Incentive effect of R&D aid

8.1. With regard to schemes, what measures are envisaged for ensuring that the aid has an incentive effect on R&D (see point 6 of the framework)?

8.2. With regard to ad hoc aid — especially in the cases referred to at point 6.5 of the framework — what factors have been taken into account to ensure that the aid has an incentive effect on R&D?

Commission letter to Member States of 2 May 1997 on the amendment of the notification thresholds for aid for Eureka projects

Sir,

When it adopted the new Community framework for State aid for research and development (OJ C 45, 17.2.1996), the Commission indicated that it planned subsequently to amend the procedure for the notification of aid relating to Eureka projects and to propose appropriate measures to the Member States to that effect.

Having examined the information available on the implementation of the Eureka initiative to date, the Commission considers it appropriate to maintain a prior notification requirement for the largest aided projects but without retaining the same notification thresholds as apply to large-scale non-Eureka projects.

The need for this monitoring is confirmed by the 1995 Eureka evaluation report: following detailed inquiries, the majority of industrial participants report having received public funding of the order of 40 %.

The Commission therefore proposes, on the basis of Article 93(1) of the Treaty, that the rule governing the notification of aid for Eureka projects set out in its letter SG(90) D/1620 of 5 February 1990 be replaced by an obligation on Member States to give prior notification of Eureka projects whose total cost equals or exceeds ECU 40 million where they plan to grant aid with a gross grant equivalent equalling or exceeding ECU 10 million.

This notification requirement will apply to any aid granted under a scheme already approved. However, any ad hoc aid exceeding the *de minimis* amount will have to be notified.

Your authorities are accordingly requested to assent to these appropriate measures proposed by the Commission under Article 93(1) of the EC Treaty within two months of the date of this letter.

Yours faithfully,

II — Environmental aid

Community guidelines on State aid for environmental protection (*)

1. INTRODUCTION

1.1. In the 1970s and early 1980s, the Community's environmental policy was mainly concerned with setting and implementing standards for the main parameters of the environment. The Commission's memorandum of 6 November 1974 on State aid in environmental matters (1) reflects this approach. The framework, which was extended with certain amendments in 1980 (2) and again in 1986 (3), provided that aid could be authorised mainly to help firms carry out investment necessary to achieve certain mandatory minimum standards. The use of State aid was considered to be a transitional stage, paving the way for gradual introduction of the 'polluter pays' principle, under which economic agents would bear the full cost of the pollution caused by their activities (4).

1.2. In the Single European Act a new section on the environment was added to the EC Treaty which gives the Community express powers in the environmental field (5). The new provisions confirm the 'polluter pays' principle but go further, calling for the requirements of environmental protection to be included in defining and implementing the Community's other policies and stressing the need for prevention. The theme of integrating the environment into other policies is taken up, along with the concept of 'sustainable development', in the Community's fifth programme on the environment (6). This acknowledges that the traditional approach, based almost exclusively on regulation and particularly standards, has not been wholly satisfactory. It therefore argues for a broadening of the range of policy instruments. Different instruments (regulation, voluntary action and economic measures) or various combinations of these may be the best way of achieving desired environmental objectives in a given situation, depending on the legal, technical, economic and social context. Both positive financial incentives, i.e. subsidies, and disincentives, namely taxes and levies, have their place. The need to integrate environmental with other policies also means taking into account the objectives of economic and social cohesion in the Community, the requirements of maintaining the integrity of the single market, and international commitments in the environmental field.

1.3. The application of the EC Treaty rules on State aid must reflect the role economic instruments can play in environmental policy. This means taking account of a broader range of financial measures in this area. Aid control and environmental policy must also support one another in ensuring stricter application of the 'polluter pays' principle.

(*) OJ C 72, 10.3.1994, p. 3.
(1) Letter to Member States SEC(74) 4264 of 6 November 1974; Fourth Report on Competition Policy, points 175 to 182.
(2) Letter to Member States SG(80) D/8287 of 7 July 1980; Tenth Report on Competition Policy, points 222 to 226.
(3) Letter to Member States SG(87) D/3795 of 23 March 1987; Sixteenth Report on Competition Policy, point 259. The 1986 version of the framework, which was due to expire at the end of 1992, was extended for a further year: see letters to Member States of 18 January and 19 July 1993.
(4) See Council recommendation of 3 March 1975 (OJ L 194, 25.7.1975).
(5) Articles 130r, s and t of the EC Treaty.
(6) COM (92) 23 final, Volume II, 27 March 1992 and Council resolution of 1 February 1993.

1.4. Subsidies may be a second-best solution in situations where the polluter pays principle — which requires all environmental costs to be 'internalised', i.e. absorbed in firms' production costs — is not yet fully applied. However, such aid, particularly in the most polluting sectors of agriculture and industry, may distort competition, create trade barriers and jeopardise the single market. The fact is that firms in all Member States have to invest to make their plant, equipment and manufacturing processes meet environmental requirements, so gradually internalising external environmental costs. State aid is liable to give certain firms an advantage over their competitors in other Member States not receiving such aid, even though subject to the same environmental constraints.

1.5. A description is given below of the main types of State support for environmental protection that have been notified in recent years. The various types of aid are divided into the three broad categories: investment aid, horizontal support measures and operating aid.

1.5.1. Investment incentives, possibly associated with regulation or voluntary agreements

In many areas of environmental policy, firms are required to meet certain standards by law. Such mandatory standards may transpose international agreements or Community legislation into national law, or they may be set solely on the basis of national, regional or local objectives. The common feature in such situations is that there is a legal requirement.

However, to achieve or restore a satisfactory quality of the environment in heavily industrialised areas in particular, it is necessary gradually to raise levels of protection and to encourage firms to go beyond legal requirements.

The ultimate objective of investment incentives in this sphere is to facilitate a gradual raising of the quality of the environment. Support for investment typically falls into one of the following categories:

(i) aid under programmes designed to help existing firms adapt their plant to new standards or encourage them to reach such standards more rapidly (aid available for a limited period to speed up the process of implementing new standards);

(ii) aid to encourage efforts to improve significantly on mandatory standards through investment that reduces emissions to levels well below those required by current or new standards;

(iii) aid granted in the absence of mandatory standards on the basis of agreements whereby firms take major steps to combat pollution without being legally required to do so, or before they are legally required to do so;

(iv) aid for investment in fields in which environmental action is a matter of priority, but benefits the community at large more than the individual investor and is therefore undertaken collectively. This may be the case, for example, with waste disposal and recycling;

(v) aid to repair past environmental damage which the firms are not under any legal obligation to remedy.

1.5.2. Aid for horizontal support measures

Horizontal support measures are designed to help find solutions to environmental problems and to disseminate knowledge about such solutions so that they are applied more widely. The wide range of activities in this field includes:

(i) research and development of technologies that cause less pollution;

(ii) provision of technical information, consultancy services and training about new environmental technologies and practices;

(iii) environmental audits in firms;

(iv) spreading information and increasing awareness of environmental problems among the general public, general promotion of ecological quality labels and of the advantages of environmentally friendly products, etc.

1.5.3. Operating aid in the form of grants, relief from environmental taxes or charges, and aid for the purchase of environmentally friendly products

Despite the progress achieved in reducing pollution and in introducing cleaner technologies, there are many activities which damage the environment but whose environmental costs are not passed on in production costs and product prices. Conversely, the environmental benefits of products and equipment that cause less pollution are normally not fully reflected in lower prices to consumers. A clear trend is nevertheless apparent in Member States towards measures to internalise some of these external costs and benefits through taxes or through charges for environmental services, on the one hand, and through subsidies, on the other.

The introduction of environmental taxes and charges can involve State aid because some firms may not be able to stand the extra financial burden immediately and require temporary relief. Such relief is operating aid. It may take the form of:

(i) relief from environmental taxes introduced in some Member States, where it is necessary to prevent their firms being placed at a disadvantage compared with their competitors in countries that do not have such measures;

(ii) grants to cover all or part of the operating cost of waste disposal or recycling facilities, water treatment plant, or similar installations, which may be run by semi-public bodies with users being charged for the service.

Cost-related charges for environmental services are in line with the 'polluter pays' principle. However, it may be necessary to delay the introduction of full charging or to cross-subsidise some users at the expense of others, especially during the transition from traditional waste disposal practices to new recycling or treatment techniques. The State may also cover part of the investment costs of such facilities.

Among the subsidies designed to reflect the positive environmental benefits of certain technologies are:

(i) grants or cross-subsidies to cover the extra production costs of renewable energies, and

(ii) aid that encourages consumers and firms to purchase environmentally friendly products [7] rather than cheaper conventional ones.

1.6. These guidelines aim to strike a balance between the requirements of competition and environment policy, given the widespread use of State aid in the latter policy. Such aid is normally only justified when adverse effects on competition are outweighed by the benefits for the environment. The guidelines

[7] General criteria for environmentally-friendly products are listed in Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme (OJ L 99, 11.4.1992, p. 1).

are intended to ensure transparency and consistency in the manner in which the Treaty provisions on State aid are applied by the Commission to the wide range of instruments described above (regulation, taxes and subsidies, training and information measures) that are used by Member States for environmental protection purposes. The following section therefore states the criteria the Commission will apply in assessing whether State aid of various types for environmental protection purposes is compatible with Article 92 of the EC Treaty. The intention is not to encourage Member States to grant aid, but when Member States wish to do so to guide them as to what types and levels of aid may be acceptable.

2. SCOPE OF THE GUIDELINES

2.1. These guidelines apply to aid in all the sectors governed by the EC Treaty, including those subject to specific Community rules on State aid (steel processing, shipbuilding, motor vehicles, synthetic fibres, transport, agriculture and fisheries), in so far as such rules do not provide otherwise. In the agricultural sector ([8]) the guidelines do not apply to the field covered by Council Regulation (EEC) No 2078/92 ([9]).

2.2. The guidelines set out the approach followed by the Commission in the assessment pursuant to Article 92 of State aid for the following purposes in the environmental field:

(i) investment,

(ii) information activities, training and advisory services,

(iii) temporary subsidies towards operating costs in certain cases,

and

(iv) purchase or use of environmentally friendly products.

They apply to aid in all forms ([10]).

2.3. Aid for energy conservation will be treated like aid for environmental purposes under the guidelines in so far as it aims at and achieves significant benefits for the environment and the aid is necessary, having regard to the cost savings obtained by the investor. Aid for renewable energy, the development of which is an especially high priority in the Community ([11]), is also subject to these guidelines, in so far as aid for investment is concerned. However, higher levels of aid than provided for in paragraph 3.2 may be authorised in appropriate cases. Operating aid for production of renewable energies will be judged on its merits.

2.4. State aid for research and development in the environmental field is subject to the rules set out in the Community framework for State aid for research and development ([12]).

([8]) Aid relating directly or indirectly to the production and/or marketing of products, excluding fisheries products, listed in Annex II to the EC Treaty.

([9]) Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ L 215, 30.7.1992, p. 85).

([10]) The principal forms are grants, subsidised loans, guarantees, tax relief, reductions in charges and benefits in kind.

([11]) See Council Decision 93/500/EEC of 13 September 1993 concerning the promotion of renewable energies in the Community (Altener programme) (OJ L 235, 18.9.1993, p. 41).

([12]) OJ C 83, 11.4.1986, p. 2.

3. APPLICABILITY OF THE STATE AID RULES

3.1. Assessment of aid for environmental protection pursuant to Article 92 of the EC Treaty

Article 92(1) of the EC Treaty prohibits, subject to possible exceptions, government financial assistance to specific enterprises or industries that distorts or threatens to distort competition and may effect trade between Member States. State aid for environmental protection often fulfils the criteria laid down in Article 92(1). It confers an advantage on particular enterprises, unlike general measures which benefit firms throughout the economy, and it can affect intra-Community trade.

However, where aid meets the conditions set out below, the Commission may consider that it is eligible for one of the exemptions provided for in Article 92 of the EC Treaty. Naturally, exemption is conditional on compliance with other provisions of Community law as well, in particular those governing the single market.

3.2. Aid for investment

3.2.1. Aid for investment in land (when strictly necessary to meet environmental objectives), buildings, plant and equipment intended to reduce or eliminate pollution and nuisances or to adapt production methods in order to protect the environment may be authorised within the limits laid down in these guidelines. The eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives. General investment costs not attributable to environmental protection must be excluded. Thus, in the case of new or replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible. Similarly, when investment in existing plant increases its capacity as well as improving its environmental performance, the eligible costs must be proportionate to the plant's initial capacity ([13]). In any case aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by these guidelines. This is true, for example, of aid for relocating plant to new sites in the same area. Such aid is not covered by the guidelines because recent cases have shown that it may conflict with competition and cohesion policy. It will therefore continue to be considered on a case-by-case basis until sufficient experience has been built up for more general rules to be issued.

3.2.2. The rules for investment aid in general also apply to aid for investment to repair past damage to the environment, for example, by making polluted industrial sites again fit for use. In cases where the person responsible for the pollution cannot be identified or called to account, aid for rehabilitating such areas may not fall under Article 92(1) of the EC Treaty in that it does not confer a gratuitous financial benefit on particular firms or industries. Such cases will be examined on their merits.

3.2.3. As a general rule, aid for environmental investment can be authorised up to the levels set out below ([14]). These provisions apply both to investment by individual firms and investment in collective facilities.

([13]) For aid concerning the disposal of animal manure, the Commission also applies by analogy the criteria set out in Annex III to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p. 1).

([14]) The rules for investment aid laid down in these guidelines are without prejudice to those provided by other Community legislation existing or yet to be enacted, in particular in the environmental field. For investments covered by Article 12(1) and (5) of Council Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures (OJ L 218, 6.8.1991, p. 1) the maximum aid level is 35 or 45 % in areas referred to in Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less favoured areas (OJ L 128, 19.5.1975, p. 1). These maximum aid levels apply irrespective of the size of the enterprise. Consequently, the maximums may not be increased for SMEs as provided for below in this section. For investments in Objectives 1 and 5b regions, the Commission reserves the right, on a case-by-case basis, to accept higher aid levels than the above, where the Member State demonstrates to the satisfaction of the Commission that this is justified.

A. Aid to help firms adapt to new mandatory standards

Aid for investment to comply with new mandatory standards or other new legal obligations and involving adaptation of plant and equipment to meet the new requirements can be authorised up to the level of 15 % gross ([15]) of the eligible costs. Aid may be granted only for a limited period and only in respect of plant which has been in operation for at least two years when the new standards or obligations enter into force.

For small and medium-sized enterprises ([16]) carrying out such investment an extra 10 percentage points gross of aid may be allowed. If the investment is carried out in assisted areas ([17]) aid can be granted up to the prevailing rate of regional aid authorised by the Commission for the area, plus, for SMEs, 10 percentage points gross in Article 92(3)(c) areas and 15 percentage points gross in Article 92(3)(a) areas ([18]).

In keeping with the 'polluter pays' principle, no aid should normally be given towards the cost of complying with mandatory standards in new plant. However, firms that instead of simply adapting existing plant more than two years old opt to replace it by new plant meeting the new standards may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant.

If both Community and national mandatory standards exist for one and the same type of nuisance or pollution the relevant standard for the purposes of this provision shall be the stricter one.

B. Aid to encourage firms to improve on mandatory environmental standards

Aid for investment that allows significantly higher levels of environmental protection to be attained than those required by mandatory standards may be authorised up to a maximum of 30 % gross of the eligible costs. The level of aid actually granted for exceeding standards must be in proportion to the improvement of the environment that is achieved and to the investment necessary for achieving the improvement.

If the investment is carried out by SMEs, an extra 10 percentage points gross of aid may be allowed. In assisted areas, aid can be granted up to the prevailing rate of regional aid authorised by the Commission for the area, plus, where appropriate, the supplements for SMEs referred to above ([19]).

If both Community and national mandatory standards exist for one and the same type of nuisance or pollution, the relevant standard for the purposes of applying this provision shall be the stricter one.

Where a project partly involves adaptation to standards and partly improvement on standards, the eligible costs belonging to each category are to be separated and the relevant limit applied.

([15]) That is the nominal before-tax value of grants and the discounted before-tax value of interest subsidies as a proportion of the investment cost. Net figures are after tax.

([16]) As defined in the Community guidelines on State aid for SMEs (OJ C 213, 19.8.1992, p. 2).

([17]) That is areas covered by national regional development schemes independent of the Structural Funds. In areas designated as eligible for aid from the Structural Funds pursuant to Objectives 2 or 5b but not nationally assisted areas, the level of aid will be decided in relation to each scheme.

([18]) See the guidelines on State aid for SMEs. If the aid available for environmental investment in a non-assisted area under these guidelines exceeds the prevailing rate of regional aid authorised for an Article 92(3)(c) assisted area in the same country, then the rate of aid in the assisted area can be raised to that available in the non-assisted area.

([19]) As in the case of aid for adapting to standards, if the aid available for environmental investment in a non-assisted area exceeds the prevailing rate of regional aid authorised for an Article 92(3)(c) assisted area in the same country, then the rate of aid in the assisted area can be raised to that available in the non-assisted area.

C. Aid in the absence of mandatory standards

In fields in which there are no mandatory standards or other legal obligations on firms to protect the environment, firms undertaking investment that will significantly improve on their environmental performance or match that of firms in other Member States in which mandatory standards apply may be granted aid at the same levels and subject to the same condition of proportionality as for going beyond existing standards (see above).

Where a project partly involves adaptation to standards and partly measures for which there are no standards, the eligible costs belonging to each category are to be separated and the relevant limit applied.

3.3. Aid for information activities, training and advisory services

Aid for publicity campaigns to increase general environmental awareness and provide specific information about, for example, selective waste collection, conservation of natural resources or environmentally friendly products may not fall within Article 92(1) of the EC Treaty at all where they are so general in scope and distant from the market place as not to confer an identifiable financial benefit on specific firms. Even when aid for such activities does fall within Article 92(1), it will normally be exemptible.

Aid may also be authorised for the provision of training and consultancy help to firms on environmental matters. As provided under the SME aid guidelines, for SMEs such aid may be granted at rates of up to 50 % of the eligible costs ([20]). In assisted areas aid of at least the authorised rate of investment aid may be authorised for training and consultancy services for both SMEs and larger firms.

3.4. Operating aid

In accordance with long-standing policy the Commission does not normally approve operating aid which relieves firms of costs resulting from the pollution or nuisance they cause. However, the Commission may make an exception to this principle in certain well-defined circumstances. It has done so, so far in the fields of waste management and relief from environmental taxes. The Commission will continue to assess such cases on their merits and in the light of the strict criteria it has developed in the two fields just mentioned. These are that the aid must only compensate for extra production costs by comparison with traditional costs, and should be temporary and in principle degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly. Furthermore, the aid must not conflict with other provisions of the EC Treaty, and in particular those relating to the free movement of goods and services.

In the field of waste management, the public financing of the additional costs of selective collection, recovery and treatment of municipal waste for the benefit of businesses as well as consumers may involve State aid but can in that case be authorised provided that businesses are charged in proportion to their use of the system or to the amount of waste they produce in their enterprise. Aid for the collection, recovery and treatment of industrial and agricultural waste will be considered on a case-by-case basis.

Temporary relief from new environmental taxes may be authorised where it is necessary to offset losses in competitiveness, particularly at international level. A further factor to be taken into account is what the firms concerned have to do in return, to reduce their pollution. This provision also applies to reliefs from taxes introduced pursuant to EC legislation in which the Member States have discretion as to the relief or its amount.

([20]) See footnote 15 on p. 210.

3.5. Aid for the purchase of environmentat-friendly products

Measures to encourage final consumers (firms and individuals) to purchase environmentat-friendly products may not fall within Article 92(1) of the EC Treaty because they do not confer a tangible financial benefit on particular firms. Where such measures do fall within Article 92(1), they will be assessed on their merits and may be authorised provided that they are applied without discrimination as to the origin of the products, do not exceed 100 % of the extra environmental costs ([21]), and do not conflict with other provisions of the Treaty or legislation made under it ([22]) with particular reference to the free movement of goods.

3.6. Basis of the exemption

Within the limits and on the conditions set out in paragraphs 3.2 to 3.5, aid for the above purposes will be authorised by the Commission under the exemption provided for in Article 92(3)(c) of the EC Treaty for 'aid to facilitate the development of certain activities... where such aid does not adversely affect trading conditions to an extent contrary to the common interest.' However, aid for environmental purposes in assisted areas pursuant to Article 92(3)(a) of the EC Treaty may be authorised under that provision.

3.7. Important projects of common European interest

Aid to promote the execution of important projects of common European interest which are an environmental priority and will often have beneficial effects beyond the frontiers of the Member State or States concerned can be authorised under the exemption provided for in Article 92(3)(b) of the EC Treaty. However, the aid must be necessary for the project to proceed and the project must be specific and well-defined, qualitatively important, and must make an exemplary and clearly identifiable contribution to the common European interest. When this exemption is applied, the Commission may authorise aid at higher rates than the limits laid down for aid authorised pursuant to Article 92(3)(c).

3.8. Cumulation of aid from different sources

The limits set above on the level of aid that may be granted for various environmental purposes apply to aid from all sources, including Community aid when this is combined with national aid.

4. NOTIFICATION, EXISTING AUTHORISATIONS, DURATION AND REVIEW OF GUIDELINES AND REPORTING REQUIREMENTS

4.1. Except in so far as aid classed as *de minimis* is concerned ([23]) these guidelines do not affect the obligation of Member States pursuant to Article 93(3) of the EC Treaty to notify all aid schemes, all alterations of such schemes and all individual awards of aid made to firms outside of authorised schemes. In the notification, Member States must supply the Commission with all relevant information showing, *inter alia*, the environmental purpose of the aid and the calculation of eligible costs. The rules

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([21]) Unless Community legislation does not allow as much as 100 % (see, for example, Council Directive 91/441/EEC of 26 June 1991 amending Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by emissions from motor vehicles (OJ L 242, 30.8.1991, p. 1)).

([22]) For example, the car emissions directive (which also contains notification requirements) and Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 109, 26.4.1983, p. 8).

([23]) See SME aid guidelines (OJ C 213, 19.8.1992, p. 2).

for the accelerated clearance procedure for SME aid schemes and amendments of existing schemes ([24]) and on the notification of cumulations of aid remain applicable ([25]). When it authorises aid schemes, the Commission may require individual notification of aid awards above a certain threshold or in certain sectors, apart from those referred to in paragraph 2.1 or in other appropriate cases.

4.2. The guidelines are without prejudice to schemes that have already been authorised when the guidelines are published. However, the Commission will review such existing schemes pursuant to Article 93(1) of the EC Treaty by 30 June 1995. Furthermore, the Commission will monitor the effects of approved aid schemes and will propose appropriate measures pursuant to Article 93(1) if it finds the aid in question to be creating distortions of competition contrary to the common interest.

4.3. The Commission will follow these guidelines in its assessment of aid for environmental purposes until the end of 1999. Before the end of 1996 it will review the operation of the guidelines. The Commission may amend the guidelines at any time should it prove appropriate to make changes for reasons connected with competition policy, environmental policy and regional policy or to take account of other Community policies and of international commitments.

4.4. The Commission will require Member States to supply it with reports on the operation of aid schemes for environmental protection in accordance with its notice of 24 March 1993 on standardised notifications and reports.

([24]) OJ C 213, 19.8.1992, p. 10.
([25]) OJ C 3, 5.1.1985.

III — Rescue and restructuring aid — new guidelines

Community guidelines on State aid for rescuing and restructuring firms in difficulty (*)

1. INTRODUCTION

1.1. The need for comprehensive and firm control of State aid in the European Community has been widely acknowledged in recent years. The distortive effect of aid is magnified as other government-induced distortions are eliminated and markets become more open and integrated. Hence, in the single market it is more important than ever to maintain tight control of State aid.

In the medium term the single market is expected to yield significant benefits in terms of increased economic growth, although currently growth is stalled by the recession. A major part of the increase in economic growth that should ultimately result from the single market will be due to the extensive structural change that it will induce in the Member States. While structural change is easier in an expanding economy, even in a recession it is undesirable that Member States should frustrate or unduly retard the process of structural adjustment through subsidies to firms which in the new market situation ought to disappear or restructure. Such aid would shift the burden of structural change on to other, more efficient firms and encourage a subsidy race. As well as preventing the full benefits of the single market for the Community as a whole, subsidies can place severe strain on national budgets and so impede economic convergence.

1.2. On the other hand, there are circumstances in which State aid for rescuing firms in difficulty and helping them to restructure may be justified. It may be warranted, for instance, by social or regional policy considerations, by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation, and by the special needs and wider economic benefits of the small and medium-sized enterprise (SME) sector.

1.3. The last time the Commission set out its policy on aid for rescuing and restructuring firms in difficulty was in 1979 in the Eighth Report on Competition Policy (1). This policy has been endorsed many times by the Court of Justice (2).

However, for the reasons given in paragraph 1.1 the advent of the single market requires the policy to be reviewed and updated. Furthermore, it must be adapted to take account of the objective of

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(*) OJ C 368, 23.12.1994, p. 12.

(1) Paragraphs 177, 227 and 228.

(2) See, in particular, judgments of the Court of Justice of 14 February 1990, Case C-301/87 *France* v *Commission* [1990] ECR I, p. 307 (*Boussac*); of 21 March 1990, Case C-142/87 *Belgium* v *Commission* [1990] ECR I, p. 959 (*Tubemeuse*); of 21 March 1991, Case C-303/88 *Italy* v *Commission* [1991] ECR I, p. 1433 (*ENI-Lanerossi*); of 21 March 1991, Case C-305/89 *Italy* v *Commission* [1991] ECR I, p. 1603 (*Alfa Romeo*). See also judgments of the Court of Justice of 14 November 1984, Case 323/82 *Intermills* v *Commission* [1984] ECR 3809; of 13 March 1985, Cases 296 and 318/82 *Netherlands* and *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR, p. 809; of 10 July 1986, Case 234/84 *Belgium* v *Commission* [1986] ECR, p. 2263 (*Meura*).

economic and social cohesion [3] and clarified in the light of developments in the policies towards government capital injections [4], financial transfers to public enterprises [5], and aid for SMEs [6].

2. DEFINITIONS AND SCOPE OF THE GUIDELINES

2.1. Definition of rescue and restructuring aid

It is right to treat aid for rescues of companies and for restructuring together, because in both cases the government is faced with a firm in difficulties unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing, and because the rescue and the restructuring are often two parts, albeit clearly distinguishable parts, of a single operation. The financial weakness of firms that are rescued by their governments or receive help for restructuring is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value. In acute cases the company may already have become insolvent or gone into liquidation.

It is not possible to establish a universal and precise set of financial parameters to identify when aid to a company amounts to a rescue, or is for restructuring. Nevertheless, the two situations show basic differences.

A rescue temporarily maintains the position of a firm that is facing a substantial deterioration in its financial position reflected in an acute liquidity crisis or technical insolvency, while an analysis of the circumstances giving rise to the company's difficulties can be performed and an appropriate plan to remedy the situation devised. In other words, rescue aid provides a brief respite, generally for not more than six months, from a firm's financial problems while a long-term solution can be worked out.

Restructuring, on the other hand, is part of 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 activities that are no longer viable or are already loss-making, the restructuring of those existing activities that can be made competitive again and, possibly, the development of, or diversification to new viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring plans take account of, *inter alia*, the circumstances giving rise to the firm's difficulties, market supply and demand for the relevant products as well as their expected development and the specific strengths and weaknesses of the firm. They allow an orderly transition of the firm to a new structure that gives it viable long-term prospects and will enable it to operate on the strength of its own resources without requiring further State assistance.

2.2. Sectoral scope

The Commission follows the general approach to rescue and restructuring aid that is set out in the guidelines in all sectors. However, in sectors currently subject to special Community rules on State

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[3] Article 130a of the EC Treaty. Article 130b of the EC Treaty inserted by the Treaty on European Union states that other policies must contribute to this objective: '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 130a and shall contribute to their achievement.'

[4] Bull. EC 9-1984, paragraph 3.5.1.

[5] OJ C 307, 13.11.1993, p. 3.

[6] OJ C 213, 19.8.1992, p. 2.

aid the guidelines will apply only to the extent that they are consistent with the special rules. At present there are special aid rules in agriculture, fisheries, steel, shipbuilding, textiles and clothing, synthetic fibres, the motor industry, transport and the coal industry. In the agricultural sector, special Commission rules for rescue and restructuring aid may continue to be applied to individual beneficiaries at the discretion of the Member State concerned as an alternative to these guidelines.

2.3. Applicability of Article 92(1) of the EC Treaty

For the reasons stated in paragraph 1.1, State aid for rescuing or restructuring firms in difficulty will, by its very nature, tend to distort competition and affect trade between Member States. Therefore, as a rule, it falls within Article 92(1) of the EC Treaty and requires exemption.

The only general exception is aid that is too small in amount to have a significant effect on inter-State trade. This *de minimis* figure has been set at ECU 50 000 for each of two broad categories of expenditure (investment and other expenditure) from all sources and under any scheme over three years ([7]). The *de minimis* facility is not available in sectors subject to special Community rules on State aid ([8]).

Aid for restructuring can take many forms, including capital injections, debt write-offs, loans, interest subsidies, relief from taxes or social security contributions, and loan guarantees. For rescues, however, it should be limited to loans at market interest rates or loan guarantees (see paragraph 3.1). The source of the aid can be any level of government, central, regional or local, and any 'public undertaking', as defined in Article 2 of the 1980 directive on the transparency of financial relations between Member States and public undertakings ([9]). Thus, for example, rescue or restructuring aid may come from State holding companies or public investment corporations ([10]).

The method used by the Commission to determine when government injections of new capital into companies that are already State-owned or become wholly or partly State-owned as a result of the operation involve aid was set out in a 1984 communication ([11]) and has been refined and extended to aid in other forms in the public enterprises communication of 1993 ([12]). The criterion is based on the 'private investor' principle. This provides that in circumstances where a rational private investor operating in a market economy would have made the finance available the provision or guarantee of funding to a company does not involve aid.

Where funding is provided or guaranteed by the State to an enterprise that is in financial difficulties, however, there is a presumption that the financial transfers involve State aid. Therefore, such financial transactions must be communicated to the Commission in advance, in accordance with Article 93(3) ([13]). The presumption of aid is compelling where the industry, as a whole, is in difficulties or suffering from structural overcapacity.

The assessment of rescue or restructuring aid is not affected by changes in the ownership of the business aided. Thus, it will not be possible to evade control by transferring the business to another legal entity or owner.

([7]) See SME aid guidelines, paragraph 3.2, and guidance note on the use of the *de minimis* facility, letter of 23 March 1993, reference IV (93) D/06878.

([8]) See paragraph 2.2.

([9]) OJ L 195, 29.7.1980, as amended by OJ L 254, 12.10.1993, p. 16.

([10]) See judgment of the Court of Justice, of 22 March 1977, Case 78/76 *Steinike und Weinlig* v *Germany*, [1977] ECR, p. 595; *Crédit Lyonnais* v *Usinor-Sacilor* Commission press release IP(91) 1045.

([11]) See footnote 4, on p. 210.

([12]) See footnote 5, on p. 210.

([13]) See paragraph 27 of the public enterprises paper.

2.4. Basis of exemption

Article 92(2) and (3) of the EC Treaty provide for the possibility of exemption of aid falling within Article 92(1). The only basis for exempting aid for rescuing or restructuring firms in difficulty — apart from cases of national disasters and exceptional occurrences which are exempted by Article 92(2)(b) and are not covered here, and, to the extent that Article 92(2)(c) is still applicable, aid in Germany that might be covered by this provision — is Article 92(3)(c). Under this 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'.

The Commission considers that aid for rescues and restructuring may contribute to the development of economic activities without adversely affecting trade against the Community interest if the conditions set out in Section 3 are met, and will therefore authorise such aid under those conditions. Where the firms to be rescued or restructured are located in assisted areas, the Commission will take regional considerations under subparagraphs (a) and (c) of Article 92(3) into account as described in paragraph 3.2.3.

2.5. Existing aid schemes

These guidelines are without prejudice to aid schemes for rescuing or restructuring firms in difficulty that have already been authorised when the guidelines are published. However, the Commission will review such existing schemes pursuant to Article 93(1) of the EC Treaty by 31 December 1995.

The guidelines are also without prejudice to the application of aid schemes authorised for other purposes than rescues or restructuring, such as regional development or the development of SMEs, provided that aid for rescues or restructuring granted under such schemes fulfils the conditions the Commission has approved for the schemes.

3. GENERAL CONDITIONS FOR THE AUTHORISATION OF RESCUE AND RESTRUCTURING AID

3.1. Rescue aid

In order to be approved by the Commission rescue aid, as defined above, must continue to satisfy the conditions laid down by the Commission in 1979 ([14]). That is, rescue aid must:

(i) consist of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates;

(ii) be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies);

(iii) be paid only for the time needed (generally not exceeding six months) ([15]) to devise the necessary and feasible recovery plan;

([14]) *Eighth Report on Competition Policy*, paragraph 228.

([15]) If the Commission is still investigating the restructuring plan when the period for which rescue aid has been authorised runs out, it will consider favourably an extension of the rescue aid until the investigation is completed (see *23rd Competition Report*, point 527).

(iv) be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial situation in other Member States.

A further condition is that, in principle, the rescue should be a one-off operation. A series of rescues that effectively merely maintain the status quo, postpone the inevitable and in the meantime transfer the attendant industrial and social problems to other, more efficient producers and other Member States is clearly unacceptable. Rescue aid should therefore normally be a one-off holding operation mounted over a limited period during which the company's future can be assessed.

Rescue aid need not be granted in a single payment. Indeed, it may be desirable to spread payment of the aid over several or more instalments subject to separate assessment in order to take account of external conditions which may be rapidly fluctuating or in order to stimulate the ailing company into taking the necessary corrective action.

In applying the above conditions to SMEs the Commission will take account of the special features of businesses in this size category.

The approval of rescue aid is without any presumption regarding the subsequent approval of aid under a restructuring plan, which will fall to be assessed on its own merits.

3.2. Restructuring aid

3.2.1. Basic approach

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 industrial problems on to other producers who are managing without aid and to other Member States. The general principle should therefore be to allow restructuring aid only in circumstances in which it can be demonstrated that the approval of restructuring aid is in the Community interest. This will only be possible when strict criteria are fulfilled and full account is taken of the possible distortive effects of the aid.

3.2.2. General conditions

Subject to the special provisions for assisted areas and SMEs set out below, for the Commission to approve aid a restructuring plan will need to satisfy all the following general conditions:

(i) Restoration of viability

The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period. The improvement in viability must mainly result from internal measures contained in the restructuring plan and may only be based on external factors such as price and demand increases over which the company has no great influence, if the market assumptions made are generally acknowledged. Successful restructuring should involve the abandonment of structurally loss-making activities.

To fulfil the viability criterion, the restructuring plan must be considered capable of putting the company into a position of covering all its costs including depreciation and financial charges and

generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits. Like rescue aid, aid for restructuring should therefore normally only need to be granted once.

(ii) Avoidance of undue distortions of competition through the aid

A further condition of aid for restructuring is that measures are taken to offset, as far as possible, adverse effects on competitors. Otherwise aid would be 'contrary to the common interest' and ineligible for exemption pursuant to Article 92(3)(c).

Where on an objective assessment of the demand and supply situation there is a structural excess of production capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the European Community by irreversibly reducing or closing capacity. A reduction or closure is irreversible when the relevant assets are scrapped, rendered permanently incapable of producing at the previous rate, or permanently converted to another use. The sale of capacity to competitors is not sufficient in this case, except if the plant is sold for use in a part of the world from which the continued operation of the facilities is unlikely to have significant effects on the competitive situation in the Community.

A relaxation of the principle of requiring a proportionate capacity reduction may be allowed if such a reduction is likely to cause a manifest deterioration in the structure of the market, for example, by creating a monopoly or a tight oligopoly situation.

Where, on the other hand, there is no structural excess of production capacity in a relevant market in the Community served by the recipient, the Commission will normally not require a reduction of capacity in return for the aid. However, it must be satisfied that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as is essential for restoring viability without thereby unduly distorting competition. To ensure that the aid does not distort competition to an extent contrary to the common interest, the Commission may impose any conditions and obligations as may be necessary.

(iii) Aid in proportion to the restructuring costs and benefits

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources, or from external commercial financing. To limit the distortive effect, the form in which the aid 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. Nor should any of the aid go to finance new investment not required for the restructuring. Aid for financial restructuring should not unduly reduce the firm's financial charges.

If aid is used to write off debt resulting from past losses, any tax credits attaching to the losses must be extinguished, not retained to offset against future profits or sold or transferred to third parties, as in that case the firm would be receiving the aid twice.

(iv) Full implementation of restructuring plan and observance of conditions

The company must fully implement the restructuring plan that was submitted to and accepted by the Commission and must discharge any other obligations laid down by the Commission decision.

Otherwise, unless the original decision is amended following a new notification from the Member State, the Commission will take steps to require the recovery of the aid.

(v) Monitoring and annual report

The implementation, progress and success of the restructuring plan will be monitored by requiring the submission of detailed annual reports to the Commission. The annual report will have to contain all relevant information to enable the Commission to monitor the implementation of the agreed restructuring programme, the receipt of aid by the company and its financial position and the observance of any conditions or obligations laid down in the Commission decision approving the aid. Where there is a particular need for timely confirmation of certain key information, such as closures, capacity reductions, etc., the Commission may request more frequent reports.

3.2.3. Conditions for restructuring aid in assisted areas

Economic and social cohesion being a priority objective of the Community pursuant to Article 130a of the EC Treaty and other policies being required to contribute to this objective pursuant to Article 130b ([16]), the Commission must take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an ailing firm is located in an assisted area does not, however, justify a wholly permissive approach to aid for restructuring. In the medium to long term it does not help a region to prop up artificially companies, which for structural or other reasons are ultimately doomed to failure.

Furthermore, given the limited Community and national resources available to promote regional development it is in the regions' own best interest to apply these scarce resources to develop, as soon as possible, alternative activities that are viable and durable. Finally, distortions of competition must be minimised even in the case of aid to firms in assisted areas.

Thus, the criteria listed in paragraph 3.2.2 are equally applicable to assisted areas, even when the needs of regional development are considered. In particular, the result of the restructuring operation must be an economically viable business that will contribute to the real development of the region without requiring continual aid. Recurrent injections of aid will thus not be viewed any more leniently that in non-assisted areas. Likewise, restructuring plans must be followed through and monitored. To avoid undue distortions of competition the aid must also be in proportion to restructuring costs and benefits. Somewhat more flexibility can be shown in assisted areas, however, with regard to the requirement for a reduction in capacity in the case of markets in structural overcapacity. If regional development needs justify it, the Commission will require a smaller capacity reduction for this purpose in assisted areas than in non-assisted areas and will differentiate between areas eligible for regional aid pursuant to Article 92(3)(a) of the Treaty and those eligible pursuant to Article 92(3)(c) to take account of the greater severity of the regional problems in the former areas.

Any aid for new investment not required for the restructuring must be within the limits for regional aid authorised by the Commission.

3.2.4. Aid for restructuring small and medium-sized enterprises

Provided certain acceptable intensities of aid are not exceeded, aid to firms in the small to medium-sized category tends to affect trading conditions less than that to large firms and any harm to

([16]) See footnote 3.

competition is more likely to be offset by economic benefits ([17]). This also applies to aid to help restructuring. Consequently, the Commission is justified in taking a less restrictive attitude towards such aid when it is granted to SMEs.

In the Community guidelines on State aid for small and medium-sized enterprises (SMEs) ([18]), the Commission has established a uniform definition of SME for State aid control purposes.

'SME' is defined as an enterprise which: has no more than 250 employees, and either an annual turnover not exceeding ECU 20 million, or a balance sheet total not exceeding ECU 10 million, and is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

In relation to SMEs, the Commission will not require aid for restructuring to meet the same strict conditions as aid for restructuring large firms, particularly as regards capacity reductions and reporting obligations.

3.2.5. Aid to cover the social costs of restructuring

Restructuring plans normally entail reductions in, or abandonment of the affected activities. A scaling back of the firm's activities is often necessary for the purposes of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid if the industry is suffering from structural overcapacity. Whatever the reason for them, such measures will generally lead to reductions in the company's workforce.

Member States' labour legislation may comprise general social security schemes under which the redundancy benefits and early retirement pensions are paid direct to redundant employees. Such schemes are not to be regarded as State aid falling within Article 92(1) in so far as the State deals direct with employees and the company is not involved.

Besides direct redundancy benefit and early retirement provision for employees, general social support schemes are widespread under which the government covers the cost of benefits that the company provides 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 considered to involve aid pursuant to Article 92(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.

The obligations a company itself has 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. This 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.

The Commission has a positive approach to such aid, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship, and often only evens out differences in the obligations placed on companies by national legislation.

([17]) Community guidelines for State aid to SMEs (OJ C 213, 19.8.1992, p. 2).
([18]) Ibid., paragraph 2.2.

As well as to meet the cost of redundancy payments and early retirement, aid is commonly provided in connection with a particular restructuring case 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.

Aid for social measures exclusively for the benefit of employees who are displaced by restructuring is disregarded for the purposes of determining the size of the capacity reduction under paragraph 3.2.2. (ii).

4. NOTIFICATION REQUIREMENTS AND DURATION AND REVIEW OF THE GUIDELINES

4.1. Schemes for rescuing or restructuring SMEs

For SMEs within the definition given above in paragraph 3.2.4 the Commission will be prepared to authorise schemes of assistance for rescue or restructuring purposes. It will do so within the usual period of two months from the receipt of complete information, unless the scheme qualifies for the accelerated clearance procedure, in which case the Commission is allowed 20 working days ([19]). Such schemes must clearly identify the firms eligible, the circumstances under which rescue or restructuring aid may be granted and the maximum amount of aid available. A condition of approval will be that an annual report is provided on the scheme's operation containing the information specified in the Commission's instructions on standardised reports ([20]). The reports must also include an individual list of all beneficiary firms giving: company name, sectoral code — in accordance with the NACE ([21]) 2-digit sectoral classification codes — number of employees, annual turnover, amount of aid granted in year, confirmation of whether rescue or restructuring aid was received in the previous two years and, if so, the total amount previously granted.

Awards of aid for rescuing or restructuring SMEs outside an approved scheme will require to be notified individually to the Commission, as in the case of such aid for large firms.

Aid awards or aid schemes for rescuing or restructuring firms which meet the conditions of the *de minimis* facility (see paragraph 2.3) need not be notified.

4.2. Aid for rescuing or restructuring large enterprises

For aid to rescue or help restructuring large firms, i.e. those not falling within the definition of SME, individual notification of all awards is required.

As time is usually not on the side of the firms concerned, particularly in rescue cases, the Commission will make every effort to make its decision quickly. The time limit for deciding on notifications of individual aid awards outside of authorised schemes is two months from the receipt of full information.

Member States themselves can do much to avoid unnecessary delays by:

(i) notifying their intentions to grant aid early. Even if, because of internal administrative procedures, the Member State is unable to notify immediately all details of a proposed rescue or restructuring

([19]) OJ C 213, 19.8.1992, p. 10.
([20]) See letter to the Member States of 22 February 1994.
([21]) General industrial classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

aid, it will be advantageous to let the Commission know of the matters that have already been decided, in order to familiarise the Commission with the case and to reduce or avoid possible requests for further information subsequent to a later incomplete notification;

(ii) sending complete notifications. In particular, notifications should distinguish clearly between aid which falls under the heading of rescue aid and that to be categorised as restructuring aid and should directly and distinctly address all the general approval conditions indicated above for the approval of rescue or restructuring aid under the guidelines. Failure to do so will mean that the notification is incomplete and delay clearance. In notifications Member States should also inform the Commission of all other aid granted to the firm that is not directly related to the operation so that the Commission is aware of the full circumstances surrounding the case.

4.3. Unnotified aid

The notification and prior authorisation of aid before it is granted are strict requirements. Member States are reminded of the risk of granting aid illegally, as the Commission has the power to order the recovery of such aid ([22]).

4.4. Duration and review of the guidelines

The Commission will follow these guidelines in its assessment of aid for rescuing or restructuring firms in difficulty for three years from the date of their publication. Before the end of that period it will review the operation of the guidelines.

([22]) Commission communication on aid granted illegally (OJ C 318, 24.11.1983). The Commission would also refer to the ruling of the Court of Justice in Case 301/87 (*Boussac*), and the conclusions it has drawn from this ruling for the handling of such cases as set out in its letter to Member States of 4 March 1991.

Commission communication concerning extension of the guidelines on State aid for rescuing and restructuring firms in difficulty (*)

The Commission has decided to extend the current guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12, as supplemented by the rules applicable to agriculture and fisheries (OJ C 283, 19.9.1997, p. 2)) until such time as new guidelines are published or, at any event, for a period of not more than one year from the date of publication of this Communication in the *Official Journal of the European Communities*.

(*) OJ C 74, 10.3.1998, p. 31.

IV — SMEs

COMMISSION RECOMMENDATION (*) OF 3 APRIL 1996

concerning the definition of small and medium-sized enterprises

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 155, second indent, thereof,

Whereas the implementation of the Integrated Programme in Favour of Small and Medium-Sized Enterprises (SMEs) and the Craft Sector (hereinafter referred to as 'the Integrated Programme') (1), in accordance with the White Paper on Growth, Competitiveness and Employment, requires the establishment of a coherent, visible and effective framework within which the enterprise policy in favour of SMEs can take its place;

Whereas, well before the implementation of the Integrated Programme, various Community policies were targeted at SMEs, each policy using different criteria to define them; whereas a number of Community policies have developed gradually with no joint approach or overall consideration of what, objectively, constitutes an SME; the result being a diversity of criteria used to define an SME and thus, a multiplicity of definitions currently in use at Community level in addition to the definitions used by the European Investment Bank (EIB) and the European Investment Fund (EIF) together with a rather wide range of definitions in the Member States;

Whereas many Member States have no general definition and operate ad hoc with rules based on local practice or which apply to particular sectors; whereas others adhere rigidly to the definition contained in the Community guidelines on State aid to SMEs (2);

Whereas the existence of different definitions at Community level and at national level can create inconsistencies and can also distort competition between enterprises; whereas the Integrated Programme aims at a more forceful coordination between, on the one hand, the different Community initiatives in favour of SMEs and, on the other hand, between these and the initiatives which exist at national level; whereas these objectives cannot be realised successfully unless the question of the definition of SMEs is clarified;

Whereas the Commission's Report to the European Council meeting in Madrid on 15 and 16 December 1995 has underlined that a refocused effort in favour of SMEs is required in order to create more jobs across all sectors of the economy;

(*) OJ L 107, 30.4.1996, p. 4.
(1) COM(94) 207 final.
(2) OJ C 213, 19.8.1992, p. 2.

Whereas the 'Research' Council of 29 September 1994 agreed that preferential treatment for SMEs should be accompanied by a clearer definition of what was meant by a small or medium-sized enterprise; therefore it has requested the Commission to re-examine the criteria to be selected for defining SMEs;

Whereas, in a first report presented in 1992 at the request of the 'Industry' Council held on 28 May 1990, the Commission had already proposed limiting the proliferation of definitions in use at Community level; specifically, it favoured the adoption of the following four criteria: number of persons employed, turnover, balance-sheet total and independence, while proposing thresholds of 50 and 250 employees for small and for medium-sized enterprises respectively;

Whereas this definition has been adopted in the Community guidelines on State aid for SMEs and in all the other guidelines or communications concerning State aid which have been adopted or revised since 1992 (it applies in particular to the Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes [3], the guidelines on State aid for environmental protection [4] and the guidelines on State aids for rescuing and restructuring firms in difficulty [5];

Whereas other measures adopt this definition wholly or in part, notably the Fourth 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 [6], as last amended by Directive 94/8/EC [7], Council Decision 94/217/EEC of 19 April 1994 on the provision of Community interest subsidies on loans for small and medium-sized enterprises extended by the European Investment Bank under its temporary lending facility [8], and the Commission's communication [9] on the Community SME initiative under the Structural Funds;

Whereas, however, full convergence has not yet been achieved; some programmes still fix very varied thresholds or disregard certain criteria, such as independence;

Whereas it is appropriate that this convergence continues and is completed on the basis of the rules set out in the Community guidelines on State aids for SMEs, and that the Commission should apply, in all the policies it administers, the same criteria and the same thresholds which it requires Member States to observe;

Whereas in a single market without internal frontiers, the treatment of enterprises must be based on a set of common rules, particularly as regards State support — national or Community;

Whereas this approach is all the more necessary in view of the extensive interaction between national and Community measures assisting SMEs, for example as regards Structural Funds and research; it means that situations in which the Community targets its action on a certain category of SMEs and the Member States on another must be avoided;

Whereas application of the same definition by the Commission, the Member States, the EIB and the EIF would reinforce the consistency and effectiveness of policies targeting SMEs and would, therefore, limit the risk of distortion of competition; whereas, moreover, many programmes intended for SMEs are co-financed by the Member States and the European Community and, in some cases, by the EIB and the EIF;

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[3] OJ C 213, 19.8.1992, p. 10.
[4] OJ C 72, 10.3.1994, p. 3, footnote 16.
[5] OJ C 368, 23.12.1994, p. 12.
[6] OJ L 222, 14.8.1978, p. 11.
[7] OJ L 82, 25.3.1994, p. 33.
[8] OJ L 107, 28.4.1994 p. 57; see Commission report on this matter (COM(94) 434 final of 19 October 1994).
[9] OJ C 180, 1.7.1994, p. 10.

Whereas before proposing thresholds for defining SMEs, it should be pointed out that this attempt to rationalise and lay down a reference standard does not mean that enterprises which exceed these thresholds do not deserve State or Community attention; however it would be more appropriate to solve this problem through specific measures in the framework of the relevant programmes, in particular international cooperation programmes, rather than by adopting or maintaining a different SME definition;

Whereas the criterion of number of persons employed is undoubtedly one of the most important and must be regarded as imperative but that introducing a financial criterion is a necessary complement in order to grasp the real importance and performance of an enterprise and its position compared to its competitors;

Whereas, however, it would not be desirable to adopt turnover as the sole financial criterion because enterprise 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 represents the overall wealth of a business, with the possibility of one of these two financial criteria being exceeded;

Whereas independence is also a basic criterion in that an SME belonging to a large group has access to funds and assistance not available to competitors of equal size; whereas there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME;

Whereas, in respect of the independence criterion, the Member States, the EIB and the EIF should ensure that the definition is not circumvented by those enterprises which, whilst formally meeting this criterion, are in fact controlled by one large enterprise or jointly by several large enterprises;

Whereas stakes held by public investment corporations or venture capital companies do not normally change the character of a firm from that of an SME, and may therefore be disregarded; the same applies to stakes held by institutional investors, who usually maintain an 'arm's-length' relationship with the company in which they have invested;

Whereas a solution must be found to the problem of joint stock enterprises which, although they are SMEs, cannot state with any accuracy the composition of their share ownership due to the way in which their capital is dispersed and the anonymity of their shareholders and cannot therefore know whether they meet the condition of independence;

Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap;

Whereas the threshold of 500 employees is not truly selective, since it encompasses almost all enterprises (99.9 % of the 14 million enterprises) and almost three quarters of the European economy in terms of employment and turnover; furthermore, an enterprise with 500 employees has access to human, financial and technical resources which fall well outside the framework of the medium-sized enterprise, namely ownership and management in the same hands, often family-owned, and lack of a dominant position on the market;

Whereas, not only do enterprises between 250 and 500 employees often have very strong market positions but they also possess very solid management structures in the fields of production, sales, marketing, research and personnel management, which clearly distinguish them from medium-sized enterprises with up to 250 employees; whereas in the latter group, such structures are far more fragile; whereas the threshold of 250 persons employed is therefore a more meaningful reflection of the reality of an SME;

Whereas this threshold of 250 employees is already the most prevalent among the definitions used at Community level and whereas it has been taken up in the legislation of many Member States as a result of the Community guidelines on State aid for SMEs; whereas the EIB had also decided to use this definition for a substantial part of the loans granted in the framework of the 'SME facility' provided for in Decision 94/217/EEC;

Whereas, according to Eurostat figures, the turnover of an enterprise with 250 employees does not exceed ECU 40 million (1994 figures); whereas it would therefore appear reasonable to apply a threshold for turnover of ECU 40 million; whereas recent calculations show that the average ratio between turnover and balance-sheet total is 1:5 or SMEs and small enterprises ([10]), whereas, as a result, the threshold for the balance-sheet total should be fixed at ECU 27 million;

Whereas, however, a distinction must be drawn, within SMEs, between medium-sized enterprises, small enterprises and micro-enterprises; whereas the latter should not be confused with craft enterprises, which will continue to be defined at national level due to their specific characteristics;

Whereas thresholds for small enterprises must be fixed in the same way, meaning thresholds of ECU 7 million for turnover, and ECU 5 million for balance-sheet total;

Whereas the thresholds chosen do not necessarily reflect the average SME or small enterprise but represent ceilings designed to allow all enterprises having the characteristics of an SME or a small enterprise to be included within one or other of the categories;

Whereas the turnover and balance-sheet total thresholds laid down for defining SMEs should be revised as the need arises to take account of changing economic circumstances such as price levels and increases in the productivity of enterprises;

Whereas the Community guidelines on State aids for SMEs will be aligned by replacing the currently used definitions with a reference to those set out in this recommendation;

Whereas it is necessary to provide that when the Fourth Council Directive 78/660/EEC, which affords Member States the right to exempt SMEs from certain obligations relating to the publication of their accounts, is next amended, the Commission will propose that the existing definition be replaced by a reference to this recommendation;

Whereas it would also be desirable for evaluations made of measures in favour of SMEs that the Commission, the Member States, the EIB and the EIF state exactly which enterprises benefit from them, distinguishing various categories of SME according to size, as greater knowledge of the recipients makes it possible to adjust and better target the measures proposed for SMEs, and consequently renders them more effective;

Whereas, given that a certain degree of flexibility must be permitted to the Member States, the EIB and the EIF to fix thresholds lower than the Community thresholds if they wish to direct their measures towards a specific category of SME, these thresholds represent only maximum limits;

Whereas it is also possible for the Member States, the EIB and the EIF, for reasons of administrative simplification, to retain only one criterion, notably that of the number of employees, for the implementation of some of their policies. However, this flexibility does not apply to the various State aid frameworks where the financial criteria must also be respected;

([10]) *Source*: 'BACH' (harmonised accounts) database.

Whereas this recommendation concerns only the definition of SMEs used in Community policies applied within the Community and the European Economic Area,

MAKES THIS RECOMMENDATION:

Article 1

Member States, the European Investment Bank and the European Investment Fund are invited:

— to comply with the provisions set out in Article 1 of the annex for their programmes directed towards 'SMEs', 'medium-sized enterprises', 'small enterprises' or 'micro-enterprises',

— to comply with the ceilings chosen for the turnover and balance-sheet total where they are amended by the Commission in accordance with Article 2 of the annex,

— to take the necessary steps with a view to using the size classes set out in Article 3(2) of the annex, especially where the monitoring of Community financial instruments is concerned.

Article 2

The thresholds specified in Article 1 of the annex are to be regarded as ceilings. Member States, the European Investment Bank and the European Investment Fund may, in certain cases, choose to fix lower thresholds. In implementing certain of their policies, they may also choose to apply only the criterion of number of employees, except in fields to which the various rules on State aid apply.

Article 3

To enable the Commission to evaluate what progress has been made, Member States, the European Investment Bank and the European Investment Fund are invited to inform the Commission, before 31 December 1977, of the measures they have taken to comply with this recommendation.

Article 4

This recommendation concerns the definition of SMEs in Community policies applied within the Community and the European Economic Area and is addressed to the Member States, the European Investment Bank and the European Investment Fund.

ANNEX

DEFINITION OF SMALL AND MEDIUM-SIZED ENTERPRISES ADOPTED BY THE COMMISSION

Article 1

1. Small and medium-sized enterprises, hereinafter referred to as 'SMEs', are defined as enterprises which:

— have fewer than 250 employees, and

— have either,

an annual turnover not exceeding ECU 40 million, or

an annual balance-sheet total not exceeding ECU 27 million,

— conform to the criterion of independence as defined in paragraph 3.

2. Where it is necessary to distinguish between small and medium-sized enterprises, the 'small enterprise' is defined as an enterprise which:

— has fewer than 50 employees and

— has either,

an annual turnover not exceeding ECU 7 million, or

an annual balance-sheet total not exceeding ECU 5 million,

— conforms to the criterion of independence as defined in paragraph 3.

3. Independent enterprises are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise, whichever may apply. This threshold may be exceeded in the following two cases:

— if the enterprise is held by public investment corporations, venture capital companies or institutional investors, provided no control is exercised either individually or jointly,

— if the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise declares that it can legitimately presume that it is not owned as to 25 % or more by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply.

4. In calculating the thresholds referred to in paragraphs 1 and 2, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25 % or more of the capital or of the voting rights.

5. Where it is necessary to distinguish micro-enterprises from other SMEs, these are defined as enterprises having fewer than 10 employees.

6. Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of 'SME', 'medium-sized enterprise', 'small enterprise' or 'micro-enterprise' only if the phenomenon is repeated over two consecutive financial years.

7. The number of persons employed corresponds to the number of annual working units (AWU), that is to say, the number of full-time workers employed during one year with part-time and seasonal workers being fractions of AWU. The reference year to be considered is that of the last approved accounting period.

8. The turnover and balance-sheet total thresholds are those of the last approved 12-month accounting period. In the case of newly-established enterprises whose accounts have not yet been approved, the thresholds to apply shall be derived from a reliable estimate made in the course of the financial year.

Article 2

The Commission will amend the ceilings chosen for the turnover and balance-sheet total as the need arises and normally every four years from the adoption of this recommendation, to take account of changing economic circumstances in the Community.

Article 3

1. The Commission undertakes to adopt the appropriate measures to ensure that the definition of SMEs, as set out in Article 1, applies to all programmes managed by it in which the terms 'SME', 'medium-sized enterprise', 'small enterprise' or 'micro-enterprise' are mentioned.

2. The Commission undertakes to adopt the appropriate measures to adapt the statistics that it produces in line with the following size-classes:

— 0 employees,

— 1 to 9 employees,

— 10 to 49 employees,

— 50 to 249 employees,

— 250 to 499 employees,

— 500 employees plus.

3. Current Community programmes defining SMEs with criteria other than those mentioned in Article 1 will continue, during a transitional period, to be implemented to the benefit of the enterprises which were considered SMEs when these programmes were adopted. Any modification of the SME definition within these programmes can be made only by adopting the definition contained herein and by replacing the divergent definition with a reference to this recommendation. This transitional period should in principle end at the latest on 31 December 1997. However, legally binding commitments entered into by the Commission on the basis of these programmes will remain unaffected.

4. When the Fourth Council Directive 78/660/EEC is amended, the Commission will propose that the existing criteria for defining SMEs be replaced by a reference to the definition contained in this recommendation.

5. Any provisions adopted by the Commission which mention the terms 'SME', 'medium-sized enterprise', 'small enterprise' or 'micro-enterprise', or any other such term, will refer to the definition contained in this recommendation.

Community guidelines on State aid for small and medium-sized enterprises (*)

1. INTRODUCTION

1.1. The Community guidelines on State aid for small and medium-sized enterprises (SMEs) (1), which the Commission adopted on 20 May 1992, stated that the Commission would review their operation no later than three years after the date of their publication. The findings of that review have been submitted to the Member States. On the basis of those findings the Commission has decided to amend or clarify a number of points in the 1992 guidelines. The *de minimis* rule, which applies irrespective of the size of the recipient firm, will now be covered by a separate notice rendering it more flexible (2). Aid towards intangible investment in the form of transfers of technology will be accorded the same favourable treatment as tangible investment. The definition of SMEs has been brought into line with the harmonised definition which the Commission has adopted (3). The main purpose of these changes is to arrive at rules which are clearer and simpler to apply, and to take account of developments in Community policy, particularly the recommendations set out in the White Paper on growth, competitiveness and employment.

1.2. At its meeting in Cannes in June 1995, the European Council emphasised in its conclusions that SMEs 'play a decisive role in job creation and, more generally, act as a factor of social stability and economic drive'. But it is generally accepted that SMEs suffer from a number of handicaps that can slow down their development (4). One of the main such handicaps is the difficulty in obtaining capital and credit, the chief causes of which are imperfect information, the risk-shy nature of financial markets and the limited guarantees that SMEs are in a position to offer; SMEs' limited resources also restrict their access to information, notably regarding new technology and potential markets. The introduction of new regulatory arrangements often entails higher costs for SMEs. The imperfections in the market which limit the socially desirable development of SMEs justify the favourable consideration which the Commission has traditionally been prepared to give to State aid to SMEs, provided that such aid does not affect trade to a disproportionate extent relative to the contribution it makes to the achievement of Community objectives allowed by Article 92(3)(c). The Community has in fact itself been implementing an action programme for SMEs (5).

1.3. The approach which Commission competition policy takes towards State aid for SMEs has to be consistent with its other policies, on such matters as enterprise, industrial competitiveness, research and technological development, and economic and social cohesion. The present guidelines are being published in order to inform Member States of the rules the Commission intends to apply when it vets aid to SMEs pursuant to Articles 92 and 93 of the EC Treaty, so that Member States know what to expect from the vetting process and in order to ensure that they are treated equally. For their part, Member States must satisfy themselves that any aid they propose to grant is transparent and that the Commission has been given all the information it needs to assess the impact on competition. The rules set out here apply regardless of the form taken by the aid.

(*) OJ C 213, 23.7.1996, p. 4.
(1) OJ C 213, 19.8.1992, p. 2.
(2) Commission notice on the *de minimis* rule for State aid (OJ C 68, 6. 3. 1996, p. 9).
(3) Commission recommendation of 3 April 1996 concerning the definition of SMEs (OJ L 107, 30.4.1996, p. 4).
(4) Report from the Commission to the European Council meeting in Madrid CSE(95) 2087, p. 3.
(5) See, for example, 'Community actions to assist SMEs and the craft sector': 1. Fourth Commission activity report on enterprise policy — Year 1993; 2. Commission report on coordination of the activities in favour of small and medium-sized enterprises (SMEs) (COM(94) 221 final, 7.9.1994).

2. WHEN COMMUNITY MONITORING COMES INTO PLAY

2.1. Article 92(1) of the EC Treaty imposes a general ban, subject to certain exceptions, on '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'. State aid given to SMEs will usually be caught by this provision. Such aid confers an advantage on particular firms, unlike general measures, which may benefit all enterprises throughout the economy. And it may affect trade between Member States because many SMEs export part of their output to other Member States and because in most industries a strengthening in the position of SMEs on the local or national market will make it more difficult for producers from elsewhere in the Community to penetrate that market.

Nevertheless, some SMEs, and certain micro-enterprises in particular, carry on businesses in which there is no trade between Member States (providing local services, for example). Aid given to them for activities of this sort falls outside the scope of Article 92(1).

2.2. The *de minimis* rule

Any aid given to a firm is capable of distorting competition; but not all aid has a perceptible effect on trade and competition betwen Member States. This is particularly true where the amount of aid involved is small, although such aid is not, as a general rule, intended exclusively for SMEs. Small amounts of aid are frequently granted under schemes administered by local or regional authorities.

In 1992, in an effort to reduce the administrative burden on the Member States and on the Commission itself — which ought to be left to concentrate its resources on cases of real importance to the Community — and in order to simplify matters for SMEs, the Commission introduced what is known as a *de minimis* rule ([6]): this rule sets a threshold figure below which Article 92(1) can be said not to apply, so that a measure need no longer be notified in advance to the Commission pursuant to Article 93(3).

3. SCOPE OF THE GUIDELINES

3.1. The Commission will follow these guidelines when it considers whether the exemption in Article 92(3)(c) applies to State aid granted to SMEs.

3.2. Definition of SMEs

For the purpose of applying the guidelines, an SME is defined in accordance with the recommendation concerning the definition of SMEs adopted by the Commission on 3 April 1996 ([7]). On the current definition, whose ceilings for turnover and balance-sheet total can be reviewed every four years in accordance with Article 2 of the annex to the recommendation, an SME is an enterprise which:

— has fewer than 250 employees ([8]), and

([6]) The version currently in force is the one set out in the Commission notice on the *de minimis* rule for State aid, referred to above. (See footnote 2.)

([7]) See footnote 3.

([8]) The number of employees is the number of annual work units (AWUs), that is to say the number of wage- and salary-earners employed full-time for a whole year, with part-time or seasonal work being counted as fractions of a unit. The year to be taken is the last completed financial year.

— has either an annual turnover (9) not exceeding ECU 40 million, or an annual balance-sheet total not exceeding ECU 27 million, and

— conforms to the criterion of independence defined below.

Where it is necessary to distinguish between 'small' and 'medium-sized' enterprises, a 'small' enterprise is defined as one which:

— has fewer than 50 employees, and

— has either an annual turnover not exceeding ECU 7 million, or an annual balance-sheet total not exceeding ECU 5 million, and

— conforms to the criterion of independence defined below.

An enterprise is considered independent unless 25 % or more of the capital or of the voting rights is owned by an enterprise falling outside the definition of an SME or of a small enterprise, whichever may apply, or jointly by several such enterprises. This ceiling may be exceeded in two cases:

— if the enterprise is held by public investment corporations, venture capital companies or institutional investors, provided no control is exercised either individually or jointly,

— if the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise declares that it can legitimately presume that it is not owned as to 25 % or more by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply.

The three tests — workforce, turnover or balance-sheet total, and independence — are cumulative: all three must be satisfied. The independence test, according to which a large enterprise must not hold 25 % or more of the SME's capital, is based on practice in a number of Member States where this percentage is the threshold at which supervision becomes possible. In order to ensure that only genuinely independent SMEs are included, there has to be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than an individual SME. In calculating the thresholds referred to above, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25 % or more of the capital or of the voting rights.

3.3. Industries covered

The present guidelines apply to aid granted to SMEs in all industries, with the exception of those where special Community rules governing State aid have been laid down under the EC or ECSC Treaty. Any aid given to SMEs in those industries is subject to the relevant rules for the particular industry. Such rules currently exist for steel, coal, shipbuilding, synthetic fibres, the motor industry (10), fisheries and transport, and for products of Annex II to the Treaty (for activities at the production level plus those at the processing and/or marketing level).

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(9) The 'turnover' referred to here is the 'net turnover' defined in Article 28 of the Council's fourth company law directive on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11), as last amended by Directive 94/8/EC (OJ L 82, 25.3.1994, p. 33), that is to say 'the amounts derived from the sale of products and the provision of services falling within the company's ordinary activities, after deduction of sales rebates and of value added tax and other taxes directly linked to the turnover'.

(10) The rules will apply for as long as 'codes', 'guidelines', 'frameworks' or the like are in force in the two last-named sectors.

4. THE TESTS APPLIED IN ASSESSING AID

4.1. General principles

The Commission may consider aid compatible with the common market in accordance with Article 92(3)(c) if it is intended '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'. To qualify for exemption under this provision, a State aid measure must in the first place be in the nature of an incentive: it must under no circumstances have the sole effect of continuously or periodically reducing the costs which the enterprise would normally have to bear, while otherwise leaving the status quo untouched, as in the case of operating aid ([11]), and it must be necessary in order to achieve objectives which market forces alone would not secure. The objectives pursued must be in the Community interest. Lastly, the aid must be proportionate to the handicaps which have to be overcome in order to secure the socioeconomic benefits deemed to be desirable on grounds of the Community interest: the positive effect must outweigh the damaging effect which State aid has on competition and trade.

4.2. Purpose of the aid and admissible intensities

4.2.1. Tangible investment

The 1992 guidelines did not define 'investment' for the purposes of the thresholds it laid down in point 4.1. In practice, the Commission has taken the view, for reasons of consistency, that the definition applied should be the one laid down in the principles of coordination of regional aid systems ([12]): 'investment' must be investment in fixed assets:

— 'in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalisation, restructuring or modernisation)',

or

— 'by way of take-over of an establishment which has closed or which would have closed had such take-over not taken place.'

The intensity is to be calculated by reference to the eligible costs, namely the actual costs of land, buildings and plant. In the case of a takeover of an establishment the selling price of the assets should be looked at.

Outside areas qualifying for domestic regional aid ([13]), the Commission may grant exemption pursuant to Article 92(3)(c) for aid to SMEs where the intensity of the aid, measured in gross grant equivalent ([14]) as a proportion of the costs referred to in the preceding paragraph, does not exceed:

([11]) There are certain exceptional circumstances in which operating aid is admissible in regions qualifying for regional aid pursuant to Article 92(3)(a). See the Commission communication on the method for applying Article 92(3)(a) and (c) to regional aid, and in particular point I.6 (OJ C 212, 12.8.1988, p. 2).

([12]) OJ C 31, 3.2.1979, p. 9.

([13]) See the Commission communication on the method for applying Article 92(3)(a) and (c) to regional aid, published in OJ C 212, 12.8.1988, p. 2, as amended by the Commission notice published in OJ C 364, 20.12.1994, p. 8).

([14]) That is to say, the nominal (before-tax) value of grants and the discounted before-tax value of interest subsidies as a proportion of the investment cost. Net figures are after tax.

— 15 % in the case of small enterprises, or

— 7.5 % in the case of medium-sized enterprises.

In assisted areas, the Commission may approve aid to SMEs which exceeds the level of regional investment aid it has authorised for large enterprises in the area:

— by 10 percentage points gross in areas covered by Article 92(3)(c), provided the total does not exceed 30 % net,

— by 15 percentage points gross in areas covered by Article 92(3)(a), provided the total does not exceed 75 % net.

The aid ceiling will apply regardless of whether the aid is provided entirely from domestic sources or is part-financed by the Community from the Structural Funds, and more especially the European Regional Development Fund (ERDF).

Where the Member State proposes financing in respect of costs other than the eligible costs defined above, the aid will have to be recalculated by reference to the eligible costs ([15]). The Member States are also free to grant aid within the limits authorised by the *de minimis* rule towards expenditure which would not be eligible under the definitions given in the present guidelines.

4.2.2. Intangible investment in the form of transfers of technology

The Commission's White Paper on growth, competitiveness and employment stresses the important role which the promotion of intangible investment has to play in a general policy on competitiveness and recommends that the tests of the acceptability of aid to industry be reviewed in order to eliminate the bias in favour of tangible investment. The Commission's sympathetic approach to aid for R&D, training and consultancy should accordingly be broadened to include aid that is designed to encourage SMEs to use advanced technology which they would not have been able to develop themselves, by authorising limited assistance towards the transfer of technology to SMEs from research laboratories or from other firms. Again, inequality in the information available to licensors and licensees regarding new technology, and other types of market imperfection associated with technology transfers, along with the irrecoverable character of the costs of acquiring specific technology or know-how, may provide justification for public assistance towards spending of this kind by SMEs, while limiting the impact on competition. For SMEs outside areas qualifying for domestic regional aid, therefore, the Commission may authorise aid which does not exceed the following gross intensities, measured as a percentage of the cost of acquiring patent rights, licences, know-how or unpatended technical knowledge ([16]):

— 15 % in the case of small enterprises, or

— 7.5 % in the case of medium-sized enterprises.

In assisted areas the Commission may approve aid to SMEs which exceeds the level of regional investment aid it has authorised for large enterprises in the area:

— by 10 percentage points gross in areas covered by Article 92(3)(c), provided the total does not exceed 30 % net,

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([15]) This rule does not apply to costs which are eligible for the classes of aid described below.

([16]) The rules which follow do not concern the costs of acquiring patent rights, licences, etc. which form part of the eligible costs of an R&D project put forward by the recipient in accordance with the fourth indent of Annex II to the Community framework on State aids to research and development (OJ C 45, 17.2.1996, p. 5) and which qualify for the rates admissible for the type of R&D project of which they form part.

— by 15 percentage points gross in areas covered by Article 92(3)(a), provided the total does not exceed 75 % net.

As at 4.2.1, the aid ceiling will apply regardless of whether the aid is provided entirely from domestic sources or is part-financed by the Community from the Structural Funds, and more especially the ERDF.

4.2.3. Consultancy services, training and dissemination of knowledge

Aid of up to 50 % gross will generally be allowed for consultancy services provided by outside consultants to new or established SMEs or for the training given to their staff in such fields as management, financial matters, new technology (especially information technology), pollution control, protection of intellectual property rights or the like, or for the purpose of assessing the feasibility of new ventures. But each scheme will be judged on its merits, with particular reference to the distance of the activity from the market place, any cost ceilings for individual firms, any possibilities of combination with other forms of aid, and other relevant factors. In certain exceptional circumstances, the Commission may allow aid of more than 50 %. Assisted areas are one such case. Aid for general information campaigns may also qualify for a higher intensity if the financial benefit to the individual firm is small.

It is important to specify that such measures do not cover:

— aid relating to investment liable to be entered on the assets side of the enterprise's balance sheet as intangible assets (costs of R&D, concessions, patents, licences, etc.) and dealt with at points 4.2.2 and 4.2.5, or

— continuous or periodic aid not acting as an incentive and relating to the enterprise's usual operating expenditure (routine tax consultancy services, regular legal services, advertising, etc.).

4.2.4. Aid for the transfer of SMEs

In its recommendation of 7 December 1994 on the transfer of small and medium-sized enterprises ([17]), the Commission drew attention to the problem of SMEs, and particularly family businesses, being forced to cease trading owing to insuperable difficulties in transferring them. If the buyer is an SME too, it may be given aid to help with the takeover in accordance with the rules on aid to tangible investment at point 4.2.1.

4.2.5. Aid for environmental protection

Aid for environmental protection will be considered in the light of the Community guidelines on State aid for environmental protection ([18]). Environmental aid granted to SMEs may be up to 10 percentage points gross above the rate ordinarily allowed in the case of large enterprises.

4.2.6. Aid for R&D

Aid for R&D will be considered in the light of the Community framework for State aid for research and development ([19]). R&D aid granted to SMEs may be up to 10 percentage points gross above the rate ordinarily allowed in the case of large enterprises.

([17]) OJ L 385, 31.12.1994, p. 14. See also the Commission communication on that recommendation (OJ C 400, 31.12.1994, p. 1).
([18]) The version which currently applies is the one published in OJ C 72, 10.3.1994, p. 3.
([19]) The version which currently applies is the one published in OJ C 45, 17.2.1996, p. 5.

4.2.7. Aid for employment

Aid for employment will be considered in the light of the guidelines on aid to employment ([20]). In particular, the Commission will be favourably disposed towards aid to create new jobs in SMEs.

4.2.8. Aid for other purposes

The majority of the aid schemes for SMEs which are notified to the Commission fall into the categories listed above. But the Commission may be prepared to authorise aid towards other justified measures designed to help SMEs, e.g. by encouraging cooperation between them, or towards measures to promote culture and heritage conservation, provided that they do not affect trading conditions and competition within the Community to an extent that is contrary to the common interest.

5. PROCEDURAL ASPECTS

5.1. The present guidelines replace the Community guidelines on State aid for small and medium-sized enterprises (SMEs) adopted by the Commission on 20 May 1992 ([21]). They shall apply as from the date of their publication in the *Official Journal of the European Communities*.

5.2. The guidelines do not affect the obligation imposed on Member States by Article 93(3) of the EC Treaty to inform the Commission of all schemes of assistance to SMEs and of any alteration to such schemes, unless the scheme is *de minimis*. To facilitate matters for both the Member States and its departments, the Commission sent Member States a standard form for such notifications by letter dated 22 February 1994 ([22]). For cases where the amount or intensity of the aid is low, the Commission has also introduced a simplified form and an accelerated clearance procedure ([23]).

5.3. These guidelines are without prejudice to schemes already authorised when the guidelines are published, but such schemes may be reviewed pursuant to Article 93(1).

5.4. The operation of these guidelines will be reviewed after they have been in force for three years; they may be revised in consequence if necessary.

([20]) The version which currently applies is the one published in OJ C 334, 12.12.1995, p. 4.
([21]) See footnote 1.
([22]) Ref. SG(94) D/2472.
([23]) The version currently in force is the one set out in the Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes, published in OJ C 213, 19.8.1992, p. 10.

V — Employment

Guidelines on aid to employment (*)

I. INTRODUCTION

1. Continued unemployment at unacceptably high levels is still the chief economic and social problem facing the Community today. Following a slight decline in unemployment between 1985 and 1990, slower growth has aggravated the employment situation for four years running. In the first quarter of 1995 there were some 18 million unemployed people in the Community, representing 11 % of the labour force.

Unemployment is distributed unevenly between social groups and between regions. More than one in five young people in the Community are unemployed, while the unemployment rate among women, at 12.6 %, is also above the average. Low-skilled workers are particularly affected by unemployment: it is estimated that three quarters of the unemployed fall into this category.

Experience in most Member States shows that, once people become unemployed, they can expect to spend a relatively long period looking for a new job because they will have become less employable. This phenomenon is responsible for an unduly high proportion of the long-term unemployed in Europe (over 40 % of total unemployed), the upshot being increasingly widespread social exclusion.

2. With the upturn in economic activity, it is expected that the coming years will see a positive trend in job creation. However, this trend will not be enough to reduce the unemployment rate to socially acceptable levels. It is now accepted that structural reasons lie behind the persistently high rates of unemployment in Europe, and this situation calls for specific policies to improve labour-market adaptability.

Although employment policy remains an area of national responsibility, the Community must play a major coordinating role in encouraging exchanges of information between Member States, promoting good practices and stimulating the quest for new solutions. The White Paper on growth, competitiveness and employment diagnoses the reasons for the inadequate employment performance in Europe and proposes guidelines for setting in place a production model capable of creating more jobs. These guidelines were taken up by the European Council, first in Brussels and then in Essen in December 1994. They were confirmed at the European Council meeting in Cannes. In particular, the Member States have drawn up a package of recommendations covering five priority areas and have established a procedure for monitoring progress:

— boosting investment in education and training,

— improving internal and external flexibility mechanisms in order to enhance the employment-content of growth,

(*) OJ C 334, 12.12.1995, p. 4.

— reducing indirect labour costs, in particular by reducing direct taxation of labour,

— improving the effectiveness of active policies, notably by redirecting public expenditure on passive income support for the unemployed,

— stepping up measures to promote the employment of underprivileged groups in the labour market, such as the long-term unemployed, young people and older workers.

3. Against this background, tax and financial measures will have to play an increasing role in encouraging firms to hire workers experiencing utmost difficulty in entering the labour market. Although they might be less effective because of substitution or windfall effects, grants per job created for the long-term unemployed, for example, and targeted exemptions from social security contributions reduce labour costs at the bottom end and thus offset the difference associated with lower-than-average productivity.

The same type of measures may also give firms an incentive to invest more in vocational training. In such cases, the grant or tax concession must reflect the externalities associated with the worker exploiting the newly acquired knowledge on the labour market.

Although the objective of such measures is to improve the situation of workers on the labour market, it must be recognised that firms also benefit in that they are able to reduce their labour costs because of the intermediary role they play in implementing tax and financial measures. That is why steps must be taken to ensure that the foreseeable proliferation of measures to promote employment, in response to the White Paper guidelines and the recommendations adopted at Essen, does not adversely affect the Commission's parallel efforts to reduce artificial distortions of competition under Articles 92 and 93 of the EC Treaty.

These guidelines pursue a number of objectives:

(i) to clarify the interpretation of Articles 92 and 93 of the EC Treaty with regard to State aid in the field of employment in order to ensure greater transparency of notification decisions under Article 93;

(ii) to ensure consistency between the rules of competition and the implementation of the policies needed to combat unemployment in Europe, in accordance with the guidelines of the White Paper and the conclusions of the Essen Council;

(iii) to make explicit, by defining the different types of aid and their objectives, the approach normally taken by the Commission, namely to give sympathetic consideration to State aid designed to improve the employment situation.

II. SCOPE OF ARTICLE 92(1) OF THE EC TREATY

4. The guidelines presented here cover only those measures falling within the scope of Article 92(1) of the EC Treaty, which stipulates 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'.

5. A number of employment-policy measures are not caught by Article 92(1) of the EC Treaty because:

— they constitute aid to individuals that does not favour certain undertakings or the production of certain goods, or

— they do not affect trade between Member States, or

— they are 'general' measures.

This is clearly the case, in particular, with measures to provide guidance and counselling, general assistance and training for the unemployed (aid to individuals that does not favour certain undertakings or the production of certain goods) and aid designed to improve labour law or to adapt the education system (general measures).

A. Aid to individuals that does not favour certain undertakings or the production of certain goods

6. Measures to assist individuals the purpose or effect of which is not to favour certain undertakings or the production of certain goods do not constitute State aid within the meaning of Article 92(1) of the EC Treaty.

In so far as such measures apply automatically to individuals on the basis of objective criteria and without favouring certain undertakings or the production of certain goods, they do not constitute State aid if they are designed:

— to improve the personal situation of workers on the labour market or to make it possible for them to find work or become socially integrated, in particular by way of vocational training or apprenticeships,

— to supplement the income of certain workers,

— to encourage the employment of women in occupations traditionally carried on by men or the employment of individuals from ethnic minorities,

— to foster mobility of workers, the creation of self-employed activities or the recruitment of certain categories of worker having to contend with temporary socio-vocational disadvantages,

— to promote the employment of persons suffering from permanent physical or mental disabilities.

B. Effect on trade between Member States

7. Aid is caught by Article 92(1) of the EC Treaty only if it affects trade between Member States. Thus, employment aid in respect of activities that do not involve trade between Member States (e.g. neighbourhood care services, certain local employment initiatives) does not fall within the scope of Article 92(1). The Commission considers that this is also the case with *de minimis* aid[1], which encompasses most forms of aid for promoting self-employed activities.

C. General measures or State aid

8. The distinction between general measures and State aid lies outside the scope of these guidelines and is currently being discussed by the Commission.

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[1] Point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992), and Commission letter to the Member States dated 23 March 1993 (D/06878).

It should be noted that a number of general measures may affect competitive conditions and trade between Member States as much as State aid but, since these measures do not constitute State aid within the meaning of Article 92(1) of the EC Treaty, the elimination of any distortions of competition that they might cause is covered not by the monitoring of State aid provided for in Articles 92 to 94 of the EC Treaty but by the implementation of Articles 101 and 102 concerning the removal of distortions caused by the differences between certain provisions in Member States which distort the conditions of competition in the common market.

9. Employment is also promoted by other measures such as those to promote training and the acquisitions of new skills. In this respect, it may be useful to point out that in many cases the subsidies for vocational training/retraining do not constitute State aid caught by Articles 92 and 93 of the EC Treaty and that, where such measures fall within the scope of Article 92(1) of the EC Treaty, the Commission usually gives them sympathetic consideration.

The same is true of measures to improve working conditions.

III. STATE AID TO EMPLOYMENT

10. One point needs to be made clear concerning the scope of these guidelines; aid to employment, as covered by these guidelines, is aid not linked to investment.

Even where investment aid is calculated per job created or includes premiums for job creation, it does not constitute employment aid as such since it is not directly intended to create or maintain jobs. its effects in combating unemployment are indirect, through the realisation of productive investment to bring about a structural change in the firm. The reference to jobs created is only one criterion for assessing aid to the investment for which the aid is intended. In view of its purpose and its permanent effects on the industrial structure, such aid should be treated just like any other investment aid and should be subject to the normal assessment criteria.

A. General comments

11. By granting employment aid to certain firms or to the production of certain goods, the authorities are taking over part of those firms' labour costs, which are normal expenditure incurred in their own interest, and conferring a financial advantage that improves their competitive position. In so far as the products or services concerned are in competition with those of firms from other Member States, such aid is likely to distort competition and affect trade between Member States; consequently, it is, in principle, incompatible with the common market. Within the single market, aid granted to reduce labour costs can lead to distortions of intra-Community competition and deflections in the allocation of resources and mobile investment, to the shifting of unemployment from one country to another, and to relocation.

12. The Commission considers that, without rigorous controls and strict limits, employment aid can have harmful macroeconomic effects which cancel out its immediate effects on job creation. If the aid is used to protect firms exposed to intra-Community competition, it could have the effect of delaying adjustments needed to ensure the competitiveness of European industry. In the absence of rigorous controls, the fact that such aid will probably be concentrated in the most prosperous regions runs counter to the objective of economic and social cohesion. Care must also be taken to ensure that the granting of State aid does not lead to escalating subsidisation, making the aid ineffective and wasting public money on all sides. Lastly, the danger is that, if granted in an uncontrolled fashion,

this type of aid will simply shift unemployment elsewhere without helping to resolve the employment problem in the European Union and will therefore distort competition to an extent contrary to the common interest.

13. The Commission has traditionally been sympathetic to employment aid, particularly where it is intended to encourage firms to create jobs or to hire individuals who face particular difficulties in finding work. This attitude is justified by the fact that the lower productivity of these workers reduces the financial advantage accruing to the firm and by the fact that the workers also benefit from the measure and are likely to be excluded from the labour market unless employers are offered such incentives. This paper confirms that position.

B. Forms of aid

14. Employment aid introduced by the Member States usually takes the form of grants (single or monthly payments) and exemptions for certain firms from employers' social security contributions or from certain taxes. In some cases the different types of aid are combined.

C. Types of employment aid

15. The concepts of aid to maintain jobs and aid to create jobs need clarification because they are of major relevance to whether the aid is compatible with the common market.

16. Aid to maintain jobs means support given to a firm to persuade it not to lay off its workers, with the subsidy usually being calculated on the basis of the number of employees at the time the aid is granted.

17. Aid to create jobs, on the other hand, provides employment for workers who have never had a job or who have lost their previous job, and is calculated on the basis of the number of jobs created. It should be made clear that job creation refers to net job creation, i.e. the creation of an additional job in relation to the (average) workforce (over a period of time) of the firm concerned. Simply replacing a worker without actually increasing the workforce, and hence without creating new jobs, does not constitute genuine job creation.

18. One form of job creation, unusual because there is no increase in the number of hours worked in the firm, is job sharing, i.e. apportionment of the overall amount of available work between a larger number of jobs with a proportionally lower number of hours worked.

IV. APPLICATION OF THE DEROGATIONS IN ARTICLE 92(2) AND (3) OF THE EC TREATY

19. Where aid to promote employment is caught by the ban laid down in Article 92(1) of the EC Treaty, an examination must be made of whether it qualifies for one of the derogations in Article 92(2) and (3). Here a distinction must be made between aid that creates new jobs and aid that maintains existing jobs.

20. The Commission is generally sympathetic to aid intended to create jobs. Despite the risks involved for intra-Community competition, such aid improves the employment content of growth. Consequently, taking due account of the application of the specific sets of rules governing certain branches of industry or agriculture, and in so far as the amount of aid per worker is justified and does not represent too high a proportion of the firm's production costs, it may be concluded that, when a

firm makes this type of effort, the aid it receives for the purpose generally qualifies for the derogation in Article 92(3)(c) in that it is intended to facilitate the development of certain activities, provided that it does not adversely affect trading conditions to an extent contrary to the common interest.

21. In assessing employment aid, the Commission will apply the following criteria:

— It will be favourably disposed towards aid to create new jobs in SMEs ([2]) and in regions eligible for regional aid ([3]). Outside these two categories, it will also look favourably upon aid to encourage firms to take on certain groups of workers experiencing particular difficulties entering or re-entering the labour market. In the latter case, there is no need for net job creation, provided that the post falls vacant following voluntary departure and not redundancy.

— It will also be sympathetic towards aid to promote job sharing, which allows the overall amount of work available to be distributed among a larger number of posts with shorter working hours, thereby offering the possibility of (part-time) work to a greater number of people.

— For aid in the preceding categories to be viewed favourably, the Commission will also scrutinise the terms of the employment contract, in particular compliance with the obligation to hire workers for an indefinite period and to maintain newly created jobs for a minimum period, conditions which ensure that the job created is a stable one. Any other guarantee of the permanence of new jobs, particularly the arrangements for payment of the aid, will also be taken into account.

— The Commission will make sure that the level of aid does not exceed that which is necessary to provide an incentive to create jobs, taking account, where appropriate, of any difficulties facing SMEs and/or disadvantages affecting the region concerned. The aid must be temporary.

— If the creation of jobs for which aid is granted is combined with the training or retraining of the workers concerned, this will make a particularly positive contribution to a favourable assessment by the Commission.

22. Aid to maintain jobs, which is similar to operating aid, will be authorised only under the following conditions:

Such aid may be authorised where, in accordance with Article 92(2)(b) of the EC Treaty, it is intended to make good the damage caused by natural disasters or exceptional occurrences. Under certain conditions, aid to maintain jobs may also be authorised in regions eligible for the derogation under Article 92(3)(a) of the EC Treaty concerning the economic development of areas where the standard of living is abnormally low or where there is serious underemployment ([4]).

Where aid to maintain jobs is granted as part of a rescue, restructuring or conversion plan for an ailing firm, it will have to be notified and will be assessed applying the relevant Commission guidelines ([5]).

Naturally, these considerations concern solely aid to maintain jobs and the Member States are free to take any appropriate measures to ensure that employment is maintained by general measures, such as a general reduction in taxes and social security contributions paid by firms.

23. Aid to create jobs that is limited to one or more sensitive sectors experiencing overcapacity or in crisis is also generally viewed less favourably than aid to create new jobs that is available to the economy as a whole.

([2]) Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992).
([3]) Commission communication on regional aid systems (OJ C 31, 3.2.1979).
([4]) Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988).
([5]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12).

Such sectoral aid constitutes an advantage for the sector(s) concerned which improves their competitive position in relation to firms from other Member States. Aid that reduces wage costs throughout one or more productive sectors reduces production costs in those sectors, and this enables them to improve their market share to the detriment of their Community competitors both within the Member State concerned and for exports inside and outside the Community, with all the attendant implications in terms of a worsening of the employment situation in those sectors in the other Member States. Consequently, the protective effect of such aid for the sector(s) in question, in particular those in crisis, and its adverse effects on employment in competing sectors in other Member States generally outweigh the common interest involved in active measures to reduce unemployment; the Commission will usually consider such aid to be incompatible with the common market. However, where such aid is granted in a region affected by serious underemployment, the Commission will take this fact into account.

The Commission will, however, be more favourably disposed towards aid to create new jobs where the jobs are in growth niche markets or sub-sectors that hold out the prospect of considerable job creation.

V. NOTIFICATION

24. The measures identified in this document as not constituting State aid caught by Article 92(1) of the EC Treaty do not need to be notified in advance ([6]). However, all employment aid schemes and all cases of ad hoc employment aid outside authorised schemes must be notified in advance to the Commission pursuant to Article 93(3), in good time for it to give its opinion on their compatibility with the common market.

25. Employment aid schemes which have been authorised by the Commission in the past may have to be reviewed in accordance with Article 93(1).

26. The Commission supports the development and implementation of structural policies including active labour market policies which establish fair competition between, on the one hand, the unemployed and those in work who are vulnerable to or affected by structural economic change and, on the other hand, those in more stable employment. Most of the measures taken by Member States in this regard apply throughout their economies and do not constitute State aid at all. However, when they favour certain undertakings or the production of certain goods, they may give rise to State aid within the meaning of Article 92(1) of the EC Treaty. Such State aid measures must be notified to the Commission pursuant to Article 93(3), unless they are within the limits of the *de minimis* rule. In order to reflect the urgency of measures to deal with the current unemployment crisis in the EU and to support the promotion of structural employment policies, in particular by means of active labour market measures, the Commission will adopt an accelerated procedure for the notification of employment and training aid schemes as follows:

— notifications on the form ([7]) prescribed for use in the 'accelerated procedure' will be processed within twenty working days of receipt,

— the Commission will make the necessary arrangements to allow Member States to transmit notifications and other relevant information in electronic form,

— finally, where Member State measures are communicated to the Commission as part of a programme under the European Social Fund (ESF) and State aid measures are identified as such, the Commission

([6]) Point 5 of these guidelines.
([7]) As amended to deal with the specific characteristics of employment aid measures.

will, as a general rule, adopt a single decision on the ESF and State aid aspects of the measures. Where the Member State wishes to avail itself of the accelerated procedure in respect of certain measures, it will present the information required on the prescribed form. The Commission will act as provided for in the first indent above.

27. Aid granted without advance notification to the Commission pursuant to Article 93(3) and not authorised by it will be illegal and, if it is declared incompatible with the EC Treaty, the Member States concerned will have to recover the aid wrongfully paid.

VI. CONCLUSION

28. If the Commission concludes, after examining employment aid schemes planned by the Member States and subject to notification, that the arrangements and conditions conform to these guidelines, it may regard them as compatible with the common market by virtue of the derogation in Article 92(3)(c), which applies to aid to facilitate the development of certain activities without adversely affecting trading conditions to an extent contrary to the common interest.

29. However, where aid to employment concerns certain sectors, firms or categories of aid which are governed by specific Community codes, it may be regarded as compatible with the common market only if it complies with the conditions laid down in those codes.

30. A report on the application of these guidelines will be submitted and, if necessary, the guidelines will be reviewed five years after they enter into force.

Notice on monitoring of State aid and reduction of labour costs (*)

INTRODUCTION

1. Job creation and combating unemployment are a priority of Community policy. Reducing labour costs is generally considered to be a potential means of improving the employment situation, particularly at the lower-skilled end of the market. The Commission intends to ensure that there is consistency between the implementation of policies necessary to combat unemployment in the European Union and its competition policy. Most labour-cost-reducing measures do not constitute State aid. Where job-creating measures have fallen within the scope of the State aid rules, the Commission has traditionally adopted a favourable attitude towards them. This communication has a twofold objective. Firstly, it sets out to indicate the reasons why the Commission is nevertheless unable, under the State aid rules, to take a positive stance towards some of the measures which have been implemented or are planned by Member States. Secondly, it aims to propose alternative courses of action which are both effective in terms of job creation and which do not pose the problem of compatibility with the competition rules.

CONTEXT

2. In December 1993, the Commission called on the Member States, in its White Paper on growth, competitiveness and employment (1), to 'seek to address the present disincentives to employing less skilled workers'. The European development system is characterised by inadequate use of human resources and excessive use of environmental resources. This imbalance should be corrected by means of 'a range of possible measures, including:

— adjusting taxation systems as they affect employers, notably by making employers' non-wage costs neutral or progressive, rather than regressive as they generally are at the moment..., in order to encourage the provision of more jobs for the relatively less-skilled by reducing their cost to employers...,

— lowering the relative cost of labour with respect to the other production factors (capital, energy and non-energy inputs), for example by reducing the employers' social security contributions and increasing revenue through other means...'.

3. Among the measures advocated by the Essen European Council in December 1994 to improve the employment situation is that of 'reducing non-wage labour costs extensively enough to ensure that there is a noticeable effect on decisions concerning the taking-on of employees and in particular of unqualified employees' (2). Likewise, the Madrid European Council in December 1995 considered it a priority to ensure 'a pattern of non-wage labour costs appropriate to unemployment-reducing objectives'. Elimination of the disincentives to employment in the Community is therefore a priority objective.

4. The Commission ensures that these recommendations are followed up and, on an annual basis, publishes its 'Employment in Europe' reports and an overview of the measures implemented by Member States in the European Employment Survey. The measures recommended normally relate to the overall economy of the Member State in an automatic and non-discretionary fashion. They do not favour 'certain undertakings or the production of certain goods' and do not therefore constitute

(*) OJ C 1, 3.1.1997, p. 10.
(1) Decision of 5 December 1993, *Bulletin of the European Communities*, Supplement 6/93, p. 131.
(2) Essen European Council, 9 and 10 December 1994, Presidency conclusions, Document SI(94) 1 000, p. 5.

State aid within the meaning of Article 92(1). This remains the case even if the measures are targeted at certain categories of workers (low-wage employees, young people in their first job, the long-term unemployed, part-time workers).

5. However, the data thus published and the information gathered by the Commission in monitoring State aid — be it notified by Member States under Article 93(3) of the EC Treaty, the subject of a complaint lodged by competitors or from another source — reveal that this is not the case for all the measures. Some Member States have decided or plan to adopt measures which distort or threaten to distort competition 'by favouring certain undertakings or the production of certain goods'. Such measures do come under the State aid rules and are dealt with as such by the Commission. Generally they are measures which are targeted at specific sectors of activity, specific regions or enterprises of a specific size. The Commission is well disposed to some of them (see point 10 below).

6. The reasons put forward by Member States to justify the introduction of such aid measures are based on two types of considerations. On the one hand, the need to reduce public deficits in order to create a macroeconomic framework, which is favourable to growth and employment, does not allow them to adopt measures benefiting all firms. On the other, currency fluctuations within Europe have apparently led to adjustment difficulties for some sectors and regions in Member States whose currency remained stable.

7. The Commission is aware of the pressure on public authorities to grant aid to certain firms in order to alleviate the dramatic situation on the labour market. However, it must also draw Member States' attention to the risk which this kind of aid carries for the proper functioning of the internal market and thus for the competitiveness of European industry and long-term job creation. Thus, in its communication on 'The impact of currency fluctuations on the internal market' ([3]), the Commission, while acknowledging the difficulties which result for the Union's economy, insisted on the need to tackle the causes of currency fluctuations and stressed the dangers of measures aimed at correcting their effects on the sectors and regions concerned. In particular it considered that 'it cannot be ruled out that severe currency turmoil can make sectors or regions already affected by structural or cyclical crises even more fragile. However, monetary fluctuations cannot be used to justify any violation of Community mechanisms or rules. If these fluctuations were to aggravate the difficulties of a sector or region appreciably, their effects would be examined, like the effects of any other cause, within the limits of the existing Community rules and mechanisms. In no circumstances shall this examination put into question either the allocation of structural funds between Member States or between objectives, or their programming rules. At any event, the Commission will seek to ensure strict application of the rules governing the functioning of the internal market in its entirety and a regime of undistorted competition.

The introduction of anti-competitive practices in the form of limits on parallel imports or State aid linked to exchange-rate movements (except in the case mentioned at point 19([4])) would clearly contravene Community rules on competition and would not conform to internal-market rules. Such measures risk setting off a process of refragmentation of the internal market, a reduction in intra-Community trade and a slackening of growth in Europe. They would therefore jeopardise the efforts being made to complete the internal market. The internal market is the cornerstone of the Community construction programme. The Commission and the Member States must therefore consolidate the internal market and make every effort to prevent such refragmentation.'

The Member States broadly supported these conclusions at the Ecofin Council meeting in Brussels in November 1995.

([3]) COM(95) 503 final.
([4]) For the agricultural sector, see Article 42 of the Treaty.

THE GUIDELINES ON AID TO EMPLOYMENT

8. In order to make clear to Member States which criteria it uses to determine whether State aid measures for employment are compatible with the common market, in July 1995 the Commission adopted its guidelines on aid to employment ([5]), which it has notified to Member States.

9. Aid to create jobs is viewed favourably when granted to small and medium-sized firms or to assisted regions. The same applies to aid intended to encourage firms to take on certain groups of workers experiencing particular difficulties entering or re-entering the labour market and to aid to promote job sharing.

10. However, aid to maintain jobs is acceptable in only a limited number of cases ([6]), i.e. where:

— the circumstances described in Article 92(2)(b) apply,

— it relates to regions covered by Article 93(3)(a),

— it relates to the rescue or restructuring of an ailing firm; however, it must in such circumstances be notified according to the relevant guidelines ([7]) and meet the conditions they lay down.

EMPLOYMENT-SUPPORT MEASURES WHICH ARE NOT COVERED BY THE STATE AID RULES

11. A general, automatic and non-discretionary reduction of non-wage labour costs is clearly not covered by the competition rules relating to State aid. For budgetary reasons, Member States which wish to implement measures of this nature are often required to target them carefully according to their cost.

12. However, the fact that employment-support measures are targeted does not necessarily imply that they are covered by Article 92(1). It is only if targeting favours certain undertakings or the production of certain goods by excluding others (which otherwise are subject to the same objective conditions in relation to the general system of social contributions) that the State aid rules enter into play.

13. The fact that measures benefit certain firms or sectors more than others does not necessarily result in their falling within the scope of the competition rules. For example, measures to reduce labour taxation for all firms have a relatively greater effect for labour-intensive industries, while the reduction of taxation on capital tends to favour capital-intensive industries. In neither case do such measures constitute State aid.

14. While measures targeted at a particular industry will be regarded as State aid, the same is not true for measures targeted at certain categories of employees, e.g. less qualified or low-wage employees, provided they apply automatically without discrimination between firms. Moreover, modulating the extent to which charges are reduced (or the scale of direct financial support) depending on the personal

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([5]) OJ C 334, 12.12.1995, p. 4; it should be noted that these guidelines do not cover aid to employment linked to investment, which is subject to the normal criteria used to assess investment aid.

([6]) See also the special rules contained in the 'Guidelines for the examination of State aid to Community shipping companies' (SEC(89) 921 final, 3.8.1989). The Commission has indicated in its communication 'Towards a new maritime strategy' [COM(96) 81] the intention of reviewing previous orientations, and has begun work in this direction.

([7]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994).

circumstances of a worker or on the level of his wage might have a redistribution effect between categories of workers which is desirable in view of the structural problems facing the labour market. Its impact, which will be greater in some industries employing a high proportion of unqualified labour, would not be enough for them to be qualified as State aid. Indeed, such measures form part of a policy of reforming the very structure of social security contributions.

15. An examination of average wages per employee reveals major differences between the various economic sectors. Thus, wages in the basic chemical, oil-refining, office-equipment and computer sectors are on average twice as high as those in the textile industry and three times as high as those in the footwear/clothing and hotel/restaurant sectors ([8]). Measures targeted at low wages would therefore have much greater effects in the latter than in the former, but would still not constitute State aid.

16. Finally, the possibilities offered by the new *de minimis* rule adopted by the Commission ([9]) should not be forgotten. In its recent communication, the Commission fixed the amount of aid below which Article 92(1) of the Treaty could be considered inapplicable in view of the lack of noticeable effects on trade between Member States at ECU 100 000 per firm over a period of three years.

SECTORAL AID TO EMPLOYMENT

17. It is clear from the guidelines on aid to employment that the Commission has confirmed its consistently less favourable view of aid targeted at specific sectors, in particular at 'sensitive sectors experiencing overcapacity or in crisis' ([10]). However, the Commission's impression is that it is these sectors which are particularly concerned by the targeted measures implemented or planned by Member States.

18. The Commission's negative stance towards aid for employment targeted at these sectors is based on the following observations:

— 'sectors' in a situation of overcapacity or in crisis are those in which demand for Community products is stagnating or indeed falling. Any drop in production costs for certain operators in these sectors generally has the effect of transferring difficulties — and unemployment problems — directly and on a large scale to competitors which do not enjoy such advantages. The effects on competition and trade are thus particularly harmful. From a Community point of view, there is, more often than not, no net creation of jobs: any jobs created or maintained artificially in one Member State are jobs which disappear in another,

— sensitive sectors are those in which intra-Community trade is significant and in which competition is particularly keen. Any aid granted by a Member State to firms in such sectors therefore directly affects trade between Member States and greatly distorts competition,

— the effects described above lead to a situation in which Member States try to outdo each other in the aid they grant ([11]). The result of this is sizeable public expenditure which neither tackles the root of the problem nor corrects the effects at Community level,

— moreover, it is to be feared that the effects on long-term competitiveness and on employment will be negative, particularly where aid is not accompanied by restructuring measures. This is because

([8]) Source: VISA/DEBA (manufacturing industry) and BDS (services); figures for 1993 and 1994. It should be noted that differences in wage costs between industries may vary from one Member State to another but the order in which the sectors fall varies little between Member States.
([9]) OJ C 68, 6.3.1996.
([10]) Point 23 of the abovementioned guidelines.
([11]) See, for example, the requests for aid from the German textile industry in response to the Borotra Plan.

the impact of targeted measures aimed at lowering labour costs considerably reduces the need for the recipient firm to readjust. If aid is withdrawn, recipient firms find themselves in an even less favourable position than before because those of their competitors which did not receive aid have in the meantime been required to undergo restructuring or improve their productivity.

19. Currency fluctuations within the Union may also give rise to difficulties for some sectors in countries whose currency has depreciated in value. Even if aid proposals generally emanate from Member States whose currency has appreciated, the argument for a depreciation of the national currency may itself be invoked to justify measures favouring industries directly affected because the increase in inflation and interest rates will also create problems for firms, including those which initially benefited from the devaluation. This phenomenon might ultimately give rise to an aid spiral in all Member States.

20. These considerations justify the Commission's vigilance concerning certain types of aid to employment which are targeted at given sectors. Aid of this type is by nature defensive and contrary to the objectives of the single market. It combines major risks of distorting competition with a zero or even negative impact on employment in the medium and long term. It should also be borne in mind that those sectors which do not benefit from the measures in question indirectly contribute to financing them.

21. Other considerations should also be stressed. The sectors at which Member States currently direct their employment aid are also sectors which are open to international competition (manufacturing industry and some services). In them, the wage-cost differentials between low-wage countries and the industrialised countries are very significant (a ratio of 1 to 10). One must therefore question the contribution which a reduction in social charges makes to the employment situation and carefully assess the short and longer term effects of such measures in view of their costs. It is more on the basis of integrating new production technologies, innovation, quality, commercial approach and training that the Community economy can durably improve its performance in terms of competitiveness and employment.

22. In employment terms, it should be stressed that market services, some of which are broadly protected from international competition, account for more than 40 % of total employment in Europe. Apart from the fact that the sectors in question do not have to compete with low-wage countries, they are often sectors in which there is a high level of tax evasion and avoidance and in which the share of the black or quasi-black economy is often large. Tax reduction might encourage people to leave the black economy.

SECTORIAL MEASURES WHICH MIGHT BE COMPATIBLE WITH THE COMMON MARKET

23. Aid to employment is a priori linked to the concern of maintaining or creating jobs. Reducing social charges in the manner envisaged by some Member States cannot, from that viewpoint, be genuinely effective unless it relates to sectors which are less exposed to international competition, in particular certain services. In contrast to the situation obtaining in sectors greatly exposed to international competition (see point 15 above), reducing wage costs in sectors protected from international competition seems all the more promising in terms of job creation given that the activities in question generally have a high concentration of unskilled labour. Examples of such sectors were identified by the Commission in its communication entitled 'A European strategy for encouraging local development and employment initiatives' ([12]).

([12]) OJ C 265, 12.10.1995, p. 3.

24. Measures to reduce social charges targeted at these sectors have a twofold advantage. On the one hand, their effects on competition and intra-Community trade are often weak or non-existent and, on the other, their potential in terms of job creation is great ([13]). The Commission will thus normally be able to adopt a positive stance on such measures. Some of them do not fall within the scope of Article 92(1) of the Treaty because the activities of recipients, often very small firms, are not the subject of trade between Member States. This is particularly true for local services. Others are 'growth niche markets or sub-sectors that hold out the prospect of considerable job creation', in respect of which the Commission will be more favourably disposed towards aid to create new jobs ([14]), provided they do not distort competition or affect trade to an extent contrary to the Community interest in terms of job creation.

CONCLUSIONS

25. The Commission recognises that high non-wage labour costs in most Member States might impede the taking-on of new staff and that reductions of these costs are desirable. However, it must intervene against Member States which opt for measures to reduce these costs which constitute State aid and which are therefore damaging to competition and the internal market and which have probably limited effects on employment at Community level. Such measures are not in the Community interest. By contrast, the Commission wishes to encourage Member States to examine a number of alternatives which are more promising in employment terms, which do not pose any problems as far as competition is concerned or whose effects on competition might be justified in the Community interest.

([13]) See, for example, the 'OECD Study on Employment — Taxation, employment and unemployment', OECD 1995.
([14]) Point 23 (final paragraph) of the abovementioned guidelines.

VI — Deprived urban areas

Guidelines on State aid for undertakings in deprived urban areas (*)

I. INTRODUCTION

1. Within the general framework of the search for solutions to problems linked with growth, competitiveness and employment, the White Paper (1) argues that every possible means of achieving this threefold objective should be mobilised. The priorities laid down by the White Paper for promoting employment include that of 'dealing with new needs' and, in this connection, specific mention is made of 'the need (...) to renovate the most disadvantaged urban areas', particularly through aid to businesses (2). The Commission believes that the economic development of these areas can help resolve, or at least alleviate, some of their socioeconomic problems. However, apart from the fact that existing State aid instruments provide only partial or inappropriate solutions, the play of market forces alone appears inadequate to achieve this objective. Such areas, for which the socioeconomic indicators are significantly worse than the average for the cities to which they belong, have such a concentration of handicaps that they are incapable of attracting or merely maintaining an adequate business fabric, the cornerstone of any economic development. The aim of this communication, therefore, is to deal with the specific problem of the shortcomings of the market in deprived urban areas and the inadequacy of existing instruments by introducing a new instrument enabling financial incentives to be granted to businesses setting up or already established in these areas, provided that the conditions of competition and trade between Member States are not distorted to an extent contrary to the common interest.

II. CONTEXT AND OBJECTIVE

2. This Commission communication to the Member States falls within a specific legal and political framework. This framework opens up possibilities and defines priorities, but also defines limits. The object of the guidelines is thus to establish a way for Member States to grant aid to certain firms situated in deprived urban areas, while meeting the criteria of necessity and proportionality. By means of this deliberate policy, the Commission hopes to boost employment and investments in such areas. The resulting economic growth should in turn help achieve major Community objectives, the instruments and priorities of which are defined below:

2.1. Legal framework:

— Article 92(3)(c) of the EC Treaty enables the Commission to regard as compatible with the common market the fact that Member States grant State aid to undertakings 'to facilitate the

(*) OJ C 146, 14.5.1997, p. 6.
(1) Commission White Paper entitled 'Growth, competitiveness, employment: the challenges and ways forward into the 21st century', Decision of 5 December 1993, EC Bulletin, Supplement 6/93.
(2) Ibid., p. 20.

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',

— Article 130a lays down that 'In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion' ([3]),

— after finding that there was an urgent need for action in this connection, the Commission adopted the 'Urban' Community initiative on measures to be carried out in certain deprived urban areas ([4]). This initiative provides, *inter alia*, for the possibility of granting Community aid '...in an integrated way, supporting business creation' ([5]). The objective is, in particular, to 'provide assistance to the responsible authorities in their efforts to provide the necessary amentities so as to attract economic activity and create confidence and security for the population living in the areas, integrating them into the economy and the social mainstream' ([6]). There is specific provision to that end for the combined effort of the ERDF and ESF 'to be complemented by other resources'.

2.2. Political framework:

— as already indicated above, the Commission recommended to the Member States in 1993, in its White Paper entitled 'Growth, competitiveness and employment: the challenges and ways forward into the 21st century', that the dynamism of small businesses be underpinned and, more generally, that 'government intervention in industry... be refocused on horizontal measures' ([7]). Aid to firms and, in particular, small and medium-sized enterprises is, therefore, clearly mentioned on several occasions in the context of the means to be employed to achieve the major objectives of the White Paper and deal with the new needs deriving from economic and social developments,

— in 1994, in defining the action to be carried out to improve the situation of employment and growth, the Essen European Council requested the implementation of such measures as 'the promotion of initiatives, particularly at regional and local level, that create jobs which take account of new requirements...' ([8]),

— in 1995, the Cannes European Council clearly confirmed its previous guidelines and, in particular, emphasised the fact that 'small and medium-sized enterprises (SMEs) play a decisive role in job creation and, more generally, act as a factor of social stability and economic drive'; it also stressed the need to promote 'the initiative of entrepreneurs, their decisions on hiring and on investments...' ([9]).

III. DEFINITION OF THE PROBLEM

3. Experience has shown that enterprises situated in and pursuing economic activities in certain deprived urban areas are confronted with many different problems which can influence their economic

([3]) Title XIV 'Economic and social cohesion', as amended by Article G (38) of the Treaty on European Union.
([4]) Commission notice to the Member States laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning urban areas, OJ C No 180, 1.7.1994, p. 6.
([5]) Ibid., paragraph 6.
([6]) Ibid., paragraph 8.
([7]) Op. cit, p. 83.
([8]) European Council meeting on 9 and 10 December 1994 in Essen, Presidency Conclusions SI(94) 1000, p. 4.
([9]) European Council meeting on 26 and 27 July 1995 in Cannes, Presidency Conclusions SI(95) 500, pp. 4-5.

development, and even their viability. Pointers to the existence of such a syndrome include a level of education that provides firms with little skilled labour, the steady impoverishment of the population, which is a sign of a low purchasing power and low consumption, a crime rate that indicates a high degree of insecurity, a particularly high unemployment rate, decay of the environment and public infrastructure and a poor standard of local amenities.

4. These indicators, which are synonymous with urban problems and economic handicaps for firms, generally mean rejection by the business world. There is evidence that new investors seeking a location shun such areas in favour of districts that are more suited to sound economic activity, and that enterprises already established in such areas often prefer to relocate to the same districts. This situation may be explained in practice by the additional direct or indirect costs involved in setting up in such areas (theft, level of insurance premiums, vandalism, etc.) and the structural handicaps that are a feature of such areas (difficulty in finding skilled labour that is prepared to work, overall reduction in economic activity, lack and decay of public infrastructure, insecurity, financial problems faced by local authorities, problem of 'public image', etc.).

5. The existing Community competition framework provides an inadequate answer — or no answer at all — to such problems, although certain Member States have called for action ([10]). There are in fact no effective incentives at present which make it possible either to attract new productive investment projects which create jobs or to prevent the disintegration of the entrepreneurial fabric in the areas in question. One of the ways in which Member States and the Commission can combat this phenomenon — the former by making the necessary budgetary resources available and the latter by adopting a position that is, in principle, in favour of such a policy — lies in economic and financial incentives. Existing provisions appear inappropriate for the following reasons:

— the rules governing regional aid ([11]) contain eligibility criteria which do not genarally allow aid to be granted to enterprises of any size whatsoever which are situated in or on the outskirts of large conurbations (mainly on account of the per capita GDP indicator) or to existing enterprises outside the scope of an investment (only initial investments are taken into account). In addition, they do not permit consideration to be given to such small geographical entities (the territorial basis of assessment being NUTS level III) ([12]). Moreover, the scope of the rules is too great, *ratione personae*, in that the instruments also apply to large undertakings, which makes it impossible to focus action on small and medium-sized enterprises and solve their specific problems, or to maintain a proper degree of proportionality between the local nature of the problems and the impact of aid granted to a large undertaking traditionally engaged in transnational activities,

— the rules governing aid to SMEs ([13]), while applicable in any part of the territory, offer only limited possibilities, in terms of aid intensity, outside areas assisted under regional aid arrangements,

— lastly, while the rules on aid to employment ([14]) can contribute to the net creation of jobs horizontally, they do not cover aid for the creation of jobs linked to a productive investment, which is subject to the normal conditions and criteria applicable to investment aid.

6. In order to take account of the abovementioned concerns and make good the shortcomings, the Commission wishes to state that it will give favourable consideration to State aid restricted to certain enterprises situated in urban areas which meet the conditions set out below. The Commission will

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([10]) See in particular 'City Revival Pact' (State aid N 159/96, France), EU Bulletin 3 1996, point 1.3.43; OJ C 215, 25.7.1996.
([11]) See Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid, OJ C 212, 12.8.1988.
([12]) Nomenclature of Statistical Territorial Units, level III.
([13]) See Community guidelines on State aid for small and medium-sized enterprises, OJ C 213, 23.7.1996.
([14]) See guidelines on aid to employment, OJ C 334, 12.12.1995, p. 4.

take the view that such measures either are not generally liable to affect trade between Member States and do not, therefore, constitute aid within the meaning of Article 92(1) of the EC Treaty ([15]), or contain an aid element but may be considered compatible with the common market in so far as the conditions laid down in this communication guarantee that any effect on trade will not be contrary to the common interest.

IV. CRITERIA GOVERNING ELIGIBILITY OF AREAS

7. In order to benefit from the possibilities set out in these guidelines, aid which is to be granted by Member States and of which the Commission has been notified pursuant to Article 93(3) of the EC Treaty must be confined to enterprises situated in difficult, geographically limited urban areas which must:

either:

— be geographically identifiable and homogeneous, and

— have a population of between 10 000 and 30 000 and belong to cities or urban agglomerations with at least 100 000 inhabitants (the Commission could, in justified cases falling just above or below these limits, exercise some discretion as regards the cumulative elements making up this condition), and

— have significantly worse statistics than both the national average and the average for the cities or urban agglomerations to which they belong, irrespective of the absolute or relative prosperity level of the latter. The socioeconmic indicators to be taken into account in selecting these areas could include: the unemployment rate (with particular emphasis on the most underprivileged categories of unemployed persons ([16])), the proportion of persons under 25, the proportion of unqualified young persons over the age of 15, per capita wealth, etc.,

or

— have been selected under the Urban Community initiative.

8. It is reasonable to believe that restricting the scope to a small number of people is likely to maintain a balanced competitive environment and prevent the possibilities opened up by this communication from being used to pursue objectives or policies which are contrary to its letter or spirit. The total population covered by all the areas ultimately selected by a Member State under the present guidelines must, therefore, stand at a level which takes account of the diversity of national situations, while respecting the principles of proportionality and necessity. This level has been fixed at 1 % of the national population. However, in circumstances justified by the Member State on the basis of objective socioeconomic data, a level slightly above this ceiling might be accepted by the Commission.

V. BENEFICIARIES OF THE AID

9. In defining the enterprises which qualify under this communication, it is necessary to reconcile requirements linked to the solution of a socioeconomic problem with the limits imposed by the need to safeguard the common interest and a competitive balance within the Community. Aid to firms falls within the scope of Article 92(1) of the EC Treaty only in so far as trade between Member States is affected.

([15]) This will normally be true of aid to existing firms carrying on a local activity (see point 11).
([16]) These traditionally comprise the long-term unemployed, young persons, women, older workers and the handicapped.

Accordingly, aid to small firms in deprived urban areas which carry on the activities listed in the annex do not come under Article 92(1) to the extent that the activities are not of a transnational nature. Similarly, public financial assistance benefiting certain categories of firms, such as small enterprises engaged in local services or local employment initiatives, cooperative, mutual and non-profit associations and enterprises involved in reintegration work should not, in general, constitute State aid. In the case of aid falling within the scope of Article 92(1), however, it is necessary to define the enterprises which are potentially eligible under the present provisions so that any distortions of competition or impact on intra-Community trade remain at a level which is not contrary to the common interest.

10. Size of eligible enterprises

The problems encountered by firms in such deprived urban areas are problems of an essentialy local nature which do not justify regional aid of the kind available to large undertakings. Extending the benefit of the aid to large undertakings would have disproportionate effects in terms of distortion of competition and the negative impact on cohesion. Furthermore, in view of the fact that the deprived areas could be situated within generally prosperous cities or cities which constitute the most prosperous part of a disadvantaged region ([17]), it is appropriate to limit the specific possibilities opened up by this communication to small enterprises as defined in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ([18]), without prejudice to the provisions of point 16.

11. Types of eligible enterprises

In order to avoid discriminating against enterprises which are already installed in the areas in question and have not benefited from initial investment aid, the Commission proposes that both new enterprises and existing enterprises should be able to benefit under the guidelines. However, since the latter may qualify for aid that is connected with neither investment nor job creation, it would be appropriate to limit the benefits to enterprises carrying on a local activity contained in Annex 1 on the basis of the NACE code ([19]). An existing enterprise making a new investment (material or human) and receiving aid in connection with that investment would fall within the scope of the normal arrangements for new enterprises.

12. Special conditions

In order to be considered eligible under the guidelines, an enterprise must:

— carry on its principal economic activity and invest in the area designated as a deprived urban area. The mere existence of a registered office or any other form of non-productive establishment (administrative address, post box, etc.) could not, save in exceptional circumstances, justify the granting of State aid ([20]),

— reserve at least 20 % of the new jobs created for persons having their domicile in a deprived urban area within the meaning of this communication.

([17]) Urban initiative, op. cit., point 5.
([18]) OJ L 107, 30.4.1996.
([19]) Council Regulation (EEC) No 3037/90, OJ L 293, 24.10.1990.
([20]) Such exceptional circumstances involve a limited number of cases involving certain types of enterprises, such as those belonging to the construction sector, whose personnel may have been recruited in a deprived urban area or a part of whose economic activity may be carried on in such an area, while the principal economic activity is physically carried on elsewhere. Consequently, even if part of the activity is exercised outside the urban area in question, the positive effects within the area (in terms of jobs in particular) may justify the enterprise's eligibility.

VI. FORM AND INTENSITY OF THE AID

13. From the point of view of both their socioeconomic situation and the handicaps and additional costs which have to be borne by enterprises situated within them, deprived urban areas are characterised by problems of a degree comparable with those of regions assisted under the derogation from Article 92(3)(c) of the EC Treaty. In order to satisfy the proportionality criterion, a balance must be struck between, on the one hand, the type of aid and the maximum intensity which may be permitted and, on the other, the nature, urgency and intensity of the problems to be solved.

14. In the case of new firms or existing firms deciding to invest, aid will have to be conditional on job creation and fixed in relation to either the initial investment, using the standard basis of assessing aid ([21]), or the number of jobs created. The maximum level of aid allowed, taking all forms of aid into account, is fixed at 26 % net grant equivalent of the investment ([22]) or ECU 10 000 per job created ([23]). This level is similar to that which SMEs situated in Article 92(3)(c) regions may obtain in the form of regional aid.

15. The conditions of competition peculiar to local markets justify extending to existing firms not making new investments the advantages made available to new firms. However, in view of the nature of the aid to which existing firms may have access, it is necessary to ensure that the competitive advantage enjoyed by an existing firm is under no circumstances greater than that received by a new firm setting up in the same urban area. To that end, it is necessary in any event to limit the aid available to existing firms to the levels applied to new firms. For that purpose, it is possible, *mutatis mutandis*, to transfer the rate of 26 % net grant equivalent to the investment already made by the existing firm ([24]) and the rate of ECU 10 000 per job created to the number of permanent employees already working in the firm. In general, considering that aid to existing firms will be confined exclusively to small enterprises carrying on the local activities laid down in Annex 1, intra-Community trade will not be affected.

VII. PROCEDURE, DURATION AND COEXISTENCE WITH OTHER RULES

16. The present guidelines will apply without prejudice to the possibilites offered by other State aid rules, particularly the *de minimis* rule ([25]), which should be sufficient to meet requirements in many cases, and the guidelines on aid to employment, which are applicable in all cases where there is a net creation of jobs and aid is not linked to investment ([26]).

17. Aid granted on the basis of the present guidelines to firms or activities involving products or belonging to sectors which are governed by specific Community codes must meet the basic and procedural conditions laid down in respect of the sector in question.

([21]) The initial investment is defined in point 18 of the annex to the Commission communication on regional aid systems, OJ C 31, 3.2.1979, and the common method of assessing aid in point 5 of the annex to the Council resolution on general systems of regional aid, OJ C 111, 4.11.1971.

([22]) The rate of 26 % net corresponds to the rate of 20 % net which the Commission generally uses in practice as a basic regional aid ceiling (applicable to large firms) in Article 92(3)(c) regions, plus a further 10 % gross (equivalent on average to 6 % net) under the 'bonus' arrangements for small firms, as provided for in the 'Guidelines on State aid for small and medium-sized enterprises', op. cit.

([23]) The ceiling of ECU 10 000 per job created corresponds to an aid level of 20 % net grant equivalent on the basis of an average investment of ECU 50 000 per job.

([24]) The method of calculating aid in respect of an investment already carried out in the past must be based on the net value of the equipment at the time when the aid is granted (taking account of any depreciation that has already taken place).

([25]) Commission notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996.

([26]) Op. cit.

18. Application of the present guidelines is also subject to the provisions of Community law on the cumulation of aid for different purposes (see OJ C 3, 5.1.1985) or aid for the same purpose under schemes adopted by a single entity or different entities (central, regional or local). In the latter case, the cumulative aid must not exceed the highest ceiling laid down by the different aid schemes involved.

19. On the basis of Article 93(3) of the EC Treaty, Member States are obliged to notify the Commission, prior to implementation, of any aid schemes drawn up with a view to implementing these guidelines. Proposals of which the Commission is notified must contain all the relevant information required to check that the scheme complies with the present guidelines. Schemes must be notified in accordance with the joint notification procedure ([27]).

20. These guidelines have been approved for a period of five years from the date of publication in the *Official Journal of the European Communities*. Prior to the expiry of that period, the Commission will review the functioning of the guidelines in order to decide whether they should be extended or any amendments should be made.

([27]) See letters from the Commission to the Member States dated 2 August 1995 and 15 May 1996.

ANNEX I

Activities not involved	Excluded activities (non-local market)	Eligible activities (local market)
Section A: agriculture, hunting and forestry		
Section B: fishing, fish farms		
Section C: mining and quarrying		
	Section D: manufacturing	
Section E: electricity, gas and water supply		
		Section F: construction
	Section G: — division 51: wholesale trade and commission trade	Section G: — division 50: sale and repair of motor vehicles — division 52: retail trade and repair of household goods
		Section H: hotels and restaurants
	Section I: transport and communication — except group 60.22: taxis	Section I: transport and communication — group 60.22: taxis
	Section J: financial intermediation	
	Section K: real estate, renting and business activities	
Section L: public administration		
Section M: education		
		Section N: health and social work
		Section O: community, social and personal service activities
		Section P: domestic services
	Section Q: extra-territorial activities	

E — Rules on the assessment of services of general economic interest

Communication on services of general interest in Europe (*)

INTRODUCTION

1. Solidarity and equal treatment within an open and dynamic market economy are fundamental European Community objectives; objectives which are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices. Many of them even view general interest services as social rights that make an important contribution to economic and social cohesion. This is why general interest services are at the heart of the European model of society, as acknowledged by the Commission in its recent report on the reform of the European Treaties (1).

2. The importance of general interest services was brought out by the Heads of State or Government, who acknowledged them as part of the set of values shared by all our countries that helps define Europe (2).

3. There are, however, differences between one Member State and another and between one sector and another in the design, scope and organisational approaches of general interest services, owing to different traditions and practices. More recently, adjustments have had to be made in response to technological change, the globalisation of the economy and users' expectations.

4. These developments have given rise to worries about the future of these services accompanied by concerns over employment and economic and social cohesion. The economic importance of these services is considerable: for instance, public-sector companies, which provide only some of these services, account for around 9 % of employment, 11 % of non-agricultural activity and 16 % of investment within the Community. 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. It was against this backdrop that the Commission felt it was time to reaffirm the principles of its policies and set out its objectives for the future.

Definition of terms

Services of general interest

This term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

(*) OJ C 281, 26.9.1996, p. 3.

(1) Reinforcing political union and preparing for enlargement — Commission opinion for the Intergovernmental Conference, COM(96) 90 final, 28 February 1996:
'Europe is built on a set of values shared by all its societies and combines the characteristics of democracy — human rights and institutions based on the rule of law — with those of an open economy underpinned by market forces, internal solidarity and cohesion. These values include access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment.'

(2) Cannes European Council, 26 and 27 June 1995 — Conclusions of the Presidency, SN 211/95, point A.I.1.7.

Services of general economic interest

This is the term used in Article 90 of the Treaty and refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications.

Public service

This is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services.

Universal service

This evolutionary concept, developed by the Community institutions, refers to a set of general interest requirements which should be satisfied by operators of telecommunications and postal services, for example, throughout the Community. The object of the resulting obligations is to make sure that everyone has access to certain essential services of high quality at prices they can afford.

I. SERVICES OF GENERAL INTEREST: A KEY ELEMENT IN THE EUROPEAN MODEL OF SOCIETY

5. The Community's involvement with services of general interest is within the context of an open economy which is based on a commitment to mutual assistance ('solidarity' for short), social cohesion and market mechanisms.

A. Serving the public

1. Shared values

6. European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as social cement over and above simple practical considerations. They also have a symbolic value, reflecting a sense of community that people can identify with. They form part of the cultural identity of everyday life in all European countries.

7. The roles assigned to general interest services and the special rights which may ensue reflect considerations inherent in the concept of serving the public, such as ensuring that needs are met, protecting the environment, economic and social cohesion, land-use planning and promotion of consumer interests. The particular concern of consumers is to obtain high-quality services at prices they can afford. The sector-specific economic characteristics of the activities they cover also enter into the equation, since they have considerable knock-on effects for the economy and society as a whole and may require the use of scarce resources or large-scale long-term investment. This implies certain basic operating principles: continuity, equal access, universality and openness.

8. Central to all these issues are the interest of the public, which in our societies involves guaranteed access to essential services, and the pursuit of priority objectives. General interest services are meant to serve a society as a whole and therefore all those living in it. The same applies in the Community to the universal service concept.

2. Different organisational set-ups

9. These shared values translate into different ways of organising general interest services, varying from one country or region to another and from one sector to another. Although the same sort of services are provided, the way in which this is done will reflect the different circumstances, such as geographical or technical limitations, the political and administrative set-up, history and traditions.

10. The services may be provided — in either a monopoly or a competitive situation — by private companies, public bodies or by public-private partnerships. The activities of these operators, who are sometimes known as service managers, may be regulated by local, regional or national authorities with different roles and statuses. There may also be considerable variation in the nature of the relationship between the regulatory authority and the operator.

11. This diversity may give rise to a certain amount of terminological confusion. It is all too easy to treat public sector and public service as synonyms and fail to distinguish the legal status of a service provider from the nature of the service being provided [3]. European policy is concerned with general interest, with what services are provided and on what terms, not with the status of the body providing them.

12. Be this as it may, these very different circumstances constitute a challenge for European economic integration. But rather than being an obstacle, they provide a range of possibilities that may be drawn on to identify the methods of organisation that are the best suited both to the general interest in a fast-moving economic context and, that are the most effective for achieving European integration.

3. The challenge of change

13. The context in which general interest services are provided has changed enormously over recent years and differs in important respects from the context in which they were originally introduced. The major developments are as follows:

— consumers are becoming increasingly assertive in exercising their rights and desires as users of general interest services, including at European level, and are more demanding in terms of choice, quality and price,

— worldwide competition is forcing companies using services to seek out better price deals comparable to those enjoyed by their competitors,

— in contrast to the years immediately following the Second World War, it would now seem that private funding for maintaining and developing infrastructure networks is not as difficult to raise as public resources,

— new technologies are changing the economic profile of sectors traditionally operated as monopolies, such as telecommunications, television and transport, paving the way for new services,

— in certain countries and sectors modernisation has been slow to get off the ground, leaving little scope for change.

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[3] See the definitions.

14. The creation of the single market and the introduction of greater competition requires providers of general interest services to meet the challenge of these developments and turn them to good account by improving range and quality and by lowering prices. This shift goes hand in hand with the implementation of an economic and social cohesion policy. The Community is also helping the modernisation of general interest services to ensure that essential needs continue to be met and to improve performance. This dynamism is the life blood of the European model of society, without which European citizenship will never become a reality.

B. General interest and the single European market: working for each other

15. 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, these 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 may not be attained. The public authority must then ensure that the general interest is taken into account. This is the reason for the Commission's action on the following fronts.

1. Respecting diversity

16. The Community's commitment to the European model of society is based on respect for the diversity of the organisation of general interest services in Europe, which is underpinned by two basic principles:

— neutrality as regards the public or private status of companies and their employees, as guaranteed by Article 222 of the Treaty. The Community has nothing to say on whether companies responsible for providing general interest services should be public or private and is not, therefore, requiring privatisation. Moreover, the Community will continue to clamp down on unfair practices, regardless of whether the operators concerned are private or public,

— Member States' freedom to define what are general interest services, to grant the special or exclusive rights that are necessary to the companies responsible for providing them, regulate their management and, where appropriate, fund them, in conformity with Article 90 of the Treaty.

17. Respect for national choice over economic and social organisation is a clear example of subsidiarity in action. It is for the Member States to make the fundamental choices concerning their society, whereas the job of the Community is merely to ensure that the means they employ are compatible with their European commitments.

18. It should be pointed out that the conditions of Article 90 do not apply to non-economic activities (such as compulsory education and social security) or to matters of vital national interest, which are the prerogative of the State (such as security, justice, diplomacy or the registry of births, deaths and marriages). The contribution these services make to various Community policies is essential hence the development of European-level cooperation and partnerships in these areas. However, it is clear that general interest services that are non-economic or the prerogative of the State are not to be treated in the same way as services of general economic interest. Any Community action in such areas, as is made clear in the Treaty, can be no more than complementary.

2. Striking a balance: the Community objective

19. The real challenge is to ensure smooth interplay between, on the one hand, the requirements of the single European market and free competition in terms of free movement, economic performance

and dynamism and, on the other, the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a very tricky 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.

20. The Community approach is, therefore, necessarily a gradual one and the balance sought must be capable of responding rapidly to developments. Services of general economic interest are normally subject to the Community rules designed to create the single market. This includes monopolies, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector. The operation of these rules encourages these services to evolve accordingly, but the general interest services must be kept intact.

21. The suppliers of certain services of general interest may be exempted from the rules in the Treaty, where the rules would obstruct the performance of the general interest tasks for which they are responsible. Definitions of general interest duties do not necessarily determine how they are to be carried out. This is why any exemption from the rules is subject to the principle of proportionality. This principle, which underlies Article 90 of the Treaty, 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 sought. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the Member States' different circumstances and objectives as well as 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.

22. The results achieved to date by this interaction have been extremely positive, in terms of both effectiveness of general interest services and implementation of the rules.

23. In terms of efficiency and quality, the provision of general interest services in the Community compares favourably with other areas of the world in many cases. Europe's showing is often very good when it comes to, say, the reliability of energy distribution, air transport safety or the quality of radio and television broadcasting. These achievements owe something to the Community's arrangements, which weed out unfair advantages, encourage openness in management and require general interest remits to be clearly and precisely defined. Gains in efficiency as a result of competition are, indeed, one of the best ways of lowering the cost of services and, in many cases, making them accessible to a larger number of people. They also make firms, in particular smaller firms, more competitive. There is none the less scope for improvement in many areas. The quest for higher quality and greater cost-effectiveness in services of general interest can in many cases require new approaches and a substantial effort to enhance efficiency.

24. The Community has always applied the rules impartially and been responsive to the concerns of industry, society and the political world. The legislative framework has been set up by the Council of Ministers and the European Parliament. All the legal instruments concerning air transport, rail transport and electricity were adopted unanimously by the Member States in the Council. The universal service concept for telecommunications and the postal service was also adopted by the Council and the European Parliament. In one-off cases the Commission has had to adopt measures on the basis of Article 90 ([4]). However, before the final adoption of any such measures, the Commission always takes care to carry out extensive consultations with the European Parliament, the Council, the Member States and the parties concerned to reach the broadest possible consensus. For example, the two main directives

([4]) Since 1958 only eight directives plus amendments and seven decisions have been based on this article.

adopted on the basis of Article 90 concerning telecommunications terminals and telecommunications services and the amendments to them received the support of the Member States within the Council.

25. As the appeal body and interpreter of the law, the Court of Justice has confirmed these instruments, making its own contribution to achieving the right balance. The Court has accepted that economic considerations, such as the overall cost-effectiveness of a general interest service, and other considerations, such as environmental protection, are admissible as legitimate grounds ([5]).

26. In their approaches, the Commission, the European Parliament, the Council and the Court of Justice have also respected the different national definitions of the general interest, which are based on each country's special social and cultural characteristics and their choice of society.

3. Promoting the European general interest

27. As a source of economic vigour and efficiency, the economic integration of Europe, based on the single market and the cohesion policy, has had to take on board the issue of the general interest at European level with the concept of universal service or other public service obligations. The concept of universal service, which was originated by the Commission, has been developed in European Parliament and Council resolutions and implemented in various sector-specific pieces of legislation ([6]).

28. The basic concept of universal service is to ensure the provision of high-quality service to all at 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. These 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 ([7]).

29. Universal service is, none the less, a flexible concept, which evolves gradually in line with specific structural and technical features and sector-specific requirements. It is also evolutionary in the way it has to adapt to technological change, new general interest requirements and users' needs.

30. There is nothing to prevent the Member States from defining additional general interest duties over and above universal service obligations, provided that the means used comply with Community law. For some services, the provisions of the universal service concept leave Member States the choice of whether or not to impose the general interest obligations and to offer compensations. In this way the development of the universal service concept at European level is sensitive to diversity, by continually taking account of the different national views of general interest, determined by each country in line with its own traditions and needs.

31. Public service obligations may also be imposed, subject to certain conditions, for reasons of general interest connected with matters such as land-use planning, security of supply and the environment.

32. The completion of the single market provides consumers with better services and puts European businesses in a stronger position to face up to international competition. The universal service principle

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([5]) Case C-320/91 *Corbeau* v *Kingdom of Belgium* (Public Prosecutor) [1993] ECR I-2565; Case C-392/92 *Almelo* v *Energiebedrijfljsselmij* [1994] ECR I-1509; Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1994.

([6]) European Parliament resolutions of 22 January 1993, OJ C 42, 15.2.1993, p. 240; 6 May 1994, OJ C 205, 25.7.1994, p. 551; 25 June 1995, OJ C 166, 3.7.1995, p. 109; 14 July 1995, OJ C 249, 25.9.1995, p. 212.
Council Resolutions of: 22 July 1993, OJ C 213, 6.8.1993, p. 1; 7 February 1994, OJ C 48, 16.2.1994, p. 1; 22 December 1994, OJ C 379, 31.12.1994, p. 4; and 18 September 1995, OJ C 258, 2.10.1995, p. 1.

([7]) See the example of telecommunications in point 35.

and the other public service obligations contribute to the objectives of equal treatment. They protect the general interest for the benefit of the public and European society. Universal service is the expression in Europe of the requirements and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

II. THE COMMUNITY CONTRIBUTION: DYNAMISM, FLEXIBILITY AND SOLIDARITY

A. A sector-specific approach

33. The principles and the approach outlined above combine the dynamism of opening up markets with general interest requirements at European and national levels. The Commission has already taken steps in this direction in several areas, such as telecommunications, postal services, transport and energy. These are solid examples of how the single market can protect and improve the satisfactory provision of general interest services to the public on the basis of universal service or public service obligations. Each case was approached in a flexible way, respecting the special characteristics of each sector, the principle of subsidiarity and the concern to get the best deal for everyone. The approach has always been a gradual one and involved consulting all the parties concerned.

Telecommunications

34. The Community approach to telecommunications is intended to improve the service provided to the public in the Community by offering a greater range, while at the same time improving quality and keeping prices affordable. The market has been opened up gradually in accordance with a precise schedule. Since proposals made in 1987, consumers have been able to choose whichever fixed or mobile phone, fax or modem they wish. Measures were then introduced to provide free choice between at least two mobile phone or satellite service operators. By no later than 1 January 1998 (or 2003 in certain countries) voice telephony infrastructures and markets are to be opened up. For this purpose, regulatory bodies are to be separate from the operators and public networks will be open to other operators.

35. The opening-up of markets and infrastructures goes hand in hand with the definition of universal service obligations, which the Community has asked Member States to impose on operators to ensure the provision of a wide range of basic services. The Commission communication of 1996 on universal service stipulates that this service should provide affordable access for everyone to a network of voice, data and fax transmission and a voice telephony service. The regulation lays down a framework for the financing of the costs relating to this service by market actors. The definition of this universal service is to be reviewed in 1998 and thereafter at regular intervals. The dynamic approach adopted is designed to adapt the service in line with technological developments, consumer needs and general interest considerations. The treatment of telecommunications as a universal service is already having a positive effect on how telecommunications services are being approached at national level. For example, the idea of guaranteeing access at affordable prices for everyone, including the socially, medically and economically disadvantaged, which was not an established principle in several countries, has now been introduced by the universal service concept.

36. In some Member States which have acted ahead of schedule, telephone services, in particular mobile phone services, are already being provided by new operators and this has helped to increase the spread of the telephone and the range of new services. A more open market will make it easier for telephone services to take on board the current flurry of technological developments at the same time as meeting customers' increasingly sophisticated demands and keeping prices down.

Postal services

37. The measures proposed by the Commission in July 1995 are being examined by the European Parliament and the Council. They aim to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets to competition in a controlled way by the year 2000.

38. The basis of the proposal is to safeguard the postal service as a universal service in the long term. Universal postal service means providing 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 printed matter, catalogues and parcels within certain price and weight limits. It also covers registered and insured (*valeur déclarée*) items and would apply to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

39. To guarantee the funding of the universal service, a sector is to be reserved for the operators of this universal service. The scope of the reserved sector will be determined by two criteria: weight and price. The issue of mailing circulars is being looked into, as is that of incoming cross-border mail. In any case, the range of reserved services will be reviewed in the year 2000 in the light of technological, economic and social developments.

40. The remaining funding for the universal service may be found by writing certain obligations into commercial operators' franchises; for example, they may be required to make financial contributions to an equalisation fund. There are also plans to keep regulatory authorities and postal service operators separate.

Transport

41. In civil aviation, national airlines often used to enjoy a monopoly in their country of origin, which allowed them to offset profit-making activities against loss-making activities connected with their public service role. The three aviation packages of 1987, 1990 and 1993 have gradually opened up the markets, while safeguarding the general interest.

42. For services to outlying areas and low-density regional services, which are vital for regional development, but not economically viable if left to market forces, the regulations allow Member States to impose public service obligations for a specific route, select a sole operator on the basis of a Community-wide invitation to tender and provide financial compensation for operating these services. Public intervention in the market is thus limited to the strict minimum.

43. Now that the process is nearly completed, it must be acknowledged that the opening-up of European aviation markets has succeeded in maintaining service and reliability levels and improved the quality of services for travellers appreciably. Competition is keener in terms of both traffic and prices, making air transport more accessible to a wider public.

44. The regulations governing the freedom to provide maritime transport services within a Member State (known as 'cabotage') allow Member States to impose public service obligations, without any discrimination between Community shipowners, as a condition for operating scheduled services to, from and between islands. Member States may take into account only considerations relating specifically to the ports to be served, the regularity, continuity and frequency of the service, the capacity to provide the service, the prices charged and the crew of the vessels. Apart from this, in a communication entitled 'Towards a new shipping strategy' the Commission has put forward the possibility of public funding to support general interest services.

45. For inland transport (rail, road and inland waterways) the Treaty itself refers (Article 77) to certain obligations inherent in the concept of a public service. In 1969 the Council adopted regulations interpreting this article and guaranteeing the supply of adequate transport services which contribute to sustainable development, social cohesion and regional balance. A great deal of progress has already been made in the process of opening up the inland transport markets and the importance of the quality of public services in this area has been fully taken into account.

46. In its Green Paper on the citizens network the Commission confirmed this approach and at the same time highlighted the need to improve the effectiveness of these regulated public services. Similarly, for rail transport, in a recent White Paper the Commission defended its 1995 proposals to open up the freight and international passenger markets and announced a study on the best practical means of introducing market rules in domestic passenger services, with due account for public service requirements. Two other proposals have been put forward in 1996 to strengthen the internal road passenger transport market; they comply in full with the proportionality principle and the public service regulations.

Electricity

47. The draft directive that is currently going through the adoption procedure is intended to open up electricity markets to new operators gradually over a period of nine years. In order to protect the very long-term investments which are typical of this sector and to take account of the diversity of national structures, Member States are being offered two options: either access to the networks for third parties or a single buyer system. It will be up to the Member States to decide who are the eligible parties, subject to certain conditions.

48. The proposed solution is based on free competition, but gives Member States the possibility of laying down general interest obligations. In line with the principle of subsidiarity, the Member States will be responsible for defining these obligations in terms of general interest objectives on the basis of openness, objectivity and equal treatment.

49. The Commission is sure that this policy will succeed in reducing energy costs for European industry and therefore boost its competitiveness on the international scene. Lower prices should also be one of the benefits passed on to consumers.

50. An initial mid-term evaluation of the directive will be carried out by the Commission, after which it will be reviewed once it has been in force for nine years.

Broadcasting

51. In most Member States, television and radio have a general interest dimension, despite the structural and technological changes affecting these markets. The general interest considerations basically concern the content of broadcasts, being linked to moral and democratic values, such as pluralism, information ethics and protection of the individual. The way these general interest considerations are catered for varies considerably from one country and region to another, particularly as regards how they are funded.

52. The main piece of Community legislation directly relating to this sector is the so-called 'Television without frontiers' directive of 1989, which provides the legal framework to guarantee freedom of movement for television programmes by coordinating the national rules which might have raised legal obstacles to free movement. The coordinated areas are rules applying to promotion of the production and distribution of television programmes, advertising and sponsorship, the protection of minors and

the right of reply. The Member States must ensure freedom to receive programmes and must not hinder the retransmission of programmes broadcast from other Member States for reasons relating to the coordinated areas. The European Parliament and the Council are currently in the process of revising the directive to clarify and adapt the present rules.

53. In addition, the rules on competition provide a safeguard against the abuse of dominant positions and, via the merger control arrangements, prevent the development of oligopolistic and monopolistic market structures.

B. THE CONTRIBUTION OF OTHER COMMUNITY POLICIES

54. The Community's involvement in developing general interest services goes beyond just the development of the single market, incorporating other activities under various Community policies such as:

— drawing up standards to ensure the interoperability and interconnection of networks; developing certification systems,

— developing European plans for major trans-European transport, energy and telecommunications infrastructure networks that form the backbone of the information society; policy coordination and financing for the development of these infrastructures,

— supporting investment projects as part of economic and social cohesion policy, particularly for infrastructure in less-advantaged regions of the Community and regions undergoing industrial reconstruction, and for projects designed in general to promote general interest services in partnership with local and regional actors,

— research and development activities in general interest service sectors, such as rail and air transport, the audiovisual industry, information technology, education and training, and health,

— encouraging legislators, regulators and operators to exchange experiences and emulate the best practices, for example as regards financing methods, price-setting and serving the public (*).

In all these activities the Community is attentive in particular to the need for a healthy and sustainable environment and consumer interests. The Community is taking measures for consumers to promote choice, quality, openness, access to objective information, rapid and inexpensive means of redress and participation.

55. However, none of these Community activities will be effective, unless the various parties concerned work together in the necessary way. Partnerships between the public and private sectors will inevitably play a decisive role, particularly when it comes to investment and research, but partnerships also need to be developed between the regional, national and European levels.

56. As regards non-economic services (°), various cooperation activities undertaken at European level may help to support or add an extra dimension to national policies, for example in the areas of employment, welfare, public health, education and training and culture. The Community is encouraging cooperation between the Member States on combating cancer. The education and training exchange

(*) An example of this in the area of public transport is the recent Commission communication 'The citizens network', COM(95) 601 final, 23 January 1996.
(°) See point 18.

and cooperation programmes, Leonardo and Socrates, involve large numbers of students and young workers. The Community also supports various activities to preserve and protect Europe's cultural heritage. These activities do not, of course, imply harmonisation at the European level, but rather they are additional ways in which the Community supports the general interest and are vital for achieving the Community's cohesion and solidarity objectives.

III. OBJECTIVES FOR THE FUTURE

57. 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, at the same time as helping, through its policies, to strengthen economic and social cohesion between the Member States and reduce certain inequalities. This objective, which is laid down in the Treaty, is served mainly by the Structural Funds and the trans-European networks. General interest services have a key role to play here, since they contribute to economic and social cohesion and economic performance. The Community is committed to maintaining these services intact, while improving their efficiency.

58. The importance of striking this balance was brought out by the Heads of State or Government at their summit in Cannes in June 1995 ([10]):

'The European Council reiterates its concern that the introduction of greater competition into many sectors in order to complete the internal market should be compatible with the general economic tasks facing Europe, in particular balanced town and country planning, equal treatment for citizens, including equal rights and equal opportunitites for men and women, the quality and permanence of services to consumers and the safeguarding of long-term strategic interests.'

59. Both this political statement and the changes currently under way point to the need to clarify future objectives. In this vein, the Commission is planning to promote European general interest services on three fronts: by making the most of operations to boost the single market and European competitiveness; by strengthening European solidarity and coordination; and by deploying Community instruments. These developments should be reflected in the Treaty, when it comes up for discussion at the Intergovernmental Conference.

A. A European perspective

1. Making the most of operations to boost European competitiveness

60. The opening up of markets on a sector-by-sector basis for economic services and, in particular, networked services, and the introduction of universal service obligations should be continued, given the positive effects they have on the general interest functions and on the competitiveness of the European economy in the world. These activities are crucial for the modernisation of the services, enabling Europe to make the most of its competitive advantages in the sectors in question and enabling the companies that use the services to obtain quality at lower cost.

61. Whatever happens, the Commission will continue to play its role of impartial referee. It intends to apply the following principles in its policy of opening up markets in the future:

— introducing evaluation tools to assess the operation, performance and competitiveness of general interest services on a sector-by-sector basis, so that the best examples can be emulated and the

([10]) Cannes European Council, 26 and 27 June 1995, conclusions of the Presidency, SN 211/95, point A.I.1.7.

services adapted in line with technological changes, new consumer needs and new public interest demands. The Commission has already launched a study to get an overview of forms of regulation and methods of organising and financing networked services in the Member States,

— adopting a step-by-step approach based on consultation with the various parties concerned, including consumers,

— applying openness by issuing a communication on the application of the Article 90 procedures.

This approach should get the best out of the activities undertaken, particularly as regards the development of the universal European service concept.

62. It is, however, important that the decisions on the Commission's pending proposals should be taken as soon as possible. The Commission is expecting the directive on the opening up of the internal market in electricity, which had been blocked, to be finalised soon. The Commission is also counting on the Council and the European Parliament adopting the drafts on the opening up of international markets in rail passenger transport, completing the opening up of the rail freight markets and the opening up of the natural gas markets. These proposals incorporate the general interest considerations.

2. Strengthening European coordination and solidarity

63. In the interests of solidarity, the general interest criteria could be extended to other activities following the evaluations referred to above. There are several sectors that have a cross-border dimension, especially in terms of their particular technical characteristics, which means that the general interest role is not necessarily best fulfilled at national level. There are other sectors with European implications too, such as land-use planning and environmental protection.

64. To meet the requirements of these sectors and ensure the best possible performance and service, the Commission could envisage future activities, in some form or another and using the powers it already possesses, designed to facilitate the coordination of national general economic interest bodies in matters such as public financing arrangements and control systems. Development of the universal service concept or public service obligations could be a fruitful avenue to explore, particularly in terms of the quality of service and users' rights.

65. The level of European integration in certain sectors could also give food for thought on means of increasing European-level coordination for monitoring the activities of regulators and operators in these sectors. In some cases, more developed forms of cooperation could be envisaged, such as the introduction of a regulatory body for air traffic control, which is under discussion (11).

3.Deploying Community instruments

66. Economic and social cohesion, harmonious urban and rural development and environmental conservation are objectives of shared interest in Europe. In this context, general interest services share the same objectives as various other common policies introduced by the Community.

67. This is why the Commission will be pushing ahead with those policies which are needed to get the most out of general interest services. With this in mind, next year the Commission is due to submit a draft plan on developing land use in the Community to the European Parliament, the Council and the Committee of the Regions. This is to be based on the recommendations of the 'Europa 2000 plus' document, which will give general interest services the sort of coverage they deserve.

(11) See Commission White Paper entitled 'Air traffic management: freeing Europe's airspace', COM(96) 57 final.

68. The Commission is planning to develop the trans-European networks in line with the commitments already made by the Heads of States or Government. The commitments should be acted on as soon as possible, particularly on the financial level. The networks have such huge potential that their introduction should not be held up any longer.

When presenting its initial guidelines for the fifth research framework programme (1999 to 2003), the Commission stressed the need for research to be made to work resolutely for the benefit of the European citizen.

69. Making sure that everyone is provided with other general interest services, such as health, welfare, education, water and housing, is a matter of national or regional responsibility. None the less, there are ways in which the Community can help (cooperation, financial support and coordination activities) and greater use should be made of them in connection with these services to promote equality of opportunity and to combat poverty and marginalisation ('social exclusion').

B. A reference in the Treaty

70. Now that the Union is discussing reforming its institutions in preparation for the transition to a new political phase, the debate is open on how to consolidate and clarify our commitment to the European model of society and the values on which it is based, as reiterated by the Commission in its opinion for the Intergovernmental Conference ([12]). The provision of public interest services is central to these values.

71. One option would be to leave the Treaty as it stands. Article 90 has proved its worth in fully guaranteeing the beneficial interaction between liberalisation and general interest. It is best left untouched. The Treaty also contains various other instruments that provide ways and means of supporting the European model of society in several ways, for example as back-up for general interest roles: trans-European networks, Community research, consumer policy and social and economic cohesion.

72. The Commission feels, however, that the role of general interest services in the development of the concept of European citizenship should be commensurate with the place they occupy among the shared values on which the European societies are founded. With this in mind, the stage should be set for developing general interest services in Europe and for deploying the means available to achieve this end in a coherent way.

73. The Commission is advocating in the Intergovernmental Conference that a reference be inserted in the Treaty. This would mean adding a new paragraph (u) to Article 3 to read as follows:

'(u) a contribution to the promotion of services of general interest.'

74. This would confirm, given the programmatic value of Article 3, that general interest services already fall within the Community remit. They none the less continue to be primarily an area for action by the Member State. Without actually creating a new legal basis, this addition would establish that general interest services are something which the Community should take into account when drawing up its policies and planning its activities.

([12]) 'Reinforcing political union and preparing for enlargement'. Commission opinion on the Intergovernmental Conference, COM(96) 90, 28.2.1996.

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 (*)

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 recognised by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the postal 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

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(*) OJ C 39, 6.2.98, p. 2.
(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* v *Commission* [1992] ECR I-565 and Case C-320/91 *Procureur du Roi* v *Paul Corbeau* [1993] ECR I-2533.

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.

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' ([8]), 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 benficiary 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.

([8]) COM(96) 443 final.

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 (9), is to ensure the provision of high-quality service at 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 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 compensation fund administered for this purpose by a body independent of the beneficiary or beneficaries, as foreseen in Article 9 of the postal directive.

(9) See footnote 8.

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 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.

([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).

1. DEFINITIONS

In the context of this notice, the following definitions shall apply ([11]):

'*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 addresses, 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;

'*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

([11]) The definitions will be interpreted in the light of the postal directive and any changes resulting from review of that directive.

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 acitivity, 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. MARKET 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

([12]) The meaning of this important phrase in the context of Community competition law is explained in paragraph 5.3.

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 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 incluce 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. Morevover, 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,

([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).

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.

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 services 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.

(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,

([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).

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]).

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 concern 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

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([15]) See footnote 13.

([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.

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 monopolising conduct designed to exclude competitors; and exclusionary rebate schemes.

3. CROSS-SUBSIDISATION

(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.

([18]) See the postal directive, recitals 16 and 28, and Chapter 5.

Nonetheless, too many dominant companies 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.

(b) Consequences

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 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.

([19]) Referred to by UPU as 'work of the mind', comprising books, newspapers, periodicals and journals.

([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.

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 Articles 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 curse 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 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

([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).

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:

([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.

(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;

(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-subsidise 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-subsidisation 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

([26]) Case NN135/92, OJ C 262, 7.10.1995, p. 11.
([27]) Case T-106/95 *FFSA* v *Commission* [1997] ECR II-229.

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 competitivenes 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. 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 harmonised 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, 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 operator 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

([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.

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 destabilisation of revenues.

8.5. As regards the distribution of inward corss-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 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.

([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.

([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.

(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 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.

([31]) According to Article 3 of the postal directive, Member States are to ensure that users enjoy the right to a universal service.
([32]) See in particular Articles 9 and 22 of the postal directive.

(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 relelvant 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 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.

F — Rules on the assessment for approval of regional aid

Council resolution of 20 October 1971 (*)

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING IN THE COUNCIL:

Considering that regional aid, when it is adequate and judiciously applied, forms one of the essential instruments of regional development and enables the Member States to follow regional policies aimed at a more balanced growth between the various regions of the same country and of the Community;

Aware that the risks of outbidding which exist in respect of regional aid require that a first series of coordinating measures intended to limit those risks be evolved without delay;

Having noted the communication of 23 June 1971 from the Commission on the coordination of general systems of regional aid;

Undertake in consequence to comply with the following principles in respect of systems of regional aid, according to the procedure for application annexed to this resolution:

1. Coordination shall be carried out gradually.

It shall be implemented first of all in the most highly industrialised regions of the Community (the 'central regions'); appropriate solutions, which will be based on the principles set out in this resolution and which will take account of the specific problems occurring in each of the peripheral regions will be prepared for these regions without delay.

Furthermore, in the central regions, implementation of all the required conditions shall take place gradually over a one-year transitional period beginning 1 January 1972.

2. Coordination is constituted by four principal aspects forming a whole: a single ceiling for aid intensity; transparency; regional specificity; and the sectorial repercussions of regional aid.

3. The single ceiling for aid intensity shall be fixed as a net subsidy-equivalent calculated according to the common method of aid assessment (described in point 5 of the procedure of application); the tendency should be, as far as possible, to lower the level of aid in the central regions.

This ceiling, initially fixed at 20 as a net subsidy-equivalent, shall enter into force on 1 January 1972. It shall apply to all regional aid granted for a particular investment project. At the end of 1973, the level of this ceiling will be reviewed, taking account of experience gained and of adaptations of existing systems of aid to make them more transparent, and in relation to the problem of cumulation of regional aid and sectorial aid; the Member States record the importance they attach to the examination, between now and then, of the relationship between the level of aid granted and the number of jobs created.

(*) OJ C 111, 4.11.1971, p. 1.

Derogations from this ceiling may be permitted on prior communication of the relevant grounds according to the procedure laid down in Article 93 of the Treaty establishing the European Economic Community. The Commission shall inform the Council periodically of these derogations from the ceiling.

4. An essential condition for ensuring the coordination and assessment of general systems of aid is the transparency of the aid and the systems.

This involves the Member States in the following obligations:

(a) achievement of transparency of aid and systems during the transitional period:

ceasing to introduce further opaque aid;

adapting the existing systems towards real transparency when amending or renewing these systems;

elimination of aid the opacity of which cannot be to some extent remedied before the end of the transitional period;

(b) actual application, from 1 January 1972, of the ceiling to all aid granted to an investor for a given investment.

5. As far as regional specificity is concerned, the following principles must effectively be observed:

(i) regional aid must not cover the whole of the national territory (with the exception of the Grand Duchy of Luxembourg, which is considered as a single region), that is to say, general aid shall not be granted under the heading of aid for regional development;

(ii) the general systems of aid must clearly define either geographically or by quantitative criteria, the boundaries of the regions or, within the latter, the boundaries of the areas benefiting from aid;

(iii) except in the case of poles of development, regional aid must not be granted in a pinpoint manner, i.e. to isolated geographical points having practically no influence on the development of a region;

(iv) where problems of varying nature, intensity and urgency occur, the intensity of aid must be varied accordingly;

(v) the graduation and variation of rates of aid according to the different areas and regions must be clearly shown.

6. The lack of sectorial specificity in general systems of regional aid makes it difficult to assess them because of the problems that the sectorial repercussions of this aid may raise at Community level. Consequently, the Member States together with the Commission will evolve a procedure to enable assessment of the sectorial effects of regional aid.

Independently of the development of this procedure, the double cumulation of aid, i.e. applying simultaneously to a sectorial or regional problem regional aid and sectorial aid which overlap, is forbidden.

7. The Commission shall supervise the application of the principles of coordination of general systems of regional aid by means of the *post facto* notification which it will receive of significant cases of application, according to a procedure ensuring business secrecy.

8. The results of application will be examined periodically with the senior national officials responsible for aid. The Commission will make an annual report to the Council and to the other Community authorities concerned.

ANNEX

PROCEDURE FOR APPLICATION OF THE PRINCIPLES OF COORDINATION OF GENERAL SYSTEMS OF REGIONAL AID

1. Gradual implementation

Gradual implementation concerns in the first place the territorial field of application. Since one of the objectives of the coordination and adaptation of general systems of regional aid is to put an end to the outbidding between Member States in order to attract investments to their respective territories, the solution advocated will first of all have to be applied in the regions where the effects of this outbidding are most felt, in particular on competition and trade, that is to say in the industrialised regions and in the regions on either side of the frontiers of the Member States. These regions are hereinafter referred to as 'central regions' of the Community.

For the other regions, referred to as 'peripheral regions', an appropriate solution based on the same principles will be worked out in the very near future, taking account of the specific problems arising in each of these peripheral regions.

Moreover, even in the central regions, the implementation of all the necessary conditions can only be gradual. Provision has therefore been made for a transitional period. This period shall run for one year from the date of implementation of the coordination, that is to say, from 1 January 1972.

2. Demarcation of the central regions

The central regions comprise the whole of the Community excluding Berlin and the Zonenrandgebiet, the part of the French territory at present receiving development subsidies and the Mezzogiorno.

The Zonenrandgebiet is defined by the annex to paragraph 9 of the German law on the development of the Zonenrandgebiet (Gesetz zur Förderung des Zonenrandgebiets of 5 August 1971, Bundesgesetzblatt I, p. 1237).

The industrial development subsidy (PDI) area in France is defined by Decree No 69-285 of 21 March 1969 and the Order of 21 March 1969 (*Journal officiel de la République française* (JORF) of 30 March 1969), supplemented by Decree No 70-386 of 27 April 1970 (JORF of 10 May 1970).

The territories referred to as the Mezzogiorno are those named in Article 1 of the consolidated laws on the Mezzogiorno (Decree of the President of the Republic No 1523 of 30 June 1967, Italian Official Gazette No 159 of 24 June 1968).

3. Aspects covered by coordination

Coordination and adaptation of the general systems of aid shall have four basic aspects: a single ceiling for the intensity of aid; the transparency of aid; regional specificity; and sectorial repercussions.

These four aspects are so closely related that they form a whole. An agreement in principle has been reached on all these aspects, although the implementation of all the necessary conditions can take place only gradually.

As regards some of these conditions — reducing the opacity of certain forms of aid and the sectorial repercussions of aid — technical work is still in progress. Nevertheless, the results obtained so far make it possible to begin to apply the principles of coordination from 1 January 1972; the remaining conditions will have to be fulfilled as soon as possible thereafter and at the latest by the end of the one-year transitional period.

4. The single ceiling for aid intensity

The aim of the single ceiling for the intensity of aid which Member States agree to respect when giving regional aid benefiting a single investor in respect of any given investment in the central regions defined in paragraph 2 is to put an end to outbidding in the matter of aid.

This single ceiling which, during the first stage, does not necessarily involve any changes in the general systems of aid, shall take account of all regional aid received. Similarly, it must not lead those Member States whose present aid systems do not reach this ceiling to increase present aid.

In view of the results of the application of the common assessment method to the principal systems of aid in force in the central regions, the level of the ceiling shall be fixed initially at 20 % in net subsidy-equivalent, calculated according to the common method of assessing aid.

This level cannot be fixed once and for all. The tendency should be as far as possible to reduce the level of aid in the central regions. Moreover, care must be taken to ensure that the ceiling chosen effectively corresponds to the needs and problems of the areas receiving aid in those central regions. Thus, while the introduction of a single ceiling for the intensity of aid constitutes a principle, the choice of the level of that ceiling must remain a procedural detail for the application of that principle. This will provide the necessary flexibility with which to work.

The fixing of a single ceiling does not, however, mean that the granting of aid is justified in all areas of the central regions. Aid may only be granted to regions — or, within the regions, to clearly defined areas — where the socioeconomic situation justifies it. Below this ceiling, which constitutes an upper limit, the Member States will continue to vary the intensity of their regional aid in line with the socioeconomic features of the regions concerned (see 'Regional specificity' under paragraph 7) and, where appropriate, with the situation in the various sectors. Derogation from this ceiling may be permitted on prior communication of the relevant grounds to the Commission. On the basis of that communication, which may deal either with individual cases or with particular or urgent problems arising in an area, the Commission shall take a decision. The Commission shall periodically inform the Council of these derogations from the ceiling.

5. The common method of assessing aid

The work done has made it possible to draw up a common method for assessing and comparing aid.

It should be stressed, however, that this is a method of comparison and not of accounting. It facilitates the comparison of aid within the same system and between the different systems of aid of the Member States, taking into consideration the theoretical maximum which may be granted. The theoretical maximum may be very different from the actual amount of aid granted in a given case.

The method is based on a single measurement criterion, namely the relative size of the aid in relation to the amount of the investment, this size being expressed as a percentage. This method makes it possible to classify the principal forms and methods of aid into three categories: transparent or measurable aid; aid which is semi-transparent or assessable (here the assessment involves assumptions which sometimes

introduce into the calculations a very wide margin of uncertainty); and opaque aid to which the method is not applicable. In the last category a further distinction must be made between opaque aid which can to some extent be made transparent and that which cannot be.

These calculations are based on aid after tax, that is to say, the beneficiary's net subsidy-equivalent after payment of taxes on profits, assuming that in its first year of operation the undertaking makes such profits that the maximum tax is chargeable. This means that the levels of intensity of aid resulting from the application of this method fall below the figures hitherto usually quoted in the context of regional aid.

The application of the common assessment method to the principal general systems of regional aid granted in the central regions of the common market gives the following theoretical maximum intensities for transparent and semi-transparent aid alone:

	(%)
Germany:	18.1
Belgium:	16.5
France:	24.7
Italy:	26.7
Luxembourg:	17.3
Netherlands:	19.8

The outline presentation of the method of assessing State aid, worked out in the course of several mutilateral meetings with national experts and approved on 18 December 1970 by the heads of the national authorities, does no more than indicate the basic definitions and the simplification conventions decided upon at a technical level, without considering in detail the problems which have had to be analysed in order to arrive at these results.

The basic definitions and the conventions are as follows:

(a) The single measurement criterion is the relationship between the amount of aid and the amount of investment, expressed as a percentage.

(b) Transparent or 'measurable' aid is aid which is based on investment and for which the relationship to the amount of that investment may be expressed as a percentage.

(c) The standard basis for granting aid involves three categories of capital expenditure: land, buildings and plant (1). The application of this method thus involves adjustments of the standard basis depending on whether aid is granted only for a part of these categories or for additional expenditure. In the latter case, the transparency of the aid depends on knowing its size in relation to the standard basis.

(d) Breakdown of the standard basis for aid: the national experts have adopted the following breakdown (2):

(1) This convention involves a greater or lesser margin of approximation according to which items are included in the three categories of expenditure.

(2) These breakdowns are only very rough averages. On this point therefore the method departs from the principle of considering only the theoretical maximum aid.

(%)

	Land	Buildings	Plant
Germany:	5	30	65
Belgium:	5	40	55
France:	5	50	45
Italy:	5	30	65
Luxembourg:	5	50	45
Netherlands:	5	40	55

(e) The date of payment is the same for all kinds of aid [3]. No account is taken of the difference between the date or dates of payment and the date when the decision to grant it was taken. Loans at reduced rates or with rebates of interest are aligned on the date of subsidies by means of a calculation adjusting them to current values.

(f) The rate of adjustment to current values used for the calculations has been fixed at 8 %.

(g) The problem of different tax arrangements applied to aid within the same general system, according to the different forms of aid, and between different general systems of regional aid of the Member States, for the same form of aid, shall be solved by adopting the formula of the net result after tax, expressed as subsidy-equivalent, of aid actually remaining to the beneficiary. This assumes [4] that the undertaking makes a profit from the outset and that at the end of the first financial year the profits are sufficient to pay the maximum taxes levied on the aid.

(h) Factors in the calculation as applied to loans at reduced rates or with rebates of interest are as follows:

(i) the proportion: percentage of the capital expenditure, taking account of the standard basis, covered by the loan;

(ii) the term of the loan;

(iii) the term of the repayment-free period;

(iv) the extent of the interest rate rebate.

The texts of laws, regulations or administrative provisions submitted to the Commission must contain this information for the system of aid to be transparent.

(i) The reference rate is the reference rate used by the public authorities for the payment of subsidies to the credit institutions. If there is no such rate, the average rate of interest in the market concerned is taken into consideration. When aid of this type is increased under depressed economic conditions, a rate which corresponds to such conditions is chosen.

[3] This simplification also introduces a margin of approximation, but with a tendency to increase the intensity.
[4] This assumption reduces the intensity of aid in real terms since in practice it would hardly ever be true. An undertaking making a loss or breaking even during the initial years would retain a considerably larger proportion of the aid.

(j) Transparent fiscal aid is that which fulfils the following conditions:

(i) The tax levied according to a standard or a maximum rate must be based on an amount invested in the region.

(ii) In addition, the aid must be determinable by a proportion of the rate of tax and be granted for a specified term.

However, all fiscal aid may be made transparent by fixing a ceiling expressed as a percentage of the investment.

6. The transparency of aid

The requirement that aid be transparent constitutes an essential condition for the coordination and assessment of the systems of aid. In relation to the common method of assessment, the concept of transparency is defined as follows:

(i) Aid is transparent or 'measurable' when the common method of assessment of aid can be applied to it.

(ii) A system of aid is transparent when, for every form of aid which it provides for, it contains all the information needed to apply the common method of assessment to each form of aid; and when the criteria for varying the amount of aid and the conditions concerning cumulation of aid are clearly specified.

The general systems of aid at present in force do not yet fulfil these conditions. A certain period of time will be required for this. Experts are at present working on the problem of opaque aid.

It is however recognised that aid can be gradually coordinated without waiting for the outcome of this work, on condition that the Member States undertake the obligations set out in point 4 of the 'Principles of coordination'.

7. Regional specificity

This is the variation of aid intensity according to the nature, intensity and urgency of the problems of regional development which the public authorities intend to solve.

Since the concept of regional specificity is directly linked with the establishment of a Community regional policy, no rule more specific than the provisions of the Treaty can, in the present circumstances, determine those Community regions where the granting of aid is justified in varying degrees and those where it is not.

The work to be carried out on the particular aspects of each region by the Regional Development Committee will facilitate this assessment.

Pursuant to the Treaty, the Commission shall ensure that the principles set out in point 5 of the 'Principles of coordination' are effectively and gradually observed.

8. Repercussions on different sectors

The lack of sectorial specificity is a basic feature of most of the general systems of regional aid, due to the fact that regional aid is often granted to all industrial sectors without distinction. Nevertheless,

it is in the goods and services sectors that the effects of aid on competition and trade are felt. It is however difficult to assess these effects in the absence of any sectorial specificity in regional aid.

Because of the problems they might cause at Community level and to solve this difficulty, a procedure must be worked out to enable these effects on various sectors to be grasped.

Experts are at present working on this matter and various solutions are being examined. It is, however, recognised that coordination of regional aid can begin to be applied without waiting for the results of this work, on condition that the ban on double cumulation (see point 6 of the 'Principles of coordination') is observed, since the Commission can use the procedure laid down in Article 93(2) of the Treaty establishing the European Economic Community should the need arise, particularly where the application of general systems of aid gives rise to well-founded complaints from a Member State.

Independently of this work, maximum attention should be devoted to the sectorial aspects of the information on aid to be supplied to the Commission by the Member States. In this respect, it should be recalled that:

(i) Provisions or measures to direct regional aid towards certain sectors must, since they are constituent elements of the systems of aid, be the subject, in the same way as the other provisions, of the prior notification which, in accordance with Article 93(3) of the Treaty, must be made in good time to the Commission: it is immaterial whether the necessary information is taken directly from the general system of aid or whether reference is made only to national or regional development plans; the legal form (statutory provisions or administrative circulars) and the legal character (binding provisions or merely guidelines) of such provisions are also irrelevant.

(ii) Where a system of regional aid has mixed objectives, both regional and sectorial, it is essential that the system be notified as such to the Commission, pursuant to Article 93(3) of the Treaty, so that it may be assessed from both the regional and the sectorial angles.

(iii) 'Sectorised' statistical information on the application of general systems of regional aid shall, like any other information on these systems, form part of the information to be communicated regularly by the Member States to the Commission in order that it may, together with those States, keep under constant review the systems of aid as provided in Article 93(1) of the Treaty.

A technique is currently being worked out to deal with the *post facto* statistical examination of the repercussions of regional aid on the various sectors (homogeneity of data, intervals at which it is to be collected).

9. Since the implementation of the coordination and adaptation of systems of regional aid is gradual, some supervision is required not only to ensure that it is gradual but also to be able to assess the effective results of this coordination and, if appropriate, to round off or supplement the procedure of application.

This supervision shall be exercised by the Commission by means of the *post facto* notification which it will receive of significant cases of application, under a procedure ensuring business secrecy, which will be drawn up with the cooperation of experts from the Member States.

The results of the application of the principles of coordination will be examined periodically with the senior national officials responsible for aid. The Commission will make an annual report to the Council.

Guidelines on national regional aid (*)

1. INTRODUCTION

The criteria applied by the Commission when examining the compatibility of national regional aid with the common market under Articles 92(3)(a) and 92(3)(c) of the EC Treaty have been set out in a number of documents of various sorts brought to the attention of the Member States and other interested parties (1).

The growing number of these documents, their heterogeneous nature and the long time-frame involved, the changes in thinking and practice both within the Commission and within Member States and the need to concentrate aid and reduce distortions of competition make it necessary to aim for transparency, up-to-dateness and simplification by revising all the criteria currently applied and replacing the said documents (2) with a single text. The text that follows seeks to meet this need.

The aid measures which form the subject-matter of these guidelines ('regional aid') differ from the other categories of government support (in particular aid for R&D, environmental protection, or firms in difficulty) in that they are reserved for particular regions and have as their specific aim the development of those regions (3).

Regional aid is designed to develop the less-favoured regions by supporting investment and job creation in a sustainable context. It promotes the expansion, modernisation and diversification of the activities of establishments located in those regions and encourages new firms to settle there. In order to foster this development and reduce the potential negative effects of any relocation, it is necessary to make the granting of such aid conditional on the maintenance of the investment and the jobs created during a minimum period in the less-favoured region.

In exceptional cases, such aid may not be enough to trigger a process of regional development, if the structural handicaps of the region concerned are too great. Only in such cases may regional aid be supplemented by operating aid.

The Commission considers that regional aid can play the role that is assigned to it effectively and hence justify the consequent distortions of competition, provided that it adheres to certain principles and obeys certain rules. Foremost among these principles is the exceptional nature of the instrument, in keeping with the letter and spirit of Article 92.

(*) OJ C 74, 10.3.1998, p. 9.

(1) See Commission of the European Communities, Competition law in the European Communities, Volume IIA: Rules applicable to State aids, Brussels — Luxembourg, 1995, p. 187 et seq.

(2) The documents replaced by these guidelines, including the annexes thereto, are as follows:
- Commission communication to the Council (OJ C 111, 4.11.1971, p. 7);
- Commission communication to the Council (COM(73) 1110, 27.6.1973);
- Commission communication to the Council (COM(75) 77 final, 26.2.1975);
- Commission communication to the Member States (OJ C 31, 3.2.1979, p. 9);
- Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2);
- Commission communication to the Member States on the reference and discount rates applicable in France, Ireland and Portugal (OJ C 10, 16.1.1990, p. 8);
- Commission communication to the Member States on the method of application of Article 92(3)(a) to regional aid (OJ C 163, 4.7.1990, p. 6);
- Commission notice, addressed to Member States and other interested parties, concerning an amendment to Part II of the communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 364, 20.12.1994, p. 8).

The guidelines are consistent with the criteria in the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971, p. 1).
As to the notice concerning the reference and discount rate (OJ C 273, 9.9.1997, p. 3), this is no longer part of the documents relating to regional aid, since it concerns all State aid.

(3) Also regarded as regional aid is aid to SMEs that provides for increases to assist regional development.

In fact, such aid is conceivable in the European Union only if it is used sparingly and remains concentrated on the most disadvantaged regions ([4]). If aid were to become generalised and, as it were, the norm, it would lose all its incentive quality and its economic impact would be nullified. At the same time, the aid would interfere with the normal interplay of market forces and reduce the efficacy of the Community economy as a whole.

2. SCOPE

The Commission will apply these guidelines to regional aid granted in every sector of the economy apart from the production, processing and marketing of the agricultural products listed in Annex II of the Treaty, fisheries and the coal industry. In addition, some of the sectors they cover are also governed by rules aimed specifically at the sectors in question ([5]).

A derogation from the incompatibility principle established by Article 92(1) of the Treaty may be granted in respect of regional aid only if the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region ([6]) can be guaranteed. The weight given to the advantages of the aid is likely to vary according to the derogation applied, having a more adverse effect on competition in the situations described in Article 92(3)(a) than in those described in Article 92(3)(c) ([7]).

An individual ad hoc aid payment ([8]) made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such ([9]). The latter must remain neutral towards the allocation of productive resources between the various economic sectors and activities.

The Commission considers that, unless it can be shown otherwise, such aid does not fulfil the requirements set out in the preceding paragraph ([10]).

Consequently, the derogations in question will normally be granted only for multisectoral aid schemes open, in a given region, to all firms in the sectors concerned.

3. DEMARCATION OF REGIONS

3.1. In order that the aid schemes directed at them may benefit from one of the derogations, the regions concerned must satisfy the conditions set forth in those derogations. The Commission establishes whether the conditions are met by applying predetermined analytical criteria.

([4]) See the conclusions of the Council of 6-7 November 1995 on competition policy and industrial competitiveness.

([5]) The sectors covered by special rules over and above those set out here are currently as follows: transport, steel, shipbuilding, synthetic fibres, and motor vehicles. In addition, specific rules apply to investment covered by the multisectoral framework for regional aid to large projects.

([6]) See in this respect the judgment of the Court of Justice in Case 730/79 *Philip Morris* [1980] ECR 2671, at paragraph 17 and in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, at paragraph 20.

([7]) See in this respect the judgment of the Court of First Instance in T-380/94 *AIUFFASS and AKT* [1996] ECR II-2169, at paragraph 54.

([8]) See in this respect the judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and C-280/92, *Spain* v *Commission* [1994] ECR I-4103.

([9]) As a result, under the WTO Agreement on subsidies and countervailing measures, this type of aid has been expressly excluded from the category of non-actionable regional aid (authorised without scrutiny).

([10]) Ad hoc aid for firms in difficulty is governed by specific rules and is not conceived of as regional aid as such. The rules currently in force are those published in OJ C 368, 23.12.1994, p. 12.

3.2. In the light of the principle stated in the introduction to these guidelines (that of the exceptional nature of the aid), the Commission considers prima facie that the total extent of assisted regions in the Community must remain smaller than that of unassisted regions. In practice, and using the most common unit of measurement of the scale of the aid (the percentage of population covered), this means that the total coverage of regional aid in the Community must be less than 50 % of the Community population.

3.3. As the two derogations in question relate to regional problems of a different nature and intensity, priority must be given, within the limits of the total aid coverage referred to in point 3.2, to regions affected by the most acute problems ([11]).

3.4. The demarcation of eligible regions must therefore lead to a spatial concentration of aid in accordance with the principles mentioned in points 3.2 and 3.3.

The derogation in Article 92(3)(a)

3.5. Article 92(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 92(3)(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole' ([12]).

The Commission accordingly considers, following a tried and tested approach, that the conditions laid down are fulfilled if the region, being a NUTS ([13]) level II geographical unit, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75.0% of the Community average ([14]). The GDP/PPS of each region and the Community average to be used in the analysis must relate to the average of the last three years for which statistics are available. These amounts are calculated on the basis of data furnished by the Statistical Office for the European Communities.

The derogation in Article 92(3)(c)

3.6. In contrast to Article 92(3)(a), where the situation in view is identified precisely and formally, Article 92(3)(c) allows greater latitude when it comes to defining the difficulties of a region that can be alleviated with the help of aid measures. The relevant indicators do not therefore necessarily boil down in this case to standards of living and underemployment. In any case, the appropriate framework for evaluating these difficulties may be provided not only by the Community as a whole but also by the relevant Member State in particular.

The Court of Justice, in Case 248/84 (see footnote 12), has expressed its views on these two matters (range of problems covered and reference framework for the analysis), as follows: 'The exemption in Article 92(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 92(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 authorise aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average'.

([11]) The regions eligible under the derogation in paragraph (a) currently account for 22.7 % of the Community population, compared with 24 % for the regions eligible under the derogation in paragraph (c).

([12]) Case 248/84 *Germany* v *Commission* [1987] ECR 4013, at paragraph 19.

([13]) Nomenclature of Statistical Territorial Units.

([14]) The underlying assumption being that the GDP indicator is capable of reflecting synthetically both the phenomena mentioned.

3.7. The regional aid covered by the derogation in point (c) must, however, form part of a coherent regional policy of the Member State and adhere to the principles of geographical concentration set out above. Inasmuch as it is intended for regions which are less disadvantaged than those to which point (a) relates, such aid is, to a greater extent than the latter, exceptional and can be allowed only to a very limited degree. This being so, only a small part of the national territory of a Member State may prima facie qualify for the aid in question. This is why the population coverage of regions falling under Article 92(3)(c) must not exceed 50 % of the national population not covered by the derogation under Article 92(3)(a) ([15]).

On the other hand, the fact that the nature of such aid makes it possible to take account of the national peculiarities of a Member State does not exempt the aid from the need for scrutiny from the viewpoint of Community interests. The determination of the regions eligible in each Member State must therefore fit into a framework guaranteeing the overall coherence of such determination at Community level ([16]).

3.8. So as to afford national authorities sufficient latitude when it comes to choosing eligible regions without jeopardising the effectiveness of the system of checks operated by the Commission in respect of this type of aid and the equal treatment of all Member States, the determination of the regions eligible under the derogation in question consists of two parts:

— the fixing by the Commission, for each country, of a ceiling on the coverage of such aid,

— the selection of eligible regions.

The latter part will obey transparent rules but will also be sufficiently flexible to allow for the diversity of situations potentially justifying the application of the derogation. The aid coverage ceiling is designed to be conducive to the abovementioned flexibility in the choice of eligible regions whilst ensuring the uniform treatment required by acceptance of such aid from the Community point of view.

3.9. To guarantee effective control of regional aid while contributing to the achievement of the objectives set out in Article 3 of the Treaty, in particular under points (g) and (j), the Commission sets an overall ceiling for the coverage of regional aid in the Community in terms of population. The overall ceiling covers all the regions eligible under the 92(3)(c) and 92(3)(a) derogations. Since the regions eligible for regional aid under the Article 92(3)(a) derogation and their global coverage at Community level are determined exogenously and automatically by applying the criterion of 75 % of per capita GDP/PPS, it follows that the Commission decision on the overall ceiling defines, simultaneously, the ceiling on coverage under the Article 92(3)(c) derogation, at Community level. The Article 92(3)(c) ceiling is obtained by deducting from the overall ceiling the population of the regions eligible under the 92(3)(a) derogation. It is then distributed among the different Member States in the light of the relative socioeconomic situation of the regions within each Member State, assessed in the context of the Community. The method of determining this percentage in each Member State is described in Annex III.

3.10. The Member States notify to the Commission, under Article 93(3), the methodology and the quantitative indicators which they wish to use to determine the eligible regions, and the list of regions they propose for the (c) derogation and the relative intensities ([17]). The percentage for the population of the regions concerned may not exceed the said ceiling on coverage for the purposes of the 92(3)(c) derogation.

([15]) Barring a transitional exception arising from the application of point 8 of Annex III to these guidelines.

([16]) See, in this connection, the judgments of the Court of Justice in Cases 730/79 *Philip Morris*, at paragraph 26, and 310/85 *Deufil* [1987] ECR 901, at paragraph 18.

([17]) See points 4.8 and 4.9.

3.10.1. The methodology must satisfy the following conditions:

— it must be objective,

— it must make it possible to measure the disparities in the socioeconomic circumstances of the regions in question in the Member State concerned, highlighting significant differences,

— it must be presented in a clear, detailed fashion, to enable the Commission to assess its merits.

3.10.2. The indicators must satisfy the following conditions:

— their number, including both simple indicators and combinations of indicators, must be limited to five,

— they must be objective and relevant to the examination of the socioeconomic circumstances of the regions,

— they must either be based on statistical series relating to the indicators used over a period including at least the three years prior to the moment of notification, or be derived from the last survey carried out, if the relevant statistics are not available on an annual basis,

— they must be drawn up by reliable statistical sources.

3.10.3. The list of regions must satisfy the following conditions:

— the regions must conform to NUTS level III or, in justified circumstances, to a different homogeneous geographical unit. Only one type of geographical unit may be submitted by each Member State,

— the individual regions proposed or the groups of contiguous regions must form compact zones, each of which must have a population of at least 100 000. If the population of the regions is less, a fictitious figure of 100 000 inhabitants will be used for the calculation of the percentage of the population covered. Exceptions to this rule are the NUTS level III regions with a population of less than 100 000, islands and other regions characterised by similar geographical isolation ([18]). Where one region adjoins regions eligible for regional aid in other Member States, the rule applies to the whole complex formed by those regions,

— the list of regions must be arranged on the basis of the indicators set out at point 3.10.2. The regions proposed must show significant disparities (half of the standard deviation) compared with the average of the potential 92(3)(c) regions of the Member State concerned, in respect of one or other indicator used in the method.

3.10.4. Regions with a low population density:

— subject to the ceiling for each Member State mentioned at point 3.9, regions with a population density of less than 12.5 inhabitants per square kilometre ([19]) may also qualify for the derogation in question.

([18]) Because of the size of its population, Luxembourg is also exempt from this rule.
([19]) Eligibility criterion established by the Commission notice cited at footnote 2, eighth indent.

3.10.5. Consistency with the Structural Funds:

— to encourage the Member States to ensure consistency between the choice of such regions and the selection of those qualifying for Community assistance, the regions eligible under the Structural Funds may also qualify for the derogation in question subject to the ceilings mentioned at point 3.9, and in accordance with the conditions set out in the second indent of point 3.10.3.

4. OBJECT, FORM AND LEVEL OF AID

4.1. The object of regional aid is to secure either productive investment (initial investment) or job creation which is linked to investment. Thus this method favours neither the capital factor nor the labour factor.

4.2. To ensure that the productive investment aided is viable and sound, the recipient's contribution ([20]) to its financing must be at least 25 %.

The form of the aid is variable: grant, low-interest loan or interest rebate, government guarantee or purchase of a State shareholding on favourable terms, tax exemption, reduction in social security contributions, supply of goods and services at a concessionary price, etc.

In addition, aid schemes must lay down that an application for aid must be submitted before work is started on the projects.

4.3. The level of the aid is defined in terms of intensity compared with reference costs (see 4.5, 4.6 and 4.13).

Aid for initial investment

4.4. Initial investment means an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation) ([21]).

An investment in fixed capital undertaken in the form of the purchase of an establishment which has closed or which would have closed had it not been purchased may also be regarded as initial investment, unless the establishment concerned belongs to a firm in difficulty. In the latter case, aid for the purchase of an establishment may include an advantage for the firm in difficulty, which must be examined in accordance with the guidelines on State aid for rescuing and restructuring firms in difficulty ([22]).

([20]) This minimum contribution of 25 % 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.

([21]) Replacement investment is thus excluded from the concept. Aid for this type of investment falls within the category of operating aid, to which the rules described at points 4.15 to 4.17 apply.
Also excluded from this concept is aid for the financial restructuring of a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12).
Restructuring aid within the meaning of point 2.5 of the said guidelines may be granted, in so far as it relates to investment measures (rationalisation, modernisation, diversification), without needing separate notification, under a scheme of regional aid. However, since such regional aid is part of proposed aid for the restructuring of a firm in difficulty, it must be taken into account in the examination carried out under the said guidelines.

([22]) For the text currently applicable, see footnote 10.

4.5. Aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery ([23]).

In the event of a purchase, only the costs of buying these assets ([24]) should be taken into consideration (the transaction must take place under market conditions). Assets for whose acquisition aid has already been granted prior to the purchase should be deducted.

4.6. Eligible expenditure may also include certain categories of intangible investment up to a limit of 25 % of the standard base in the case of large firms ([25]).

Such expenditure must be confined to expenditure entailed by the transfer of technology through the acquisition of:

— patents,

— operating or patented know-how licences,

— unpatented know-how.

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 amortisable assets,

— 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.

4.7. Aid notified by the Member States must normally be expressed in gross terms, i.e. before tax. In order to make (i) the various forms of aid comparable with one another and (ii) aid intensities comparable from one Member State to another, the Commission converts aid notified by Member States into aid expressed in net grant equivalent (NGE) ([26]).

4.8. The intensity of the aid must be adapted to take account of the nature and intensity of the regional problems that are being addressed. A distinction must therefore be drawn from the outset between the intensities allowed in regions eligible under the derogation in point (a) and those allowed in regions eligible under the derogation in point (c). Regard has to be had in this connection to the fact that regions which are eligible under the derogation in Article 92(3)(c) are not characterised by an abnormally low standard of living or serious underemployment in the sense in which these terms are used in the derogation in point (a) of that paragraph. The distorting effects of aid are accordingly less

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([23]) In the transport sector, expenditure on the purchase of transport equipment (movable assets) cannot be included in the uniform set of items of expenditure (standard base). Such expenditure, therefore, is not eligible for aid for initial investment.

([24]) Where a purchase is accompanied by other initial investment, the expenditure relating to the latter should be added to the cost of the purchase.

([25]) For SMEs, the criteria and conditions applying are defined in the Community guidelines on State aid for small and medium-sized enterprises, OJ C213, 23.7.1996, p. 4.

([26]) For the method used to calculate NGE, see Annex I.

justified there than in regions qualifying for exemption under point (a). This means that the admissible aid intensities are from the outset less high in regions qualifying for exemption under point (c) than in those qualifying for exemption under point (a).

In the case of regions falling under Article 92(3)(a), the Commission thus considers that the intensity of regional aid must not exceed the rate of 50 % NGE, except in the outermost regions ([27]), where it may be as much as 65 % NGE. In the Article 92(3)(c) regions, the ceiling on regional aid must not exceed 20 % NGE in general, except in the low population density regions or in the outermost regions, where it may be as high as 30 % NGE.

In the NUTS level II regions eligible under Article 92(3)(a) whose per capita GDP/PPS is greater than 60 % of the Community average, the intensity of regional aid must not exceed 40 % NGE, except in the outermost regions, where it may be as high as 50 % NGE.

In the regions eligible under Article 92(3)(c) which have both a higher per capita GDP/PPS and a lower unemployment rate than the respective Community average ([28]), the intensity of regional aid must not exceed 10 % NGE except in the low population density regions or in the outermost regions, where it may be as high as 20 % NGE. Exceptionally in the case of regions subject to the said ceiling of 10 % NGE, higher intensities not exceeding the normal ceiling of 20 % NGE may be approved for regions (corresponding to NUTS level III or smaller) adjoining a region with Article 92(3)(a) status.

All the abovementioned ceilings constitute upper limits. Beneath these ceilings, the Commission will ensure that the regional aid intensity is adjusted to reflect the seriousness and intensity of the regional problems addressed when examined in a Community context.

4.9. The ceilings indicated in point 4.8 may be raised by the supplements for SMEs provided for in the Commission notice on aid for SMEs ([29]), i.e. by 15 percentage points gross ([30]) in the case of regions qualifying for exemption under point (a) and by 10 percentage points gross in the case of regions qualifying for exemption under point (c). The final ceiling applies to the base for SMEs. These supplements for SMEs do not apply to transport firms.

4.10. Aid for initial investment must be made conditional, through its method of payment or through the conditions associated with its acquisition, on the maintenance of the investment in question for a minimum period of five years.

Aid for job creation

4.11. As was indicated in point 4.1, regional aid may also focus on job creation. However, unlike aid for job creation, which is defined in the guidelines on aid to employment and relates to jobs not linked to an investment project ([31]), we are concerned here solely with jobs linked to the carrying-out of an initial investment project ([32]).

([27]) The outermost regions are: the French overseas departments (FOD), the Azores, Madeira and the Canary Islands (see Declaration 26 on the Outermost Regions of the Community, annexed to the Treaty on European Union).

([28]) GDP and unemployment must be measured at NUTS level III.

([29]) Regional aid supplements are also provided for in the case of aid for R&D and aid for environmental protection. The basis on which such aid is calculated is, however, different from that for regional aid (including the SME variant). The supplements in question, therefore, are added, not to the regional aid, but to the other type of aid concerned. The texts currently applicable to the two types of aid mentioned are, in the case of R&D, that published in OJ C 45, 17.2.1996, p. 5 and, in the case of environmental protection, that published in OJ C 72, 10.3.1994, p. 3.

([30]) Aid intensity supplements in gross terms are used, as defined in the guidelines on aid for SMEs.

([31]) For the version currently in force, see OJ C 334, 12.12.1995, p. 4.

([32]) A job is deemed to be linked to the carrying-out of an investment project if it concerns the activity to which the investment relates and if it is created within three years of the investment's completion. During this period, the jobs created following an increase in the utilisation rate of the capacity created by the investment are also linked to the investment.

4.12. Job creation means a net increase in the number of jobs ([33]) in a particular establishment compared with the average over a period of time. Any jobs lost during that period must therefore be deducted from the apparent number of jobs created during the same period ([34]).

4.13. As with investment aid, the aid for job creation provided for in these guidelines must be tailored to the nature and intensity of the regional problems it addresses. The Commission considers that the amount of aid must not exceed a certain percentage of the wage cost ([35]) 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.

4.14. Aid for job creation must be made conditional, through its method of payment or through the conditions associated with its acquisition, on the maintenance of the employment created during a minimum period of five years.

Operating aid

4.15. 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 92(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 ([36]). It is for the Member State to demonstrate the existence of any handicaps and gauge their importance.

4.16. In the outermost regions qualifying for exemption under Article 92(3)(a) and (c), and in the regions of low population density qualifying either for exemption under Article 92(3)(a) or under 92(3)(c) on the basis of the population density test referred to at point 3.10.4, aid intended partly to offset additional transport costs ([37]) may be authorised under special conditions ([38]). It is up to the Member State to prove that such additional costs exist and to determine their amount.

4.17. With the exception of the cases mentioned in point 4.16, operating aid must be both limited in time and progressively reduced. In addition, operating aid intended to promote exports ([39]) between Member States is ruled out.

Rules on the cumulation of aid

4.18. The aid intensity ceilings laid down in accordance with the criteria set out at points 4.8 and 4.9, apply to the total aid:

— where assistance is granted concurrently under several regional schemes,

— whether the aid comes from local, regional, national or Community sources.

([33]) The number of jobs corresponds to the number of annual labour units (ALU), i.e. the number of persons employed full time in one year, part-time and seasonal work being ALU fractions.

([34]) It goes without saying that such a definition holds true as much for an existing establishment as for a new establishment.

([35]) The wage cost comprises the gross wage, i.e. before tax, and the compulsory social security contributions. The Commission retains the right to use Community statistics on the average wage cost in the different Member States as a reference.

([36]) Operating aid takes the form in particular of tax exemptions or reductions in social security contributions.

([37]) Additional transport costs mean the extra costs occasioned by movements of goods within the borders of the country concerned. In no circumstances may such aid constitute export aid, nor must it constitute measures having an equivalent effect to quantitative restrictions on imports, within the meaning of Article 30 of the EC Treaty.

([38]) With regard to the special conditions for regions qualifying for the Article 92(3)(c) derogation under the population density criterion, see Annex II. As for the other regions eligible for aid to offset in part additional transport costs, the conditions applicable are similar to those in Annex II.

([39]) See footnote 3 of the notice on *de minimis* aid, OJ C 68, 6.3.1996, p. 9.

4.19. The job creation aid described in points 4.11 to 4.14 and the investment aid described in points 4.4 to 4.10 may be combined ([40]), subject to the intensity ceiling laid down for the region ([41]).

4.20. 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 schemes in question.

4.21. Where the Member State lays down that State aid under one scheme may be combined with aid under other schemes, it must specify, for each scheme, the method by which it will ensure compliance with the conditions listed above.

5. REGIONAL AID MAP AND DECLARATION OF COMPATIBILITY OF AID

5.1. The regions of a Member State eligible under the derogations and the ceilings on the intensity of aid for initial investment or the aid for job creation approved for each region together form a Member State's regional aid map.

5.2. Under Article 93(3) of the Treaty, the Member States notify the draft map drawn up in accordance with the criteria set out above in points 3.5, 3.10, 4.8 and 4.9. The Commission adopts the map in accordance with the procedure laid down in Article 93 of the Treaty, normally by a single decision for all the relevant regions of a Member State and for a fixed period. National regional aid maps will thus be reviewed periodically.

5.3. In the interests of consistency between the Commission's competition policy decisions and decisions concerning regions eligible under the Structural Funds, the period of validity of the maps is in principle aligned on the timetable for Structural Fund assistance.

5.4. Draft aid schemes are approved by the Commission either when the map is drawn up or subsequently, subject to the regions, ceilings and duration defined for the map.

5.5. The implementation of the schemes mentioned in point 5.4 forms the subject matter, on the part of Member States, of annual reports to the Commission in accordance with the rules in force ([42]).

5.6. During the period of validity of the map, Member States may request adjustments to it, if it is shown that socioeconomic conditions have changed significantly. Such changes may relate to the rates of intensity and the eligible regions, provided that the possible inclusion of new regions is offset by the exclusion of regions having the same population. The validity of the adjusted map expires on the date already set for the original map.

5.7. For regions losing their Article 92(3)(a) status as a result of the review of the regional aid map, and acquiring Article 92(3)(c) status, the Commission could accept, during a transitional period, a

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([40]) The job creation aid and the investment aid provided for in these guidelines may not be combined with the job creation aid defined in the guidelines on aid to employment indicated in footnote 31, since it applies in different circumstances and at different times. However, increases in aid for particularly less-favoured categories of beneficiaries will be acceptable under arrangements to be laid down in the guidelines on aid to employment.

([41]) This condition is deemed to be met if the sum of the aid for the initial investor, 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 points 4.8 and 4.9 or the ceiling set for the region in accordance with the criteria indicated at point 4.13.

([42]) For the rules currently in force, see the Commission letter to the Member States of 22 February 1994 as modified by Commission letter to Member States of 2 August 1995.

progressive reduction of the aid intensities for which such regions had been eligible under Article 92(3)(a), at a linear or faster rate, until the intensity ceiling corresponding to the application of points 4.8 and 4.9 above is reached ([43]) ([44]). The transitional period should not exceed two years in the case of operating aid and four years in the case of aid for initial investment and job creation.

5.8. With a view to drawing up the map, Member States are invited to notify to the Commission under Article 93(3) of the Treaty, in addition to the list of regions they propose as being eligible for the derogations in question and the ceilings on intensity, any other factors that need to be taken into account in determining a framework scheme for aid schemes (purpose and form of the aid, size of firms, etc.) which they propose to adopt, whether at central or regional and local level. During the period of validity of the map and within the limits of its duration, all schemes conforming to this framework scheme may be notified in the context of an accelerated procedure.

6. ENTRY INTO FORCE, IMPLEMENTATION AND REVIEW

6.1. Except for the transitional provisions set out in points 6.2 and 6.3 below, the Commission will assess the compatibility of regional aid with the common market on the basis of these guidelines as soon as they are applicable. However, aid proposals which are notified before these guidelines are communicated to the Member States and on which the Commission has not yet adopted a final decision will be assessed on the basis of criteria in force at the time of notification.

In addition, the Commission will propose appropriate measures under Article 93(1) of the EC Treaty to the Member States to ensure that all the regional aid maps and all the regional aid schemes in force on 1 January 2000 are compatible with these guidelines.

In this connection, the Commission will propose, as an appropriate measure under Article 93(1), that the Member States limit the validity of all lists of assisted regions approved by the Commission without an expiry date, or with an expiry date after 31 December 1999, to 31 December 1999.

The Commission will also propose, as an appropriate measure under Article 93(1), that the Member States amend all existing regional aid schemes which will be in force after 31 December 1999, so as to make them compatible with these guidelines from 1 January 2000, and that they communicate the proposed changes within six months.

6.2. Since the eligibility for regional aid under the Article 92(3)(a) and (c) derogations of most of the assisted regions has been approved until 31 December 1999, and with a view to ensuring equitable treatment of the Member States until that date, the Commission may derogate from these guidelines until 31 December 1999, with regard to examination of the eligibility of the lists of assisted regions (new lists or amendments) notified prior to 1 January 1999, provided that the validity of the said lists expires on 31 December 1999. In such cases, the Commission will continue to base itself on the method laid down in its communication ([45]).

6.3. Also with a view to ensuring equitable treatment of the Member States, the Commission may derogate from these guidelines until 31 December 1999, with regard to the examination of the

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([43]) The transitional provisions do not apply to the parts of NUTS II regions losing their Article 92(3)(a) status which, where the additional population-density percentage obtained by applying the second adjustment at point 8 of Annex III to these guidelines is not available, would have had to be excluded from the new aid map.

([44]) In view of its particularly difficult situation, Northern Ireland will retain its status as an exceptional region and its ceiling will be 40 %.

([45]) Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid: see footnote 2, fifth indent.

compatibility of the aid intensities and ceilings on combination proposed in new schemes, ad hoc cases and modifications of existing schemes notified prior to 1 January 1999, provided that the validity of the said intensities and ceilings on combination expires on 31 December 1999 or that the intensities and ceilings on combination proposed from 1 January 2000 are compatible with these guidelines.

6.4. The Commission will review these guidelines within five years of their becoming applicable. It may, in addition, decide to amend them 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.

ANNEX I

NET GRANT EQUIVALENT OF INVESTMENT AID

The method of calculating the net grant equivalent (NGE) is used by the Commission in its assessment of aid schemes notified by the Member States. In principle, therefore, the Member States do not have to apply it, and it is published here simply for reasons of transparency.

1. GENERAL PRINCIPLES

The calculation of net grant equivalent (NGE) consists in reducing all the forms of aid connected with an investment ([46]) to a common measure irrespective of the country concerned, i.e. the net intensity, for the purposes of comparing them with each other or with a predetermined ceiling. What is involved is an *ex ante* comparative method that does not always reflect accounting practice.

The net intensity represents the final benefit which a firm is deemed to derive from the value without tax of the aid in relation to the assisted investment. This calculation may take account only of fixed capital expenditure corresponding to land, building and plant, which represent the standard base.

In the case of schemes whose base includes supplementary expenditure, the latter must be limited to a certain proportion of the standard base. Thus, all schemes will be examined, in the light of their intensities reduced to the expenditure appearing in the standard base, as shown in the following examples ([47]).

Example 1

— Base of scheme: plant

— Maximum intensity of scheme: 30 %

As all the expenditure eligible for the scheme appears in the standard base, the Commission will take the maximum intensity of the scheme, i.e. 30 %, into account without further ado. If the intensity ceiling authorised by the Commission in the region in question is 30 %, the scheme will be considered compatible in this respect.

Example 2

— Base of scheme: plant, buildings and patents up to 20 % of the preceding expenditure

— Maximum intensity of scheme: 30 %

([46]) Tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region. Where the grant of tax aid is spread over several years, any balance remaining at the end of a given year may be carried over to the following year and increased in accordance with the reference rate.

([47]) This system of recalculating intensities does not apply to the intangible investments referred to at point 4.6 of the main text.

All the expenditure eligible for the scheme appears either in the standard base (plant, buildings) or in the list of eligible intangible expenditure (patents). The latter expenditure may not exceed 25 % of the standard base. In these circumstances, the Commission will take the maximum intensity of the scheme, i.e. 30 %, into account without further ado. If the intensity ceiling authorised by the Commission in the region in question is 30 %, the scheme will be considered compatible in this respect.

Example 3

— Base of scheme: buildings, plant, land and stocks up to 50 % of the preceding expenditure

— Maximum intensity of scheme: 30 %

The Commission will take into account the maximum intensity of the scheme reduced to the standard base, i.e. 30 % x 1.5 = 45 %. If the intensity ceiling authorised by the Commission in the region in question is 30%, the scheme will not be considered compatible, unless its intensity is reduced to 30 % / 1.5 = 20 %.

Example 4

— Base of scheme: buildings

— Maximum intensity of scheme: 60 %

If the regional ceiling authorised by the Commission is 30 %, there is nothing to ensure that the aid will comply with the ceiling. The intensity provided for by the scheme is higher than the regional ceiling, but it is applied to a reduced base. The scheme will therefore not be considered compatible in this respect, unless an express condition is added concerning compliance with the regional ceiling applied to the complete base.

The determination of the NGE is based solely on calculation of tax and present value, except in the case of certain forms of aid which require specific treatment. Such calculations are based on elements supplied by the aid scheme or the tax law of the country concerned and on certain parameters established by convention.

1.1. Taxation

The intensity of aid must be calculated after taxation, i.e. after having deducted the taxes payable on it, and in particular taxes on company profits. This is the basis for the term Net Grant Equivalent (NGE), which represents the aid accruing to the recipient after payment of the relevant tax, assuming that the enterprise makes a profit right from the first year, so that maximum tax is charged on the aid.

1.2. Discounting

Present value is calculated at various stages in the determination of an NGE. First, when aid and/or investment expenditure is staggered over time, the actual timing of aid disbursement and expenditure must be taken into account. Consequently, the investment expenditure and aid payments are discounted back to the end of the year in which the enterprise made its first depreciation write-off. Second, the present value is calculated of benefits obtained on repayment of a subsidised loan, or of the tax charged on a grant.

The rate used in such cases is the reference/discount rate determined by the Commission for each Member State. In addition to being used as the discount rate, it is also used to calculate the interest subsidy on a low-interest loan.

1.3. Specific cases

In addition to the taxation and discounting calculations described above, some forms of aid require specific handling. Thus, in the case of aid for the renting of a building, the aid is measured by discounting the differences between the rent paid by the enterprise and a theoretical rent equivalent to the reference rate applied to the value of the building, plus an amount corresponding to depreciation for the building in the year in question. A similar method is used for aid to finance leasing ([48]).

In the case of aid for the renting of land, the theoretical rent is calculated on the basis of the reference rate, minus the rate of inflation, applied to the value of the land.

2. NET GRANT EQUIVALENT OF INVESTMENT AID IN THE FORM OF A CAPITAL GRANT

2.1. General

Investment aid given to an enterprise in the form of a capital grant is expressed first as a percentage of the investment, representing the nominal grant equivalent or the gross grant equivalent.

According to the common assessment method, the Net Grant Equivalent (NGE) of aid is the benefit accruing to the recipient after payment of taxes on company profits.

In most cases, grants are not taxable in themselves, but are deducted from the value of the depreciable investment. This means that the investor depreciates a smaller amount each year than if he had not received aid. Since depreciation amounts are deductible from taxable profits, a grant increases the proportion taken by the State each year in the form of tax on company profits.

The taxation method applying to grants described above, which consists in adding the grant to profits in step with depreciation, is the one most commonly used in all the Member States, but other taxation methods are encountered in certain schemes.

2.2. Calculation examples

Example 1: The aid is not subject to tax

In all Member States, grants are generally entered in the accounts as income and are made subject to tax. It may be, however, particularly in the case of certain R&D aid, that they are exempt from tax. In this case, the NGE is equal to the nominal grant.

([48]) It should be noted that the expenditure associated with the purchase of the land or the building by the renting firm may be considered as eligible, provided that the need for the aid in question is demonstrated.

Example 2: The investment involves only one category of expenditure and the grant is fully subject to tax at the end of the first financial year

This means that the full grant is subject to corporate profits tax from the first year onward. This convention is not excessive, if one remembers that firms, which generally record a loss in their first years of operation, can carry over their losses for several financial years.

To calculate the NGE of the grant, the amount of tax charged is deducted from it.

For instance: investment: 100

nominal grant: 20

rate of tax: 40.0%

The tax charged on the grant is thus 20 x 40 % = 8

The NGE will thus be: (20 – 8) / 100 = 12 %

Example 3: The investment involves only one category of expenditure and the grant is subject to tax on a straight-line basis over five years.

Here the grant is subject to tax in equal portions over five years. One fifth of the aid will thus be added to profits each year for five years. To calculate the NGE, the discounted amounts of tax charged each year on each fifth under the tax arrangements applicable are deducted from the grant.

For instance: investment: 100

nominal grant: 20

rate of tax: 40.0 %

discount rate: 8 %

The table below shows how the taxes charged each year, and the discounted values, are calculated:

Period	Tax charged on grant (1)	Discount factor (2)	Discounted value (1) x (2)
End of 1st year	(20/5) x 40 %	1.0	1.600
End of 2nd year	(20/5) x 40 %	$1/(1 + 0.08)^1$	1.481
End of 3rd year	(20/5) x 40 %	$1/(1 + 0.08)^2$	1.372
End of 4th year	(20/5) x 40 %	$1/(1 + 0.08)^3$	1.270
End of 5th year	(20/5) x 40 %	$1/(1 + 0.08)^4$	1.176
		Total	6.900

The total in the last column represents the sum of the discounted taxes charged each year. It has to be deducted from the nominal grant to obtain the Net Grant Equivalent.

Thus the NGE is: (20-6.9)/100=13.1 %

Note: The tax charged on the grant is discounted at the end of the first year on the assumption that this is the date when the enterprise makes its first depreciation write-off.

Example 4: The investment involves three categories of capital expenditure: land, buildings and plant, taxed over different timescales

The three types of expenditure constitute what is referred to as the standard base for aid. Expenditure is apportioned within the standard base using a breakdown which differs by Member State, as shown in the following table.

	Land	Buildings	Plant
Belgium	5	40	55
Germany	5	30	65
France	5	50	45
Italy	5	30	65
Luxembourg	5	50	45
Netherlands	5	40	55
United Kingdom	10	20	70
Denmark	5	45	50
Greece	3	27	70
Spain	5	40	55
Ireland	5	50	45
Portugal	3	25	72
Austria	5	30	65
Finland	1	19	80
Sweden	5	45	50

These factors are used to calculate the theoretical NGEs under aid schemes. In individual cases of aid, on the other hand, the actual apportionment breakdown of the three categories of expenditure in the standard base is used.

As the timescale over which a grant is subject to tax differs according to the category of expenditure, the first step is to allocate the grant proportionally among the items forming the base of the aid.

The next step is to calculate the amounts charged as tax, separately for each category of expenditure (the calculations are of the same kind as those in Example 3).

Lastly, the taxes are deducted from the nominal grant in order to arrive at the NGE:

NGE = Nominal grant less:

— The tax charged on aid allocated to land

— The tax charged on aid allocated to buildings

— The tax charged on aid allocated to plant

For instance: investment: 100

of which: — land: 3 not depreciable

— buildings: 33 straight-line depreciation over 20 years

— plant: 64 decreasing-line depreciation over 5 years

nominal grant: 20

rate of tax: 55 %

discount rate: 8 %

To calculate the tax on aid allocated to land

In general, land is not depreciable. Assuming that the aid is to be subject to tax at the same pace as depreciation, aid granted to land is not taxed and no tax is to be deducted from the grant made in respect of land.

To calculate the tax on aid allocated to buildings

Assuming that the aid allocated to buildings is to be subject to tax in equal portions at the same pace as depreciation, i.e. over 20 years:

— the nominal grant allocated to buildings would be: 20 x 33 % = 6.6

— each year, the portion of the grant included in profits would be: 6.6/20 = 0.33

— the amount of tax charged on that portion would be: 0.33 x 55 % = 0.18

An amount of 0.18 would be due from profits each year for 20 years in respect of the grant made for buildings. If this stream of amounts is discounted at the end of the first year (same kind of calculation as in the table in Example 3), the total tax charged in the period on the aid grant to buildings will be 1.925.

To calculate the tax on aid allocated to plant

Let us assume that the aid allocated to plant is to be subject to tax at the same pace as depreciation, i.e. by the decreasing-line method, over five years, at the following rates: 40 %, 24 %, 14.4 %, 10.8 % and 10.8 %.

Unlike the case of buildings, taxation here is different each year. The tax will therefore have to be calculated year by year. The share of the nominal grant allocated to plant is 20 x 64 % = 12.8.

To calculate the tax charges

Period	Tax charged on grant (1)	Discount factor (2)	Discounted value (1) x (2)
End of 1st year	12.8 x 40 % x 55 %	1.0	2.816
End of 2nd year	12.8 x 24% x 55%	$1/(1 + 0.08)^1$	1.564
End of 3rd year	12.8 x 14.4% x 55%	$1/(1 + 0.08)^2$	0.869
End of 4th year	12.8 x 10.8% x 55%	$1/(1 + 0.08)^3$	0.604
End of 5th year	12.8 x 10.8% x 55%	$1/(1 + 0.08)^4$	0.559
		Total	6.412

To calculate the NGE:

— nominal grant		20
less:		
— tax charged on aid allocated to land		0
— tax charged on aid allocated to buildings		– 1.925
— tax charged on aid allocated to plant		– 6.412
	NGE	11.6 %

Notes:

1. The taxation of grants, referred to in the common method of assessing aid, is governed both by the tax laws of the Member States concerned and by any special arrangements under the scheme in question.

2. For the purposes of determining an NGE, it is therefore necessary to have precise information on:

— the scale of tax rates on profits in the country concerned,

— the depreciation rules in force, or the specific method of incorporating aid into profits prescribed by the scheme in question.

3. NET GRANT EQUIVALENT OF INVESTMENT AID IN THE FORM OF A SUBSIDISED LOAN

3.1. General

Investment aid given to an enterprise in the form of a subsidised loan is expressed first as the number of percentage points of the rebate, i.e. the difference between the reference rate and the rate charged by the lender.

The sole effect of the interest rebate is to reduce interest charges, since it is assumed that capital repayments are carried out in the same way whether the interest rate is normal or reduced.

This benefit obtained on repayment of the loan is expressed as a percentage of the investment, as for capital grants. This gives the nominal grant equivalent or gross grant equivalent.

This does not represent the final benefit which the enterprise derives from the interest subsidy. Since interest charges are deductible from taxable profits, an interest subsidy means the loss of part of such tax benefit by increasing the share taken by the State in the form of tax on company profits.

Consequently, the net grant equivalent (NGE) is obtained by deducting from the gross grant equivalent the tax charged by the State on the increase in taxable profits that is attributable to the rebate.

As in the case of a grant, the NGE of a subsidised loan is based on elements supplied either by the aid scheme or by the tax law of the country in question, plus any other factors established by convention.

The following elements are needed to calculate the NGE of investment aid in the form of a subsidised loan:

— period of the loan,

— length of the grace period, i.e. the initial period when no repayments need to be made, interest being paid on the total amount of principal,

— number of percentage points of the rebate,

— duration of the rebate, not necessarily the same as the loan,

— amount of the loan as a percentage or proportion of the investment,

— reference/discount rate,

— rate of tax.

It is also necessary to know the terms for repayment of the loan. In most cases the loan is repaid on a straight-line basis, in equal portions, interest being due on the balance outstanding. Repayment is occasionally by constant annual instalments, in which case this is taken into account in calculating the NGE.

3.2. Calculation examples

Example 1

1. Parameters

— the loan is for ten years with straight-line repayment and no grace period,

— the rebate is three percentage points throughout the period of the loan,

— the loan is for 40 % of the investment,

— the reference/discount rate is 8 %,

— the rate of tax is 35 %.

2. Calculation of the unit gift element

The unit gift element is the nominal grant equivalent of a one-point interest rebate on a loan of 100 % of the investment, taking account of the characteristics of the aid used as parameters. It is calculated as follows:

End of year No	Loan: balance outstanding (1)	1-point rebate (2)	Benefit obtained (1) x (2)	Discount factor (3)	Discounted value (*) (1) x (2) x (3)
1	100	1 %	1	$1/(1 + 0.08)^1$	0.926
2	90	1 %	0.9	$1/(1 + 0.08)^2$	0.772
3	80	1 %	0.8	$1/(1 + 0.08)^3$	0.635
4	70	1 %	0.7	$1/(1 + 0.08)^4$	0.515
5	60	1 %	0.6	$1/(1 + 0.08)^5$	0.408
6	50	1 %	0.5	$1/(1 + 0.08)^6$	0.315
7	40	1 %	0.4	$1/(1 + 0.08)^7$	0.233
8	30	1 %	0.3	$1/(1 + 0.08)^8$	0.162
9	20	1 %	0.2	$1/(1 + 0.08)^9$	0.100
10	10	1 %	0.1	$1/(1 + 0.08)^{10}$	0.046
				Unit gift element:	4.112

(*) Discounting starts at the beginning of the first year.

3. Calculation of net grant equivalent

The net grant equivalent is obtained simply by multiplying the unit gift element by the characteristics of the aid (three-point rebate, 40 % share, non-taxable portion of aid: (1 – 35 %):

$$NGE = 4.112 \times 3 \times 40\,\% \times (1 - 35\,\%) = 3.21\,\%$$

Example 2

1. Parameters

The parameters are the same as in Example 1, but with a two-year grace period from repayment. This means that capital is not repaid in the first two years. The 10 year loan will thus be repaid in eight equal portions from the third to the 10th year. Interest is payable during the 10 years on the balance outstanding.

2. Calculation of unit gift element

End of year No	Loan: balance outstanding (1)	1-point rebate (2)	Benefit obtained (1) x (2)	Discount factor (3)	Discounted value (*) (1) x (2) x (3)
1	100	1%	1	$1/(1 + 0.08)^1$	0.926
2	100	1%	1	$1/(1 + 0.08)^2$	0.857
3	100	1%	1	$1/(1 + 0.08)^3$	0.794
4	87.5	1%	0.875	$1/(1 + 0.08)^4$	0.643
5	75.0	1%	0.750	$1/(1 + 0.08)^5$	0.510
6	62.5	1%	0.625	$1/(1 + 0.08)^6$	0.394
7	50	1%	0.500	$1/(1 + 0.08)^7$	0.292
8	37.5	1%	0.375	$1/(1 + 0.08)^8$	0.203
9	25.0	1%	0.250	$1/(1 + 0.08)^9$	0.125
10	12.5	1%	0.125	$1/(1 + 0.08)^{10}$	0.058
				Unit gift element:	4.802 %

(*) Discounting starts as the beginning of the first year.

3. To calculate the net grant equivalent

As in Example 1, the unit gift element is multiplied by the number of rebate points, the proportion of expenditure covered by the loan and the complement to unity of the rate of tax:

$$NGE = 4.802 \times 3 \times 40\,\% \times (1 - 35\,\%) = 3.75\,\%$$

Note: It will be seen that, other things being equal, the result of introducing a grace period from capital repayments is to increase the NGE. The grace period increases the balance due each year and hence the benefit attributable to the rebate and, consequently, the unit gift element.

Example 3

1. Parameters

The same facts as in Example 2, but the loan is to be repaid in constant annual instalments.

In this case, the calculation method differs fundamentally from that used in the preceding two examples: first the 'normal' annual instalments excluding the interest rebate are calculated, then the 'rebated' instalments; the difference between the two series is established year by year, and the results discounted in order to obtain the grant equivalent.

2. To calculate the grant equivalent

The constant annual instalments, expressed as a percentage of the loan, are calculated as follows:

$$A = i/(1 - r^n)$$

$$\text{where } r = 1/(1 + i)$$

i being the interest rate and n the number of years for which the instalment is calculated. The calculations below are based on a loan of 100 units:

Year	Normal instalment (1)	Rebated annual instalment (2)	Benefit obtained (3)	Discount factor (4)	Discounted value(*) (3) x (4)
1	8	5	3	$1/(1 + 0.08)^1$	2.778
2	8	5	3	$1/(1 + 0.08)^2$	2.572
3	17.401	15.472	1.929	$1/(1 + 0.08)^3$	1.532
4	17.401	15.472	1.929	$1/(1 + 0.08)^4$	1.418
5	17.401	15.472	1.929	$1/(1 + 0.08)^5$	1.313
6	17.401	15.472	1.929	$1/(1 + 0.08)^6$	1.216
7	17.401	15.472	1.929	$1/(1 + 0.08)^7$	1.126
8	17.401	15.472	1.929	$1/(1 + 0.08)^8$	1.042
9	17.401	15.472	1.929	$1/(1 + 0.08)^9$	0.965
10	17.401	15.472	1.929	$1/(1 + 0.08)^{10}$	0.894
				Grant equivalent:	14.85 %

(*) Discounting starts at the beginning of the first year.

3. To calculate the net grant equivalent

The net grant equivalent is obtained by multiplying the grant equivalent by the proportion, then deducting the portion charged as tax:

$$NGE = 14.85 \text{ x } 40\,\% \text{ x } (1 - 35\,\%) = 3.86\,\%$$

Note: If there is no grace period from repayment, the NGE calculated in the same way is 3.41 %.

3.3. Formulae for calculating the NGE of a subsidised loan

The preceding methods, which can easily be transposed to a spreadsheet, make it possible to calculate the NGE of a low-interest loan according to the characteristics of the case in question. In standard cases, the NGE may also be calculated direct by means of the following formulae.

1. Terms

— i is the reference rate per interval and r=1/(1 + i)

— i′ is the subsidised rate per maturity interval and r′ = 1/(1 + i′)

— P is the period (in number of maturity intervals) of the loan

— Q is the proportion

— T is the rate of tax

— F is the period, in number of intervals, of any grace period from repayment of principal: during the grace period, only interest on the loan is repaid, at the subsidised rate.

(F = 0 where there is no grace period)

2. Straight-line repayment

$$NGE = \left(1 - T\right) Q \left(1 - \frac{i'}{i}\right) \left(1 + \frac{r^P - r^F}{i \times (P - F)}\right)$$

3. Repayment in constant annual instalments

$$NGE = \left(1 - T\right) Q \left[1 - \left(\frac{i'}{i}\right) \times \left(1 - r^F + \frac{r^F - r^P}{1 - r'^{P-F}}\right)\right]$$

ANNEX II

AID TO OFFSET ADDITIONAL TRANSPORT COSTS IN REGIONS QUALIFYING FOR EXEMPTION UNDER ARTICLE 92(3)(c) ON THE BASIS OF THE POPULATION DENSITY TEST

Conditions to be met

— aid may serve only to compensate for the additional cost of transport. The Member State concerned will have to show that compensation is needed on objective grounds. There must never be overcompensation. Account will have to be taken here of other schemes of assistance to transport,

— aid may be given only in respect of the extra cost of transport of goods inside the national borders of the country concerned. It must not be allowed to become export aid,

— aid must be objectively quantifiable in advance, on the basis of an aid-per-kilometre ratio or on the basis of an aid-per-kilometre and an aid-per-unit-weight 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,

— aid may be given only to firms located in areas qualifying for regional aid on the basis of the new population density test. Such areas will be made up essentially of NUTS level III geographic regions with a population density of less than 12.5 inhabitants per square kilometre. However, a certain flexibility is allowed in the selection of areas, subject to the following limitations:

  — flexibility in the selection of areas must not mean an increase in the population covered by transport aid,

  — the NUTS III parts qualifying for flexibility must have a population density of less than 12.5 inhabitants per square kilometre,

  — they must be contiguous with NUTS III regions which satisfy the low population density test,

  — their population must remain low compared with the total coverage of the transport 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.),

— Transport aid given to firms in industries which the Commission considers sensitive (motor vehicles, synthetic fibres, shipbuilding and steel) must always be notified in advance and will be subject to the industry guidelines in force.

ANNEX III

METHOD OF DETERMINING THE CEILINGS ON THE POPULATION COVERED BY THE 92(3)(c) DEROGATION

1. The Commission first fixes an overall ceiling on the coverage of regional aid in the Community. This determines the maximum percentage of the population which the regions eligible for the Article 92(3) regional derogations in the Community may together account for.

2. The regions eligible for regional aid under the derogation in Article 92(3)(a), and their overall coverage at Community level, are determined exogenously and automatically by the application of the criterion of 75.0 % of per capita GDP expressed in purchasing power standards (PPS). The Commission's decision on the overall ceiling, therefore, simultaneously defines the ceiling on coverage under the Article 92(3)(c) derogation, at Community level. The Article 92(3)(c) ceiling is obtained by deducting from the overall ceiling the population of the regions eligible under the 92(3)(a) derogation.

3. The distribution of the Article 92(3)(c) Community ceiling between the different Member States is effected by using a distribution key (see section I), which takes account of regional disparities in a national and Community context.

The results thus obtained are then adjusted to take account of certain other aspects (see section II).

1. Distribution key

4. The distribution key for the Article 92(3)(c) Community ceiling is calculated on the basis of the population of the regions which, at national level, have a minimum disparity in terms of per capita GDP/PPS and/or unemployment, defined in relation to certain thresholds (see point 5).

The geographical unit used is NUTS level III. For each NUTS III region, an average value over three years is calculated for per capita GDP/PPS and unemployment indices, defined in relation to the national average. The per capita GDP/PPS and unemployment rate indicators are supplied by Eurostat.

5. The abovementioned thresholds are calculated for each of the two criteria (per capita GDP/PPS and unemployment), and for each of the Member States concerned. The calculation is carried out in two stages. The first establishes an identical basic threshold for all Member States, set at 85 for per capita GDP and 115 for the unemployment rate. In the second stage, the basic thresholds are adjusted to take account of the relative situation of each of the Member States compared with the average for the Community. The formula applied is as follows:

$$\text{Threshold} = 1 \times \left(\text{Basic threshold} + \frac{\text{Basic threshold} \times 100}{\text{European index}}\right)$$

where the European index expresses the position of the different Member States, in terms of unemployment or per capita GDP/PPS, as a percentage of the corresponding Community average. The European index is calculated as an average value over the same three-year period as for the regional indices.

Thus, the more favourable a Member State's situation as regards unemployment or the standard of living, the more selective the thresholds used for the distribution of the ceiling on 92(3)(c) coverage, and vice versa.

However, so that the unemployment criterion does not become too rigorous, the corresponding threshold is subject to a ceiling of 150. This facilitates the granting of regional aid in Member States which show considerable disparities in domestic unemployment but whose situation does not seem that unfavourable at Community level. Since for the per capita GDP/PPS threshold the differences observed between the Member States are small, it has not been thought necessary to establish a minimum level.

6. The regional indices are then compared with the abovementioned thresholds, which makes it possible to determine whether the region concerned shows a sufficient regional disparity to be taken into account in the calculation of the distribution key.

The population of all the regions not eligible for regional aid under the Article 92(3)(a) derogation which show a sufficient regional disparity compared with at least one of the two abovementioned thresholds is aggregated for each of the Member States. The distribution key for the Article 92(3)(c) Community ceiling is defined as each Member State's share of the corresponding total Community population.

7. Subject to the corrections mentioned above, the population ceiling for each Member State under the Article 92(3)(c) derogation is calculated by directly applying the distribution key, i.e. by multiplying the Article 92(3)(c) Community ceiling, expressed in terms of population, by the share of the Member State concerned in the total sum obtained.

2. Corrections

8. The results thus obtained are corrected, if necessary, in order:

— to guarantee to each Member State that the population assisted under the 92(3)(c) derogation is at least equal to 15 % and does not exceed 50 % of its population not covered by the 92(3)(a) derogation,

— to attain, in each Member State, a sufficient level to include all the regions which have just lost 92(3)(c) status and the areas with a low population density,

— to limit the reduction in the total coverage (under the two Article 92(3) regional derogations) of a Member State to 25 % of its previous coverage.

9. The results obtained for the Member States not directly concerned by the abovementioned corrections are then adjusted proportionately so that the sum of the individual ceilings equals the Article 92(3)(c) ceiling set for the Community.

Communication from the Commission to the Member States on the links between regional and competition policy (*)

Reinforcing concentration and mutual consistency

In 1996 the Commission produced its first report on economic and social cohesion in the Union. The report notes that targeting resources on problem areas, known as 'concentration', is the key principle underpinning the effectiveness of cohesion policies (Chapter 6, section 2) and it concludes in particular that 'within the context of the concentration of resources on the most disadvantaged regions, the Member States and the Commission need to address, in partnership, inconsistencies between the regions which are suported under national regional policies and those which are supported under Union regional policies. Eligibility for Union regional aid should in the future become one of the criteria for allowing assistance under Member States' own regional policies' (Chapter 7).

The Commission again stressed in Agenda 2000, which it adopted in July 1997, that there was a need to increase the geographical concentration of structural assistance with a view to making it more visible, more effective, and also more consistent with the Union's competition policy (1). The Commission announced in the same document that the geographical extent of areas covered by regional assistance would be reduced.

Finally, in its action plan for the single market the Commission has indicated that it will produce new guidelines for regional State aid which will aim to reduce disparities by concentrating aid.

1. STATEMENT OF THE PROBLEM

Concentration

Despite progress since the Community started to operate a regional policy, there are still important structural disparities within the Union and one of its fundamental goals remains to increase economic and social cohesion, as required by Article 130a of the EC Treaty. The Union needs to be in a position to continue its support for the creation and development of productive activities in regions lagging behind in their development and those undergoing economic and social transformation. Past experience shows that, to be effective in regional development terms, such assistance should not be spread thinly over areas which are too large or fragmented. We need to increase the concentration of Community part-financing if we are to reach critical mass and have a significant impact, and among other things this involves identifying the regions in the Union which are most affected.

Concentration is an equally important aim in the context of the Community's competition policy as set out in Articles 92, 93 and 94 of the Treaty, since concentration would help to limit the distortions brought about by national regional-aid schemes, in terms of the extent of the geographical area involved, while at the same time focusing on the regions lagging behind in their development.

Mutual consistency

Decision-making in the Union is a system involving several actors which have different institutional responsibilities. This applies in particular to regional policy. For example, the Commission has sole

(*) OJ C 90, 26.3.1998, p. 3.

(1) 'This will lead to a zoning which is less scattered and as consistent as possible with the areas assisted by the Member States under Article 92(3)(c) of the Treaty.'

responsibility for checking that national aid schemes (as well as any related lists of designated areas) which are notified by Member States under Article 93(3) of the Treaty are compatible with the aims of the Treaty, whereas the task of ensuring that the less prosperous regional economies are helped is primarily in the hands of the regional and national authorities, with the Union contributing in a subsidiary fashion through its structural assistance. The Structural Funds provide this support *inter alia*, by part-financing schemes for assisting investment in production activities which are designed and implemented at national and/or regional level. Structural Fund assistance forms only a rather small part of the total regional-aid spending of the Member States. This logically means that the ERDF ought to be providing this assistance only in areas where Member States themselves are granting regional aid, although this does not prevent them from assisting other regions as well if they want. But national regional-aid schemes have to be given prior authorisation under the Union's policy on State aids, so the areas eligible for assistance from the Structural Funds ought also to be covered by national aid schemes. However, because there are several different actors with differing powers, objectives and timetables, it has proved difficult to coordinate these two policies. This situation has been criticised by the actors involved, such as the regional and local authorities, and by the European Parliament.

For instance, in areas currently eligible under the Structural Funds but not eligible for regional State-aid schemes under the exemptions in Article 92(3)(a) and (c), it is still possible to part-finance schemes to assist small businesses and schemes dealing with the environment or research, at lower rates than allowed in areas eligible under Article 92(3)(a) and (c). In such areas, the Structural Funds are not able to attract investment by major companies, even though this would be highly desirable in regional development terms because of the knock-on effects and access to world markets it would bring. This inconsistency should not be allowed to continue, for both political and economic reasons.

The Commission made an attempt to introduce more consistency when the Structural Fund regulations were being reviewed in 1993. Later, when the Commission and the Member States were agreeing on lists of designated areas, especially under Objective 2 but also under Objective 5b, the Commission repeatedly encouraged them to propose eligible areas that were compatible with their State-aid designations. What is needed now is to lay down a set of principles and find ways of making decisive progress in this area in time for the next programming period under the Structural Funds (2000 to 2006).

In essence, the consistency being sought would ensure that the regions in each Member State which are eligible under the Structural Funds could also be covered by a regional State-aid scheme.

2. REVIEW OF THE CURRENT SITUATION

2.1. Mutual consistency as a responsability shared by the Commission, the Council and the Member States

Chronologically in the development of Community policy, it was the eligible areas under competition policy which were the first to be designated using a method published by the Commission in 1988 (OJ C 212, 12.8.1988), although the Commission had already clarified and amplified the basic principles for coordinating regional aid dating from 1997. Under its sole responsibility for reviewing State-aid schemes, the Commission gives approval to the designations within each Member State on the basis of a proposal from the Member State concerned.

With regard to assistance from the Structural Funds, there are currently four region-based objectives, i.e. Objectives 1, 2, 5b and 6.

The Objective 1 regions have been designated until now by the Council acting unanimously on a proposal from the Commission. In theory these are the NUTS II regions where per capita GDP (in

PPPs) is less than 75 % of the Community average. But, as pointed out in Chapter 6, section 2, of the cohesion report, 'political compromise in 1993 led to the inclusion under Objective 1 of [regions containing] 7.4 million people, 8 % of the total eligible population, living in regions with GDP per head of more than 75 % of the Union average'.

The Objective 6 areas, i.e. where population density is less than eight people per km^2, were designated in the Act of Accession of Austria, Finland and Sweden in 1995.

Under the rules set by the Council, the Objective 2 and 5b areas have been designated by the Commission on the basis of Community socioeconomic criteria as well as national criteria in close cooperation with the Member States. The latter send in their proposals to the Commission and these are then the subject of negotiation between them and the Commission. As already mentioned, the number of different actors, each with their own responsibilities, and different implementation timetables have hampered attempts to reduce the inconsistencies further during the last programming period, although this should have been an ideal opportunity to do so.

2.2. Statistical data

In 1994 to 1999 a total of 50.6 % of the population of the Union (EU-15) live in regions eligible for Community structural aid, while 46.7 % live in areas qualifying for exemption under Article 92(3) and (c). As these figures show, some regions eligible under the Structural Funds cannot at the same time receive State aid for regional purposes. The following two tables indicate the degree of overlap between the two sets of designations. However, it has to be stressed that the figures below are only an approximate guide because they are aggregated for the whole Community and there is some drift in actual areas covered during the programming period.

Mutual consistency between designated areas under the Structural Funds and under State-aid schemes

Table 1

(percentages of the Community population)

	Regions eligible under the Structural Funds	Regions not eligible under the Structural Funds	Total
Areas where national regional aid is permitted (Article 92(3))	44.0	2.7	46.7
Areas where national regional aid is not permitted	6.6	46.7	53.3
Total	50.6	49.4	100

These figures show that 6.6 % of the Community population live in regions eligible under the Structural Funds where competition policy precludes the granting of regional aid.

By contrast, 2.7 % of the Community population live in regions which are covered by a national regional-aid scheme but are not eligible under the Structural Funds. This is not a particular problem. On the contrary, it helps promote consistency between policy on regional-aid schemes and the Community's own assistance under the Structural Funds because it means that Member States have a margin of room for manoeuvre to pursue regional policy goals specific to their situations in addition to the areas designated jointly for the purposes of Community regional policy.

Table 2 — *Percentage of the national population in regions eligible under the Structural Funds but not covered by national regional-aid schemes*

B	D	DK	E	EL	F	IRL	I	L	NL	A	P	S	FIN	UK	EU
0	5.3	0	8.9	0	9.6	0	7.5	6.4	10.4	5.9	0	8.7	12.6	9.0	6.6

Complete congruence already exists in five countries: Belgium, Denmark and the three Member States whose entire territory is classed in Objective 1. By contrast, all the other Member States display wide divergences.

3. PROPOSAL FOR A COORDINATED APPROACH

3.1. Better identification of responsibilities

Achieving consistency between the two sets of designations is predicated on having an overall picture of the various instruments involved so that they can converge on this common goal, on the basis of a timetable that will ensure it is attained.

The Commission, the Council, Parliament and the Member States all have their share of responsibility in pursuit of greater consistency:

— the Commission, which has sole responsibility for State aids and shares responsibility with the Member States and the Council for structural policy, has stressed the need for consistency and greater geographical concentration. In its decision of 16 December 1997 on State-aid guidelines, the Commission has accordingly modified the rules on regional-aid schemes and will be proposing that the Council adjust the regulatory and operational provisions regarding the Structural Funds. The Commission is naturally well-placed to ensure an overall coordinated approach,

— the Council and Parliament must take account of the need for consistency and concentration when adopting the new regulations on the Structural Funds,

— the national authorities in charge of regional policy need to face up to their responsibilities regarding the consistency and concentration effort and take part where their field of competence is involved.

It is important that designations under both national regional-aid schemes and the Structural Funds should be adopted in time for them to enter into force on 1 January 2000. In the case of national schemes the onus is on the Commission because of its particular powers, while in the other case the Commission, Council, Parliament and Member States are all concerned.

3.2. Proposed method and timetable

The Commission made it clear in Agenda 2000 that the percentage of the population of the European Union eligible for structural assistance under the future Objectives 1 and 2 should be cut from the figure of 51 % today to one situated between 35 % and 40 %, and that the overall figure will have to be smaller than the population coverage of regions qualifying under Article 92(3) and (c) (added together). The Commission also stated that the coverage of national regional-aid schemes had to be reduced.

Following up on these indications, the Commission in its decision of 16 December 1997 on State-aid ceilings has set an overall figure for population coverage under Article 92(3) and (c) of 42.7 % for the 2000 to 2006 programming period, i.e. a cut of four percentage points compared with the current coverage of 46.7 %. The Commission has recently put to the Member States the measures that will be needed under Article 93(1) of the Treaty to implement the new regional-aid regime by the required date under the new regional State-aid rules which it has just adopted. The figure of 42.7 % is higher than the range from 35 % to 40 % set out in Agenda 2000 for the share of eligible population under the future Objectives 1 and 2, making overall consistency possible across the Union. The two designation systems will thus be like two concentric circles for the Union as a whole. This relationship will have to be reflected as well in each of the 15 Member States, in particular to make Objective 2 designations fall within the areas designated under Article 92(3)(c).

As Agenda 2000 points out, the particular situation of the most remote regions means that they can be included as a special case in Objective 1. Equally, the most northerly regions with very low population density which are currently eligible under Objective 6 but which would not qualify under Objective 1 should also be treated as a special case. The regions lagging behind in their development (i.e. eligible under Objective 1) should be designated by strictly applying the criterion of 75 % of per capita GDP so that they coincide with those qualifying for exemption under Article 92(3), otherwise the overall consistency effort will be put in doubt as well as the concentration being sought under the Structural Funds. The list of Objective 1 regions is to be finalised early in 1999 on the basis of the latest data available at the start of the last quarter of 1998.

As regards the new Objective 2, consistency needs to be established with Article 92(3)(c), which must cover regions treated in the same way as Objective 1 or qualifying for special arrangements but not eligible for exemption under Article 92(3) . In its decision setting aid ceilings, the Commission gives a rate of coverage for each country which, when totalled (i.e. Article 92(3) and (c) together), produce the figure of 42.7 %. These figures should ensure that the Objective 2 list for each country lies within the boundaries of the Article 92(3)(c) list.

If the Commission's recommendation of keeping strictly to the criterion of 75 % for selection regions lagging behind in their development (i.e. Objective 1) is not followed, the result will inevitably be a lack of consistency not only between Article 92(3) and Objective 1 but also between Article 92(3)(c) and Objective 2, given the overall ceiling of 42.7 % and the different national ceilings.

The Commission will not accept a region under the new Objective 2 unless the Member State concerned undertakes to include it on the list of assisted areas notified to the Commission under Article 92(3)(c).

However, in duly justified cases the Commission could include other regions in the new Objective 2 as exceptions. This would be confined to a maximum per Member State of 2 % of the national population not falling under Objective 1, and consistently with the general aim of geographical concentration (i.e. Objectives 1 and 2 together should cover between 35 % and 40 % of the Union's total population (EUR-15)).

The present situation is that Agenda 2000 proposes that the list of Objective 2 areas should be drawn up on the basis of Community-agreed criteria in partnership with the Member States, taking into account their regional priorities. The actual selection method will be defined in the new Structural Fund regulations. So that both lists of designations can come into effect on 1 January 2000, the Commission will be asking Member States to make their proposals for regions to be assisted under the Structural Funds immediately after the adoption of the Structural Fund regulations, at the latest by 31 March 1999. The Commission calls on the Council and the Member States to take all necessary steps to ensure that these decisions can be adopted in time. As regards the regions covered by regional State-aid schemes, the Commission has recently proposed to the Member States that they make their notifications as soon

as possible but also by 31 March 1999 at the latest. The Commission will decide on the regional-aid lists in line with the relevant procedures and deadlines, this time by 31 December 1999 at the latest.

The Commission is not able to say at this point what will be the population coverage of the Objective 2 eligible areas in each country because the method for designating them will not become applicable until after the adoption of the new Structural Fund regulations. The idea will be to use the latest socioeconomic data available at that juncture.

3.3. Transitional measures

As a result of the concentration effort made during each of the two designation exercises, a number of regions across the Union will lose their current status after 2000. How this 'phasing out' is to be conducted will vary depending on which of the two policies is involved. Consistency between them will none the less be ensured, as Agenda 2000 points out, by the fact that 'measures for the regions which will benefit from transitional (phasing out) support from the Structural Funds will have to comply with the competition rules on State aid.'

4. CONCLUSIONS

There are various stages remaining to be gone through and many different actors involved, but the Commission has laid its groundwork for ensuring consistency between the two designation lists as from the year 2000. With this communication, the Commission would like to call on the national governments to do their part, both for their own account and collectively within the competent bodies of the Council.

The Commission is proposing the following action.

(a) In the new Structural Fund regulations, the Council should designate the regions lagging behind in their development by strictly applying the ceiling of 75 % of per capita GDP so that these regions are the same as those qualifying for exemption under Article 92(3)(a), and also avoid consequent inconsistencies between the Objective 2 list and the designations under Article 92(3)(c).

(b) In the light of the guidelines on regional State-aid schemes which the Commission adopted on 16 December 1997, it calls on the Member States to notify it under Article 92(3) of all the regions treated as Objective 1 regions or qualifying for a separate regime of their own.

(c) The Commission is announcing now that, in the context of the future Structural Fund regulations, it will not accept a region as eligible under the new Objective 2 unless the Member State concerned undertakes to include it in the list of assisted regions notified to it under Article 92(3)(c).

However, in duly justified cases the Commission could include other regions in the new Objective 2 as exceptions. These would be confined to a maximum limit per Member State of 2 % of the national population not falling under Objective 1, and consistently with the general aim of geographical concentration (i.e. Objectives 1 and 2 together should cover between 35 % and 40 % of the Union's total population (EUR-15)).

(d) The Commission stresses that the guidelines on regional-aid schemes identify eligibility under the Structural Funds as a major selection criterion, on condition that the ceiling which is set is complied with and that the regions eligible under the Funds are not designated after the list of regions to receive regional State aid.

(e) The Commission will ensure that the two designation exercises will start and end, following their respective procedures, in time to guarantee that both designation lists can come into effect on 1 January 2000. As far as the Structural Funds are concerned, this exercise will start immediately after adoption of the new regulations, which must in turn therefore take place in time for Member States to be able to forward their proposals for designated regions to the Commission by 31 March 1999 at the latest. With regard to regional State-aid schemes, Member States' proposals will have to be notified to the Commission as soon as possible but at the latest by 31 March 1999.

(f) The Commission notes that the ceiling for coverage of total Community population in the regions of the Union (EU-15) selected under Articles 92(3)(a) and 92(3)(c) is to be 42.7 % in the period 2000 to 2006.

(g) The Commission will be sending this communication to the Member States and publishing it in the *Official Journal of the European Communities*.

Multisectoral framework on regional aid for large investment projects (*)

1. NEED FOR AND SCOPE OF THE MEASURE

1.1. The need for more systematic controls 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. At the same time, it is important to strike an appropriate balance between three core objectives of EU policy, namely undistorted competition in the internal market, economic and social cohesion and industrial competitiveness.

1.2. Investors in large projects often consider alternative sites in different Member States, which may lead to a spiral of increasingly generous promises of aid. Such subsidy auctions carry a considerable risk of distorting competition in the single market. In addition, they clearly favour the richer Member States and/or regions with larger regional aid budgets. The Commission is therefore introducing this framework, initially for a trial period only, with the aim of limiting aid for large-scale projects to a level which avoids as much as possible adverse effects on competition but which at the same time maintains the attraction of the assisted area. The Commission's intention to adopt a horizontal framework on State aid to large-scale investment projects in all sectors of industry was first announced in its communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on '*An industrial competitiveness policy for the European Union*' ([1]).

1.3. Several sensitive industrial sectors are already subject to special rules on aid, notably agriculture, fisheries, steel, shipbuilding, synthetic fibres, the motor industry, transport and the coal industry. During the trial period these sectors will continue to be covered exclusively by their own existing sectoral codes and frameworks (with the exception of the textile and clothing sector which will be subject solely to the provisions of this framework ([2])). This situation will be reviewed after an evaluation has been carried out of the efficacy of this framework. In other sectors the only current restriction on regional investment aid is that the amount of aid must not exceed the ceilings authorised by the Commission for the regional scheme in question. However, the regional ceilings are in general designed to provide an incentive for the type of investment facing the biggest problems and are usually in excess of the average regional handicaps. The purpose of this framework is to limit this net incentive for large projects to a level which avoids as much as possible adverse sectoral effects caused by the project.

1.4. Under this framework the Commission will decide on a case-by-case basis a maximum allowable aid intensity for projects which are subject to the notification requirement. This might lead to aid intensities below the applicable regional ceiling. 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 ([3]). 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 ([4]) and the Community guidelines on State aid for environmental protection ([5]).

(*) OJ C 107, 7.4.1998, p. 7.
([1]) COM(94) 319 final.
([2]) This framework consequently replaces the Community framework for aid to the textile industry SEC(71) 363 final, July 1971.
([3]) OJ C 283, 19.9.1997, p. 2.
([4]) OJ C 45, 17.2.1996, p. 5.
([5]) OJ C 72, 10.3.1994, p. 3.

1.5. The Commission would stress that it has no intention of seeking to interfere unnecessarily with the discretion of Member States in the field of regional policy. Nor does it seek to weaken the application of Article 92(3)(a) and (c) of the Treaty, which aims to encourage companies to invest in disadvantaged areas, despite the structural handicaps that they face there. On the contrary, the intention is strictly to limit the scope of the new rules to those large-scale projects, often capital intensive in nature, which could have a serious impact on unaided competitors located elsewhere in the EEA; and to examine more critically the planned levels of aid for those projects which do not have, directly or indirectly, a significant impact on employment in the region concerned, which is an important objective of regional policy. Member States will continue to be able freely to decide on the aid intensity in the vast majority of cases, within the terms of the approved regional aid schemes.

1.6. In drawing up this framework, the Commission has attempted to ensure that, as far as possible, it is clear and unambiguous, predictable, certain and efficient and that the additional administrative burden it entails is kept to a minimum.

2. NOTIFICATION REQUIREMENT

2.1. Under this framework Member States are required to notify pusuant to Article 93(3) of the Treaty any proposal to award regional investment aid ([6]) within the scope of an approved scheme ([7]), where either of the following two criteria are met:

(i) the total project cost is at least ECU 50 million ([8]), and the cumulative aid intensity ([9]) expressed as a percentage of the eligible investment costs is at least 50 % of the regional aid ceiling for large companies in the area concerned and aid per job created or safeguarded amounts to at least ECU 40 000 ([10]); or

(ii) the total aid is at least ECU 50 million.

Notification format

2.2. The standard notification form is contained in the annex. This form should be sent directly to the Directorate-General for Competition.

3. ASSESSMENT RULES

3.1. The Commission will determine, in accordance with the calculation formula set out in point 3.10, a maximum allowable aid intensity for a proposal to award aid. It will begin by identifying the maximum aid intensity (regional aid ceiling) which a large company could obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of notification (unless it is ad hoc aid in which case the aid ceiling fixed for the region concerned will be applied). A range of adjustment factors will then be applied to that percentage figure, in accordance with three specific assessment factors (see below), in order to calculate a maximum allowable aid intensity for

([6]) Regional investment aid awarded solely for the creation of jobs as described in the Community regional aid guidelines is not covered by this framework.
([7]) The notification requirement also applies, of course, to proposals to award ad hoc aid.
([8]) ECU 15 million in the case of projects carried out in the textile and clothing sector.
([9]) Including any co-financing from the Structural Funds.
([10]) ECU 30 000 in the case of projects carried out in the textile and clothing sector.

the project in question. In the case of the third criterion, the regional impact indicator, a positive factor or bonus may be applied, depending on the degree of benefit the project is likely to confer on the region concerned. The question of the viability of an individual project will be for Member States themselves to determine. However, the Commission will be entitled, if it deems it to be necessary, to request information on a project's viability. Finally, the Commission will, where appropriate, utilise independent external data to assess the likely impact on competition in the relevant market; where this is not easily obtainable, however, the Commission will give full weight to representations made by Member States.

The three assessment criteria

(i) Competition factor

3.2. The authorisation of aid to companies operating in sectors which are in structural overcapacity poses particular risks for the distortion of competition. Any capacity expansion which is not compensated by capacity reductions elsewhere will exacerbate the problem of structural overcapacity. If such expansion is aided, the aid recipient may be left with excess capacity that it will not be able to use in the future or it may start a price-war in order to drive other producers out of the relevant market. It is also likely to threaten jobs elsewhere. Thus the competition factor will involve an analysis of whether the proposed project would take place in a sector or subsector suffering from structural overcapacity.

3.3. In determining whether structural overcapacity exists in the sector or subsector concerned, the Commission will consider, at the Community level, the difference between the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector. In order to allow for cyclical fluctuations in relative capacity utilisation rates, the reference period will be the last five years for which data are available.

3.4. In the absence of sufficient data on capacity utilisation, the Commission will consider whether the investment takes place in a declining market. For this purpose, the Commission will compare the evolution of apparent consumption of the product(s) in question (that is, production plus imports minus exports) with the growth rate of EEA manufacturing industry as a whole.

3.5. For the purpose of determining whether the investment will result in a capacity expansion, the relevant capacity is the total viable capacity of the prospective beneficiary (and/or, if appropriate, the group to which it belongs) for the relevant product. In all cases, viable capacity would include temporarily idle capacity (that is, capacity that would be reactivated when sales improve) but would exclude obsolete and inactive capacity (that is, idle capacity that cannot be reused without substantial additional investment).

3.6. Wherever a company, prior to making an application for aid, already has a high market share for the product(s) concerned, which for the purpose of this framework will be assumed to be at least 40 %, there is a risk that the award of maximum levels of aid normally permitted in the region concerned will unduly distort competition. In such circumstances the company should, in principle, receive less aid than would otherwise be the case, even if its investment contributes to regional development. There could, however, be exceptions to this general rule, for example where the company creates, through genuine innovation, a new product market.

(ii) Capital-labour factor

3.7. Since regional aid is usually granted in the form of capital subsidies, there is a natural tendency for capital intensive projects to locate in assisted areas. While this is a positive development, such a policy

does not necessarily contribute to the creation of many new jobs and the reduction of unemployment. Only highly capital-intensive projects will be captured by this factor. The notion of jobs safeguarded will only be relevant where it is demonstrated that they are directly linked to the investment project in question and can thus be assessed in terms of investment aid, as opposed to employment aid.

3.8. This criterion would also take account of the possible distorting effect of the aid on the price of the final product. Undertakings with a relatively high share of capital in total costs realise an important reduction of their unit cost through the aid and could obtain thereby a considerable competitive advantage over non-aided competitors. The higher the capital intensity of the supported investment project, the more distortive the effects of capital grants on competition are likely to be.

(iii) Regional impact factor

3.9. Whereas the competition and capital-labour factors look at the project's potentially distorting effects, the regional impact factor takes account of the beneficial effects on the economies of the assisted regions. The Commission considers that job creation can be used as an indicator of a project's contribution to the development of a region. Where a capital-intensive investment creates only a limited number of direct jobs, it may nevertheless create a significant number of indirect jobs in the assisted region concerned and any adjacent assisted region(s). Job creation in this context refers to jobs created directly by the project together with jobs created by first-tier suppliers and customers in response to the aided investment. When applying this factor to the calculation formula to arrive at an allowable aid intensity, the Commission will give a higher positive weighting to the indirect creation of jobs by aid recipients located in Article 92(3)(a) regions than in Article 92(3)(c) regions in recognition of the more severe economic problems faced by the former.

Calculation formula

3.10. The complete calculation formula is obtained by multiplying the regional aid ceiling by the coefficients that result from the examination of the three factors mentioned above, which are represented by the following symbols:

R = authorised maximum aid intensity for large companies in the assisted area concerned (regional ceiling),

T = competition factor,

I = capital-labour factor,

M = regional impact factor.

The formula of the maximum allowable aid intensity is then: R x T x I x M.

The following adjustment factors will apply to each of the three assessment criteria:

1. Competition factor

(i) Project which results in a capactiy expansion in a sector facing serious structural overcapacity and/or an absolute decline in demand	0.25
(ii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market and which is likely to reinforce high market share	0.50

(iii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market 0.75

(iv) No likely negative effects in terms of (i)-(iii) 1.00

2. Capital-labour factor

New capital/jobs (1) (ECU 000s)	Factor
<200	1.0
200 to 400	0.9
401 to 700	0.8
701 to 1000	0.7
>1000	0.6

(1) Total amount of proposed capital divided by number of jobs created or safeguarded.

3. Regional impact indicator

	Article 92(3)(a) regions	Article 92(3)(c) regions
(i) High degree of indirect job creation (1) for each job created by the aid recipient (more than 100 %)	1.5	1.2
(ii) Medium degree of indirect job creation for each job created by the aid recipient (between 50 %-100 %)	1.25	1.1
(iii) Low degree of indirect job creation for each job created by the aid recipient (less than 50 %)	1.0	1.0

(1) That is, jobs created with first-tier suppliers and customers in the assisted region where the company is located or in any adjacent assisted regions (i.e. Article 92(3)(a) or (c) regions).

NB: No project would of course be allowed to receive aid above the regional ceiling.

4. DATE OF INTRODUCTION AND PERIOD OF VALIDITY

4.1. This framework will be applicable from 1 September 1998 for an initial trial period of three years. Before the end of the trial period, the Commission will carry out a thorough review of the utility and scope of the framework, which will *inter alia* consider the question of whether it should be renewed, revised or abolished.

5. PROCEDURE FOR ASSESSMENT OF CASES BY THE COMMISSION

5.1. The Commission aims, in principle, to take a decision either to authorise the aid or to open the Article 93(2) procedure within a period of two months following the receipt of a complete notification, which

should follow the standard format set out in the annex. (In the case of incomplete notifications, the Commission will send a request for additional information to the Member State within ten working days). The two-month time limit may only be extended with the consent of the Member State concerned.

5.2. In the event that the Commission initiates an Article 93(2) procedure, the Commission will take a final decision within four months following the decision to open the procedure. The Commission will take account of all the evidence which can be gathered during that period, including information from interested third parties and any additional elements not considered during the initial investigation. Thus the maximum period for investigation into an individual case would normally not exceed six months.

6. *EX POST* MONITORING

6.1. In view of the sensitive nature of the large mobile investments involved, it is essential that a mechanism exists which helps to ensure that the level of aid actually disbursed to the beneficiary conforms with the Commission decision.

6.2. For each aided project approved by the Commission under this framework, the Commission will require either that any aid contract between the relevant authority of the Member State and the aid recipient contains a reimbursement provision in the event of non-compliance with the contract or that the final significant payment of the aid (e.g. 25 %) will be made only when the aid beneficiary has satisfied the Member State that execution of the project is in compliance with the Commission decision and on condition that the Commission, on the basis of information provided by the Member State concerning implementation of the project, has, within 60 working days, indicated its agreement or raised no objections to the final payment of the aid.

6.3. A copy of any aid contract between the Member State and the aid beneficiary must be communicated to the Commission immediately after it has been signed by the parties.

6.4. In order to ensure compliance with the Commission decision, the Member States, in cooperation with the aid beneficiaries, must provide the Commission with an annual report on the project, including information on the subsidies already paid, any interim report on the execution of the aid contract, and a final report indicating the objectives in terms of the timetable, the investments, and compliance with any specific conditions laid down by the authority granting the aid.

7. DEFINITION OF TERMS USED

7.1. The following definitions of the terms used in this framework will apply.

Investment project

7.2. 'Investment project' means an initial investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalisation, diversification or modernisation). It may also take the form of the takeover of an establishment which has closed or which would have closed had such a takeover not taken place, but does not include the acquisition of assets from a company in financial difficulties (for which the Community guidelines on State aid for rescuing and restructuring firms in difficulty apply).

An investment project should not be artificially divided into sub-projects in order to escape the notification obligation.

Total project cost

7.3. 'Total project cost' means the total expenditure on tangible and non-tangible new assets which are purchased by an undertaking to carry out an investment project and will be depreciated (or leased) over the lifetime of the assets concerned.

Eligible expenses

7.4. 'Eligible expenses' mean expenditure on those tangible and non-tangible assets permitted under the Community regional aid guidelines ([11]).

Jobs

7.5. 'Job' means a permanent full-time job or its part-time equivalent. It may be a new job or the safeguarding of an existing job to the extent that the latter is directly associated with the investment project, would require a significant amount of re-training and would no longer exist at the start of the new production if not for that investment.

Relevant market

7.6. The relevant product market(s) for determining market share comprises the products envisaged by the investment project and, where appropriate, its substitutes considered by the consumer (by reason of the products' characteristics, their prices and their intended use) or by the producer (through flexibility of the production installations) ([12]). The relevant geographic market comprises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas of the EEA. Where appropriate the relevant market(s) may be considered to be global.

Structural overcapacity

7.7. Structural overcapactiy is deemed to exist when, on average over the last five years, the capacity utilisation rate of the relevant sector or subsector ([13]) is more than two percentage points below that of manufacturing as a whole. Serious structural overcapacity is deemed to exist when difference with respect to the average for manufacturing is more than five percentage points.

Declining market

7.8. The market for the product(s) in question will be deemed to be declining if, over the last five years, the average annual growth rate of apparent consumption of the product(s) in question is significantly (more than 10 %) below the annual average of EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product(s). An absolutely declining market is one in which the average annual growth rate of apparent consumption over the last five years is negative.

([11]) Adopted on 16 December 1997 (OJ C 74, 10.3.1998).

([12]) If the investment concerns the production of intermediates, the relevant market may be the market for the final product if most of the production is not sold on the open market.

([13]) The sector or subsector will be established at the lowest available segmentation of the NACE classification.

ANNEX

STANDARD NOTIFICATION FORM PURSUANT TO THE MULTISECTORAL FRAMEWORK ON REGIONAL AID FOR LARGE INVESTMENT PROJECTS

Introduction

This form specifies the information to be provided by a Member State when notifying the European Commission of an investment project to be located in an assisted area which is subject to the notification rules of the multisectoral framework on regional aid for large investment projects.

The Member States should note that:

(a) all information requested by this form must be provided. However if notifying parties, in good faith, are unable to provide a response to a question or can only respond to a limited extent on the basis of available information they should indicate this and give reasons;

(b) unless all sections are completed in full or adequate reasons are given explaining why it has not been possible to answer the questions in full, the notification will be incomplete and will become effective only on the date on which all the information is received;

(c) the Commission may request the Member State and the aid recipient concerned to provide additional information and/or explanation on the information supplied in this form in order to facilitate the initial assessment, which should be provided within 10 working days and may form the subject of a technical meeting to be arranged by the Directorate-General for Competition with the competent public authority.

Supporting documentation

(a) a copy of the draft aid agreement or, if that is unavailable, a copy of the envisaged aid offer letter. If the draft aid agreement is unavailable at the time of the notification, it should be submitted as soon as possible and not later than when it is posted to the aid recipients;

(b) copies of the most recent annual reports and accounts of the aid recipient(s), and if the recipient is part of a larger group, the most recent annual reports and accounts of the group;

(c) a list and short description of the contents of all other analyses, reports, studies and surveys prepared by or for the aid recipient(s) for the purpose of assessing or analysing the proposed aided investment with respect to competitive conditions, competitors (actual and potential), and market conditions. Each item in the list must include the name and position of the author.

How to notify

The notification must be completed in an official language of the European Union appropriate for the Member State concerned. This language will thereafter be the language of the proceeding for all notifying parties.

Supporting documents must be submitted in their original language; where this is not an official language of the European Union they must be translated into the language of the proceeding.

The financial data requested must be provided in local currency or ecu/euro indicating the conversion rates used.

The notification should be sent to:

European Commission,
Directorate-General for Competition,
(DG IV),
State Aid Directorate,
(Cort. 150),
rue de la Loi/Wetstraat 200,
B-1049 Brussels,

or delivered by hand during normal Commission working hours to the following address:

European Commission,
Directorate-General for Competition,
(DG IV),
State Aid Directorate,
avenue de Cortenberg/Kortenberglaan 150
B-1040 Brussels.

Secrecy

The Member State and/or the aid recipient concerned should take note that any of the information requested may be used as a basis to prepare a decision on the case. Notifying parties should indicate that part of the information submitted in this notification which should not be published or otherwise divulged to other parties by marking it 'Business secrets'. They should also set out the reasons why this information should not be divulged or published. However, if sensitive information is needed in the preparation of the decision, the Commission would first consult the Member State and/or the aid recipient about the publication of the parts of the decision containing sensitive information.

***Ex post* control**

The Commission acknowledges that part of the information requested in this notification form cannot be given entirely accurately in advance. The Member State and/or the aid recipient concerned are requested to give their best estimate and to provide a justification of the information to be provided. The aided investment project will be subject to *ex post* control by which the Commission can verify the accuracy of the information provided in the context of the notification.

Section 1 — Member State

1.1. Information on notifying public authority:

1.1.2. name and address of notifying authority;

1.1.3. 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 a 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.

2.3. 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.

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(1) 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

(The information to be given in this section is used *inter alia* to determine the outcome of the application of the capital-labour assessment factor.)

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.

(1) The notion of State aid may include Community financing.

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 by filling in the following table:

	Total expenditure				Eligible expenditure			
Capital	Year 1	Year 2	Year 3	Etc.	Year 1	Year 2	Year 3	Etc.
land								
buildings								
installations, machines								
tools								
intangibles (1)								
other (specify)								
Non-capital								
additional working capital								
R&D								
launching costs								
other (specify)								
Total								

(1) For large enterprises, certain categories of intangible investments can be included in the eligible capital expenditure, however, not exceeding 25 % of the total eligible capital expenditure (cf. Regional aid guidelines, point 4.6).

(2) Investment expenditure that cannot be depreciated over the lifetime of the investment project.

4.5. Financing of total project costs:

4.5.1. indicate the financing of the total cost of the investment project by filling in the following table:

	Amount			
	Year 1	Year 2	Year 3	Etc.
Internal resources				
Equity contributions				
Borrowing from private institutions				
Borrowing from public institutions				
Public assistance				
(national and Community)				
Other (specify)				
Total				

4.6. Employment creation:

4.6.1. does the project create new permanent jobs (full-time equivalent)? If yes, provide a number of the jobs to be created and over which period as well as a description of the jobs to be created.

4.7. Safeguard of existing employment:

4.7.1. does the project safeguard existing permanent jobs? If yes, provide a number of the jobs to be safeguarded and over which period as well as a description of the jobs to be safeguarded;

4.7.2. explain in detail the re-training in average number of hours and cost (excluding the salaries of the trainees) necessary to safeguard these permanent jobs;

4.7.3. explain why these jobs would be at imminent risk if the project was not realised.

Section 5 — Capacity considerations and affected market(s)

(The information to be given in this section is used to determine the outcome of the application of the competition assessment factor. A definition of the relevant market(s) as well as a definition of structural overcapacity and market(s) in decline are given in the appendix.)

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 (indicate the CN code) and the relevant (sub-)sector(s) to which the product(s) belong(s) (indicate the NACE code);

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. Characterisation of relevant geographic market(s):

5.2.1. specify the relevant geographic market(s) where different from EEA;

5.2.2. why is the geographic market considered to be different from EEA?

5.3. Capacity considerations:

5.3.1. 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).

5.3.2. provide an estimate of the total EEA (or of the relevant geographic market) capacity utilisation rate of the relevant (sub-)sector(s) for the last five years. What proportion of this capacity during this period is accounted for by the aid recipient and what has been its rate of capacity utilisation in the relevant (sub-)sector?

5.4. Market data:

5.4.1. provide for each of the last five financial years data on apparent consumption ([3]) of the product(s) concerned. If available, include statistics prepared by other sources to illustrate the answer;

5.4.2. 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 other sources to illustrate the answer;

5.4.3. is the relevant market in decline and for what reasons? If not, why?

5.4.4. an estimate of the market share (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.

Section 6 — Regional impact

(The information to be given in this section is used to determine the outcome of the application of the regional impact assessment factor.)

6.1. Information on the employment created with first-tier suppliers and customers of the aid recipient:

6.1.1. in the opinion of the Member State and/or aid recipient, which of the three options below best describes the degree of jobs created with first-tier suppliers and customers resulting from the project:

([3]) Production plus imports minus exports.

(i) high degree of job creation for each job created by the aid recipient (more than 100 %);

(ii) medium degree of job creation for each job created by the aid recipient (between 50 % and 100 %);

(iii) low degree of job creation for each job created by the aid recipient (less than 50 %)?

6.1.2. justify and explain your answer to the previous question;

6.1.3. provide as complete a list as possible of the prospective first-tier suppliers for the new production within the assisted region and/or assisted regions;

6.1.4. provide as complete a list as possible of the prospective customers for the new production within the assisted region and/or assisted regions.

G — Rules on the assessment for approval of aid to particular industries

I — Synthetic fibres

Code on aid to the synthetic fibres industry (*)

In 1977, in recognition of the low average rate of capacity utilisation for the production of synthetic fibres and yarns, the consequent job losses and the risk that further aid would exacerbate the situation and distort competition, the Commission adopted certain measures pursuant to Article 93(1) of the EC Treaty in order to impose further control on the freedom of Member States to award aid to producers of the fibres and yarns concerned. The measures became known as 'The code on aid to the synthetic fibres industry'; the current code will expire on 31 March 1996 (1).

In 1995, the Commission commissioned an independent firm of specialist consultants on the synthetic fibres industry to undertake two studies: the first on the efficacy of the code on aid to the synthetic fibres industry and the arguments for and against continuing to control such aid; and the second on the future control of aid to this industry.

In the light of these reports and the views expressed by Member States and the EFTA Surveillance Authority (ESA) on the reports and on the operation of the code generally, in particular during the discussion of this subject at the multilateral meeting on State aid, held in December 1995, the Commission has decided that it should continue to impose further controls on the freedom of Member States to award State aid to the synthetic fibres industry.

However, as the reports on the code identified ways in which the control of State aid to the synthetic fibres industry could be refined, the Commission has decided that it should continue to exercise control through the introduction of new industry-specific measures rather than by a further extension of the period of validity of the current code. This will ensure that there is no risk of disruption of competition in this industry, especially in sectors still characterised by structural overcapacity, ahead of the introduction of the planned horizontal framework on State aid in support of major investments.

The objective of these new measures is to prevent the distortion of competition in the internal market with regard to the synthetic fibres industry, in a manner consistent with the Community's other activities, as set out in the Treaty of Rome, and other Community instruments, the EEA agreement and other international obligations entered into by the Community.

THE SCOPE OF CONTROL

The measures apply, irrespective of the size of the prospective beneficiary, to all categories of aid, except aid for vocational training/retraining awarded under schemes that have been authorised by the Commission or aid awarded under schemes that have been authorised by the Commission and falling

(*) OJ C 94, 30.3.1996, p. 11.
(1) OJ C 142, 8.6.1995, p. 4.

within the scope of either the Community guidelines on State aid for environmental protection [2] or the Community framework for State aid for research and development [3].

In terms of generic types of fibres and yarns, their polymeric basis and their end-uses, the measures apply to all generic types of staple fibre and filament yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of the products' end-uses.

In terms of industrial processes, the measures apply to aid in direct support of extrusion, texturisation or polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used, or in direct support of any ancillary process that, in the specific business activity concerned, is normally integrated with extrusion/texturisation capacity in terms of the machinery used.

The measures do not apply to aid in direct support of processes upstream of polymerisation — for example, the production of monomer. Similarly, the measures do not apply to processes downstream of extrusion/texturisation which, in the specific business activity concerned, are not normally integrated with extrusion/texturisation capacity in terms of the machinery used. Finally, the measures do not apply to yarn extrusion processes where the extruded yarns would only have a transitory existence before being spunlaid and spunbonded in order to produce non-woven products. The non-woven sector is an area of continuing innovation and high growth, and the machinery concerned in the extrusion of yarns of this type could not easily or cheaply be adapted to produce staple fibre or filament yarn.

THE NOTIFICATION REQUIREMENT

Accordingly, under the measures Member States are required to notify pursuant to Article 93(3) of the EC Treaty any proposal to award aid in whatever form, irrespective of whether or not the Commission has authorised the scheme concerned, where the aid would not satisfy the *de minimis* criterion [4] in direct support of:

— extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses, or

— polymerization (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.

Member States are not required to notify certain categories of aid: aid for vocational training/retraining awarded under schemes that have been authorised by the Commission; and aid awarded under schemes that have been authorised by the Commission and which come within the scope of either the Community guidelines on State aid for environmental protection or the Community framework for State aid for research and development.

Any proposal to award aid outside the scope of an authorised aid scheme is, of course, subject to the obligation of notification pursuant to Article 93(3) of the EC Treaty.

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[2] OJ C 72, 10.3.1994, p. 3.
[3] OJ C 83, 11.4.1986, p. 2.
[4] Currently incorporated in the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2).

In addition to the information normally supplied when a proposal to award aid is notified to the Commission (5), Member States are asked to supply the following information:

— the full name of the prospective beneficiary, under which it is registered in the Member State concerned and, if it belongs to a group, the full name of that group and, if necessary, a description of the ownership structure,

— for the prospective beneficiary (and/or, if appropriate, the group to which it belongs) a statement of its current capacity, capacity in each of the previous three years and the capacity it would have after undertaking the investments that would be supported by the proposed aid (in tonnes per annum) to extrude and/or texturise the fibres and yarns coming within the scope of control, the volumes that have been, or are expected to be extruded and/or texturised in each of these years, breaking down the data by the specific generic/polymeric types of fibre or yarn concerned (identified using the combined nomenclature (6)) and, for yarn only, stating the average decitex on which the calculation of capacities has been made,

— a statement of the purpose of the investments that would be supported by the aid, and a description of them and the expected benefits to the prospective beneficiary (and, where the aid in question would support elements of a wider strategy within the group to which it belongs, to the group also),

— where the aid would support the installation, modernisation or adaptation of extrusion and/or texturisation machinery, a statement as to whether or not the machinery could be adapted to produce different generic types of products with the same polymeric basis, or products based on different polymers, and if so the cost of such adaptation and the ease with which it could be carried out,

— a description of the specific product and geographical markets that would be affected as a result of the proposed aid.

THE ASSESSMENT METHODOLOGY AND AUTHORISATION CRITERIA

In assessing the compatibility of aid coming within the scope of these measures, the fundamental consideration is the effect of that aid on the markets for the relevant products, namely the fibre/yarn whose production would be supported by the aid. Average capacity utilisation rates in many sectors remain unsatisfactory and the effect of State aid in support of production will generally be negative in terms of competition in the internal market except where there is a structural shortage of supply of the relevant product.

In all cases and irrespective of the state of the market for the relevant products and the effect of the aid on that market, the new measures provide for the limitation of the intensity of aid. However, in line with the Community guidelines on State aid for small and medium-sized enterprises (SMEs), SMEs will be able to receive aid at a higher intensity than larger firms. The measures also provide for SMEs to receive aid at an even higher rate if it would support the production of an innovative product.

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(5) See Section II of Annex II to the Director-General of the Competition Directorate's letter dated 2 August 1995 (D/20506) on the joint procedure for reporting and notification under the Treaty of Rome and under the World Trade Organisation's agreement on subsidies and countervailing measures.

(6) OJ L 241, 27.9.1993, p. 1.

Under the measures, the Commission will assess the compatibility of an aid in up to three stages:

— the state of the markets for the relevant products,

— the effect that the aid would have on the relevant capacity, and

— depending on the outcome of the first two stages and the size of the company, the innovative character of the relevant products.

The relevant products are the fibres and/or yarns whose production would be supported by the proposed aid and which come within the scope of the measures. In the assessment, the Commission will define the markets for such products in terms of the generic type of the fibre or yarn (whether carpet filament yarn, industrial filament yarn, textile filament yarn or staple fibre) and its polymeric basis (whether polyamide, polyester, acrylic or polypropylene). The Commission will also determine whether or not the equipment concerned is switch capacity and could, with ease and at relatively low cost, be adapted to produce different fibres and yarns, in which case it could affect more than one market.

In determining the state of the market for each of the relevant products — that is the structural balance between supply and demand — the Commission will consider the evidence, which would have to be based on facts and not merely on allegations, conjecture or remote possibility. It might include:

— the average capacity utilisation rate for production of the fibre or yarn, averaged on an annual basis over the previous two years, which would be expected to be ≥ 90 % if there were a structural shortage of supply,

— the level of imports of the fibre or yarn into the EEA, capacity and consumption volumes within the EEA, exports and prices and sales margins in the current year, in each of the previous three years and as they are forecast to develop in future,

— for the prospective beneficiary (and/or, if appropriate, the group to which it belongs) its share of the market for the fibre or yarn in the current year and in each of the previous three years.

However, this list is not exhaustive, nor would any one or more of these factors necessarily give decisive guidance.

The relevant capacity is the total viable capacity of the prospective beneficiary (and/or, if appropriate, the group to which it belongs) to extrude and/or texturise the relevant products. In all cases, viable capacity would include temporarily idle capacity (capacity that would be reactivated if sales improved) but would exclude obsolete capacity (capacity shut down before the application for aid was made and marked for scrapping or disposal outside the EEA).

In determining whether or not a product is innovative within the meaning of the measures, the Commission will again consider the factual evidence as to the nature and structure and forecast development of the market for the specific product, the ease with which the equipment concerned could be adapted to produce standard or less significantly innovative products and the cost of such adaptation, and whether the product was distinctly and significantly different from any other product or simply the result of product diversification through only marginal variation in the technical characteristics of an existing product.

The Commission will seek specialist advice and data where necessary, for example to help it to establish the structural balance between supply and demand for the relevant products, or to determine whether or not production equipment could, with ease and at relatively little cost, be adapted to produce different

products, or to assess the level of innovation. Furthermore, the Commission will open Article 93(2) proceedings where, after an initial assessment, it is either convinced that the proposal is incompatible with the common market or unable to overcome all the difficulties involved in determining whether or not the proposal is compatible.

Under the measures, investment aid will only be authorised:

— for larger firms — that is, firms that are not SMEs — at up to 50 % of the applicable aid ceiling:

  • if the aid would result in a significant reduction in the relevant capacity, or

  • if the market for the relevant products was characterised by a structural shortage of supply and the aid would not result in a significant increase in the relevant capacity;

— for SMEs, at up to 75 % of the applicable aid ceiling if the market for the relevant products was characterised by a structural shortage of supply and the aid would not result in a significant increase in the relevant capacity;

— for SMEs, at up to 100 % of the applicable aid ceiling:

  • if the aid would result in a significant reduction in the relevant capacity, or

  • if the market for the relevant products was characterised by a structural shortage of supply and the aid would not result in a significant increase in the relevant capacity and the relevant products were innovative.

For proposals to award regional investment aid under schemes authorised by the Commission, the applicable aid ceiling is that for the scheme in question. For proposals to award regional investment aid outside the scope of authorised schemes, and which do not come within the scope of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (7), the applicable aid ceiling is that for the region concerned.

In determining whether or not a change in capacity would be significant in the context of the measures, the Commission will consider the factual evidence, which might include:

— for the prospective beneficiary (and, where the aid would support elements of a wider strategy within the group to which it belongs, for the group as well):

  • its current capacity, capacity in each of the previous three years and the capacity it would have after undertaking the investments that would be supported by the proposed aid (in tonnes per annum) to extrude and/or texturise each of the relevant products and the actual volumes that have been or are expected to be extruded and/or texturised in these years,

  • its share of the market for each of the relevant products in the current year, in each of the previous three years and as it is expected to develop in the future,

  • its size — that is, whether it is an SME or a larger firm, and

  • its viability;

(7) OJ C 368, 23.12.1994, p. 12.

— the average capacity utilisation rate for production of each of the relevant products, averaged on an annual basis over the previous two years;

— the expected effect of the aid on the region concerned in terms of the structural handicaps of that region.

But, as with the analysis of the state of the market for the relevant products, this list is not exhaustive, nor would any one or more of the factors listed necessarily give decisive guidance.

The implementation of investments supported by authorised aid totalling ≥ ECU 50 million will be subject to *ex-post* monitoring to demonstrate that the conditions of authorisation have been respected.

In the opinion of the Commission, the new notification requirement described above is an appropriate measure within the meaning of Article 93(1) of the EC Treaty. It was considered by the Member States and the EFTA Surveillance Authority at a multilateral meeting in December 1995.

The measures will come into force on 1 April 1996 with a period of validity of three years. In principle, they will be abolished no later than six months after the date on which the planned horizontal framework on State aid in support of major investments comes into force.

II — Motor vehicle industry

Community framework for State aid to the motor vehicle industry (*)

1. UTILITY AND SCOPE OF THE FRAMEWORK

(a) Background

Because of its considerable importance in the fields of employment, trade and technological development, the motor vehicle industry is generally regarded as a strategic industry by most Member States. In the period 1970 to 1980, the governments of several Member States injected massive amounts of aid into the modernisation and development, or indeed the survival, of their domestic car industry (1). This action caused a subsidy race among the Member States and led to a number of distortions of competition. As a result, the Commission introduced a Community framework for State aid to the motor vehicle industry in 1989 (2), (hereinafter 'the framework') with the twofold aim of increasing the transparency of aid flows and imposing strict discipline in the granting of such aid in order to reduce distortion of competition in the Community industry to a minimum. At that time, the industry in Europe had not experienced surplus production capacity; however, intra-Community trade in vehicles and engines was extensive and alone ensured that the industry was a sensitive one.

The framework was adopted on the basis of Article 93(1) of the EC Treaty for three years (3), after which the Commission would review its scope and utility. In December 1990, the Commission decided to extend the framework without setting a time limit for its application, but undertaking to review it after two years and decide on possible modifications or its abolition following consultation with the Member States (4). On 23 December 1992, after consulting the Member States, the Commission decided (5) not to modify the framework and to extend it until a further review. Following an action brought by Spain, the Court of Justice of the European Communities ruled in its judgment of 29 June 1995 in Case C 135/93, *Spain* v *Commission* (6), that the decision should be regarded as a limited extension, until a future review of the framework which, in the present case, was to take place no later than 31 December 1994. In the light of that judgment, the Commission proposed to the Member States on 5 July 1995 that the framework be reintroduced by 1 January 1996 at the latest in the form of an appropriate measure within the meaning of Article 93(1) of the Treaty, and that it include certain changes such as raising the notification threshold to ECU 17 million (7). The Commission also informed the Member States that it

(*) OJ C 279, 15.9.1997, p. 1.

(1) In the period 1977 to 1987, State aid to the motor vehicle industry, essentially in the form of capital injections or extensive debt write offs, is estimated at ECU 26 billion. Between 1989, when the framework entered into force, and July 1996, the Commission approved ECU 5.4 billion of aid to the industry.

(2) OJ C 123, 18.5.1989, p. 3.

(3) The application of the framework was delayed for the first six months of 1989 pending its approval by 10 Member States, until January 1990 for Spain and May 1990 for Germany; Spain and Germany had originally been opposed to its application.

(4) OJ C 81, 26.3.1991, p. 4.

(5) OJ C 36, 10.2.1993, p. 17.

(6) [1995] ECR I 1651.

(7) OJ C 284, 28.10.1995, p. 3.

might re-examine, possibly revise or abolish the framework after two years, depending on the status of a possible horizontal framework ([8]).

In 1996, the Commission carried out an in-depth study of the framework with the help of independent consultants which concluded that the framework was generally effective and recommended certain adjustments concerning, in particular, the notification thresholds, the definition of the sector and the methods of carrying out the cost-benefit analysis.

On the basis of the report, the Commission presented its new draft Community framework for State aid to the motor vehicle industry for examination by the representatives of the Member States at a multilateral meeting, then decided to propose it to the Member States as an appropriate measure under Article 93(1) of the Treaty.

(b) General background

The motor vehicle industry is of great importance to the Community's economy. Experts reckon that as many as 10 jobs depend on each job in that industry; it employs, directly and indirectly, nearly 10 % of the active population. Furthermore, the industry is experiencing faster globalisation of its markets. European manufacturers and their component suppliers are faced with a steady increase in competitors on their traditional markets; their response is to maintain or strengthen their commercial plant locations on the prime export markets, often setting up local production plants in central Europe, Asia or South America.

However, as the Commission noted in its communication of 10 July 1996 ([9]) on the European motor vehicle industry, production capacity utilisation rate has been below 80 % since 1993 among most of the major European manufacturers. It is unlikely that the rate will improve significantly in the medium term ([10]), as the motor vehicle industry will form part of a general context of weak growth on a mature and cyclical market.

Much progress has been made in recent years by European industries, for instance in the area of gains in productivity and quality of manufacture; they are thus approaching the best world standards. However, efforts to catch up with the United States or Japan entail a stronger emphasis on intangible investments, especially in R&D and training, the development of industrial cooperation, modernisation of the role of public authorities, creation of a stable and favourable economic climate and a guarantee of effective competition ([11]). Adjusting the framework to bring it into line with the new economic situation is fully consistent with those targets.

The Commission has therefore decided to propose to the Member States that, pursuant to Article 93(3) of the Treaty, they give prior notification of the most significant aid cases in the motor vehicle industry, as from 1 January 1998, in accordance with the rules defined below.

([8]) On 25 April 1997, in Case C 292/95, *Spain* v *Commission*, the Court of Justice annulled the Commission decision of July 1995 to extend, with retroactive effect to 1 January 1995, the framework to 31 December 1995 pending the reintroduction of the framework for a period of two years from 1 January 1996 to 31 December 1997.

([9]) COM(96) 327 final.

([10]) A survey conducted in the first half of 1996 among all vehicle manufacturers in the Community and the EEA revealed that the production capacity utilisation rate in 1995 was 71 %, that is an installed capacity of 18.1 million vehicles as against an annual output of 12.9 million vehicles.

([11]) See footnote 9.

2. RULES ON NOTIFICATION

2.1. Definition of the industry

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, fork-lift 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

([12]) Design and development often take place on the project site of the manufacturer.

([13]) This proximity could *inter alia* take the form of a fixed link (automated conveyor belt for example) allowing the delivery of modules directly into the car factory.

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.

2.2. Aid to be notified

The purpose of prior notification of Member States' plans to grant aid is to allow the Commission to check as thoroughly as possible that aid envisaged for the motor vehicle industry is compatible with the competition rules of the Treaty.

(a) Aid under an approved scheme

All aid which the public authorities plan to grant to an individual project or an overall project under authorised aid schemes for a firm or firms operating in the motor vehicle industry must, in accordance with Article 93(3) of the Treaty, be notified before being granted if either of the following thresholds is reached:

— nominal amount of the investment project ([14]) (total cost of the project ([15])): ECU 50 million,

or

— total gross aid for the project ([16]), whether State aid or aid from Community instruments (Structural Funds and framework programmes), irrespective of the form and objectives of the measure: ECU 5 million.

The Commission then analyses the projects of the manufacturer and each first-tier component supplier in order to determine the compatibility of each of the aid measures envisaged.

(b) Ad hoc aid

Any aid which the public authorities intend to grant outside an approved scheme to one (or several) undertaking(s) operating in the motor vehicle sector defined above must be notified in advance under Article 93(3) of the Treaty, unless it complies with the thresholds and rules of the Commission notice on the *de minimis* rule for State aid ([17]).

([14]) An investment project is usually defined as an investment by an undertaking in new assets that are necessary to set up, expand, modernise or rationalise production facilities on a specific industrial site. An investment project should not be artificially broken down into several sub projects and/or over several financial years in order to avoid the obligation to notify.

([15]) The total cost of a project is defined as follows: total expenditure by an undertaking on the acquisition of new tangible and intangible fixed assets which are part of an investment project and will be depreciated (or leased) during their lifetime. Consequently, the cost is equal to the amount of capital invested in a project. The cost of the project may be different from the cost that is eligible for State aid (see paragraph 3.2 (b)).

([16]) The gross aid is obtained by adding the grants and grant equivalents of the aid envisaged; if aid is granted net of tax, it should be changed into gross equivalent aid by taking account of the tax effect wherever possible.

([17]) Currently OJ C 68, 6.3.1996, p. 9.

(c) Rescue and restructuring aid for firms in difficulty

Any rescue and restructuring aid which public authorities plan to grant to one (or several) undertakings operating in the motor vehicle industry must be notified in advance under Article 93(3) of the Treaty, unless it complies with the thresholds and rules of the notice on the *de minimis* rule for State aid.

(d) Notification

State aid must be notified on the form attached at Annex II, supplemented by an appropriate form to be obtained from the Directorate-General for Competition.

All notifications must be sent directly to the Secretariat-General of the Commission.

Member States should attach any relevant supporting documents to the notification forms. As regards regional aid in particular, studies on the final plant location site should be provided wherever available.

2.3. Ex-post control and assessment

In its decision, the Commission may require *ex-post* monitoring and assessment of aid already granted, the amount of detail varying according to the case and the potential distortion of competition.

In any event, a copy of the final aid contract concluded by the Member State and the undertaking receiving the aid must be sent to the Commission immediately after signing by the parties.

In order to enable the Commission to check that its decision has been complied with, the Member States, with the assistance of the aid recipients, must submit an interim report on the aid payments or a copy of the interim report on performance of the aid contract, followed by a final report on the objectives, in terms of timetable, investments and compliance with the specific conditions imposed by the Member State, and the actual achievements at the end.

2.4. Annual report

Member States are requested to provide the Commission with an annual report giving data on all aid, whatever its form, granted in the past year to undertakings in the motor vehicle industry. Aid which does not have to be notified must also be mentioned in the annual report.

The model form for the annual report must be sent by 1 April of the year following the reference year to the Directorate-General for Competition.

Annual reports may be communicated in their original language at the request of a Member State.

2.5. Community instruments

In view of the need to ensure that the measures financed by the Structural Funds or benefiting from aid from the European Investment Bank (EIB) or other financial instrument comply with Articles 92, 93 and 94 of the Treaty, the Commission has a duty to monitor all aid applications and authorisations under Community instruments and ensure that they are consistent with these guidelines.

2.6. Entry into force and duration

This framework will enter into force on 1 January 1998; the preceding framework, which entered into force on 1 January 1996 for two years, will serve as a basis for the assessment of aid proposals which

were notified before 1 November 1997 but which have not yet been declared compatible by the Commission or are the subject of proceedings under Article 93(2) of the Treaty initiated before that date.

This framework will apply for three years. At the end of that period, the Commission will decide whether to extend it, in particular in the light of the status of the proposed multisectoral framework.

3. GUIDELINES FOR ASSESSMENT OF AID

The assessment of aid must take account of general economic and industrial factors, sectoral considerations and regional, environmental and social factors. The Commission does not intend, however, to impose an industrial strategy on the sector, it is preferable for a strategy to be defined within the sector and the market. The Commission's aim continues to be to make sure that motor vehicle manufacturers in the Community operate in a climate of fair competition. To that end, the Commission endeavours to limit distortions of competition caused by certain aid measures and to maintain a competitive environment which boosts competitiveness and productivity in the sector.

Thus the criteria which the Commission uses to assess aid vary according to the objectives of the aid in question. It checks, however, that in every instance the aid granted is both proportional to the gravity of the problems to be resolved and is necessary for the realisation of the project. Both tests, proportionality and necessity, must be satisfied if the Commission is to authorise State aid in the motor vehicle industry. All forms of aid described above are assessed directly on that basis.

A notification of a project may contain various types of aid; each one will be analysed on the basis of its own rules of assessment.

3.1. Rescue and restructuring aid for firms in difficulty

Rescue and restructuring aid is assessed under the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([18]), without prejudice to the second subparagraph. The Commission ensures in particular that restructuring aid, like rescue aid, is in principle a one-off operation.

As structural overcapacity in the motor vehicle industry is set to continue until the end of the decade, the Commission will prohibit State aid which is aimed at a net increase in production capacity. In addition, the Commission will usually require a reduction in installed capacity. The Commission also considers it necessary for the reduction in production capacity to be proportional to the intensity of the aid, being the amount of the aid divided by the cost of restructuring.

3.2. Regional aid

The motor vehicle industry may benefit from regional aid to assist new plants and the extension of existing ones in the assisted areas of the Community, thus making a valuable contribution to regional development by creating or safeguarding often highly skilled jobs and through significant indirect effects.

Prior notification allows the Commission to compare the advantages from the standpoint of regional development with any unfavourable consequences for the sector as a whole. The purpose of the

([18]) Currently OJ C 368, 23.12.1994, p. 12.

comparison, in the form of a cost-benefit analysis, is not to deny the essential contribution made by regional aid to cohesion at Community level but to ensure that other factors affecting the Community, such as development and the general competitiveness of the industry in Europe, as well as respect for fair competition, are also taken into consideration.

(a) Necessity

In order to demonstrate the necessity for regional aid, the aid recipient ([19]) must clearly prove that it has an economically viable alternative location for its project or sub-part(s) of a project. If there were no other industrial site, whether new or in existence, capable of receiving the investment in question within the group, the undertaking would be compelled to carry out its project in the sole plant available, even in the absence of aid.

The existence of a viable alternative defines the 'mobility' of a project; mobility may if necessary be demonstrated by investors ([20]) on the basis of studies they have carried out in order to identify the final location. That alternative site is not always located in the Community. However, the Commission verifies the likelihood of the alternative, particularly when the relevant markets are considered.

Thus, to authorise regional aid, the Commission studies the geographical mobility of the notified project, after checking that the region in question is eligible for aid under Community law. No regional aid may be authorised for a project or parts of a project that are not geographically mobile.

In demonstrating the mobility of a project, where the alternative location is not in the EEA or in one of the countries of central and eastern Europe (CEEC), an investor must prove, notably by means of a location study, that at least one commercially viable alternative to the location chosen has been considered in the EEA or in one of the central and east European countries (CEEC). Otherwise, the location chosen will be considered to be the best one. Consequently, only regional aid may be authorised whose intensity does not exceed the threshold (defined in paragraph 3.2 (c)) below which it is not necessary to carry out a cost-benefit analysis.

Regional aid intended for modernisation and rationalisation, which is generally not mobile, is not authorised in the motor vehicle industry (see paragraph 3.7).

In view of the characteristics of industrial activity in the motor vehicle industry, entire production lines that are obsolete are sometimes dismantled. Such occurrences, although rare, may involve an element of mobility inasmuch as a firm is often faced with the choice of adapting the existing plant or closing it and setting up a new plant elsewhere, either in the form of an extension or on a greenfield site. A radical change in production structures of this nature on the existing site is called a 'transformation' ([21]), it may be eligible for regional aid.

Finally, transformation is not the same as 'restructuring', the latter being applicable to firms in financial difficulties.

([19]) A project put forward by first-tier module or sub-system suppliers that is directly linked to a mobile investment by a motor vehicle manufacturer will by definition be considered mobile itself. A supplier's project may be mobile even if the manufacturer's project is not; the supplier would have to be able to satisfy the Commission on this point.

([20]) Mobility alone is not always sufficient to establish the necessity for aid; for example, the site chosen may have net competitive advantages in comparison with the alternative proposed by the investor.

([21]) 'Transformation' means the complete dismantling of bodywork lines (motor vehicles) or power plant lines (engines) and, simultaneously, of the final assembly lines of the plant in question and the setting-up of new bodywork lines, power plant lines and final assembly lines in an overall production structure that is clearly different from the previous one.

(b) Eligibility of costs

The Commission determines whether or not costs relating to the mobile aspects of a project are eligible; eligibility is defined by the regional scheme applicable in the assisted region concerned.

(c) Proportionality of aid

When considering the mobile aspects of a project, the Commission satisfies itself that the planned aid is in proportion to the regional problems it is intended to help resolve. To that end, the cost-benefit analysis method is used. For the sake of transparency, a copy of the standard notification forms for a cost-benefit analysis is attached at Annex II to this document.

Until the Commission has approved the regional maps in accordance with the new regional guidelines, which it should do by 1 January 2000, if the intensity of the planned regional aid is 10 % ([22]) or less of the regional ceiling, a cost-benefit analysis will not be required by the Commission. This is because a mobile project located in an assisted region always suffers from minimum disadvantages. After that date, and in so far as the new regional maps have lower ceilings, the minimum intensity triggering a cost-benefit analysis will be 20 % of the new regional ceiling.

A cost-benefit analysis compares, with regard to the mobile elements, the costs which an investor would bear in order to carry out its project in the region in question with those it would bear for an identical project in a different location, which makes it possible to determine the specific handicaps of the assisted region concerned. The Commission authorises regional aid within the limit of the regional handicaps resulting from the investment in the comparator plant.

In the cost-benefit analysis, the comparator plant must be located in the EEA or in the countries of central and eastern Europe (CEEC) if the purpose of the investment is the manufacture of vehicles and parts of vehicles intended largely for the European markets ([23]).

If the cost-benefit analysis takes as comparator a location in another assisted area within the meaning of Article 92(3) of the Treaty or Article 61(3) of the EEA Agreement, any difference in the regional aid rate is neither an advantage nor a handicap for the cost-benefit analysis; it is regarded as neutral by definition.

As stated in paragraph 2.2 (d) ('Notification') of these guidelines, studies on the choice of plant location must be submitted to the Commission whenever available in order to facilitate processing of the case and speed up the final decision.

Operational handicaps are assessed over three years in the case of expansion projects and five years in the case of new plants on greenfield sites. The Commission believes that these periods are generally consistent with the time needed to overcome start-up difficulties and reach target operational levels in each case.

New plant means new plant on a new site which has not yet been developed. In such cases, compared with plant expansion, undertakings are faced with the following specific problems: lack of adequate infrastructure, lack of organised logistics, lack of a workforce specifically trained for the needs of the undertaking and lack of a sub-contracting structure. If, however, such services can be provided by a unit of the same group located in close proximity, the project is regarded, in accordance with Commission Decision 96/666/EC, as an expansion, even if it is actually built on a greenfield site ([24]).

([22]) See State aid Case N 781/96, *Ford Bridgend*, OJ C 139, 6.5.1997, p. 4.
([23]) The study of the mobility of the investment and the cost-benefit analysis may be carried out using different alternative locations.
([24]) OJ L 308, 29.11.1996, p. 46.

In the case of an overall project, the first-tier component suppliers concerned may each benefit from the same regional handicap percentage as the vehicle manufacturer, as calculated by the cost-benefit analysis, no individual cost-benefit analysis being applied to them. However, if a first-tier component supplier taking part in an overall project considers it has the specific regional handicaps that would give it a higher aid intensity, it may request a separate cost-benefit analysis the results of which will be applied irrespective of the outcome.

(d) Analysis of the effects on the industry and on competition

In view of the sensitive character of the motor vehicle industry, the Commission proposes to study the effects on competition of every investment project, looking in particular at variations in production capacity ([25]) on the relevant market in the group concerned ([26]).

For these reasons, an adjustment (top up) will be calculated, as follows:

	Top up	
Impact on competitors	Article 92(3)(a) regions	Article 92(3)(c) regions
negligible	+ 4	+ 2
moderate	+ 2	+ 1
high	– 1	– 2

The top-up is expressed in terms of percentage points to be added to or subtracted from the intensity allowable according to the cost-benefit analysis.

The impact on the industry is 'high' where the ratio between the capacity of the group after the investment (C(f)) and the capacity of the group before the investment (C(i)) is 1.01 or over.

The impact is 'moderate' where $0.99 < C(f) / C(i) < 1.01$ or where a new segment is created on the relevant market.

The impact is 'negligible' where C(f)/C(i) is 0.99 or under.

The distinction between Article 92(3)(a) regions and Article 92(3)(c) regions is needed in order to take better account of the difficulties encountered in each region and to increase the incentive effect of regional aid on investors.

(e) Determination of aid intensity

The authorised aid, expressed as a gross grant equivalent, may not exceed the total of the amounts calculated in stages (a) to (d) (mobility, eligible investments, identification of regional handicaps,

([25]) Because of the structural overcapacity in the industry.

([26]) The relevant product market covers the products (and possibly the services) referred to in the investment project and their possible substitutes from the consumer's standpoint (on the basis of product characteristics, prices and intended use) and that of the producer (plant flexibility). The relevant geographic market in principle covers the EEA and the countries of central and eastern Europe (CEEC).

possible top-up) and usually discounted and expressed as a percentage of eligible investment so that they can be compared with the gross grant equivalent of the assisted region. The aid may not exceed the regional ceiling applicable to the type of undertaking concerned.

3.3. Research and development aid

Aid for R&D will be assessed under the Community framework for State aid for research and development ([27]).

The Commission carries out a thorough analysis of the breakdown of costs between the different categories of R&D; investors must clearly distinguish industrial research and genuine precompetitive development from the introduction of new technology in the form of productive investment or competitive development.

3.4. Investment aid for innovation

Innovation means the development and industrialisation in Europe, the EEA and the countries of central and eastern Europe (CEEC) of genuinely or substantially new products or processes, that is products or processes which have not yet been used or marketed by other parties operating in the industry. A genuine innovation carries a risk of failure; the Commission will take account of the scale of this risk when it assesses the intensity of the aid envisaged.

In general, the European motor vehicle industry needs to improve its competitiveness as compared with its United States, Japanese and Korean competitors. To that end, it should for example improve its ability to innovate in order further to reduce the technological and industrial gap ([28]).

Investment aid for innovation will therefore be authorised only in duly justified cases, as an incentive to industrial or technological risk-taking.

The maximum intensity of such aid is set at 10 % of all eligible costs, corresponding to engineering activities and investments of direct and exclusive relevance to the innovative part of the project.

An innovative project must concern only one plant location ([29]) within the same group in the motor vehicle industry; no aid will be granted for parts of the project carried out in other branches of a group.

3.5. Aid for environmental protection and energy saving

Aid to combat pollution in general, that is aid granted under the Community guidelines on State aid for environmental protection ([30]), may be regarded as compatible.

It should be noted that those guidelines involve complex technical evaluations of such things as the 'ecological' costs incurred by the investor. Moreover, when it assesses the compatibility of aid, the Commission makes a thorough study of the cost savings on energy, raw materials and so on which the investor has secured as a result of the environmental protection component in the project.

([27]) Currently OJ C 45, 17.2.1996, p. 5.
([28]) The gap can be illustrated by the average time required to build a vehicle: 25 hours in Europe, 22 hours in the United States and 16 hours in Japan (see footnote 9).
([29]) Or a small number of sites if different complementary sub-projects take place on a small number of sites.
([30]) OJ C 72, 10.3.1994, p. 3.

3.6. Aid to vocational training

The Commission has a generally positive attitude towards training, retraining and reconversion programmes. State aid for such purposes will be scrutinised to ensure that it is not used solely to reduce the costs a firm would normally bear.

The Commission will soon adopt a Community framework for training aid which will also apply to the motor vehicle industry.

3.7. Aid for modernisation and rationalisation

Modernisation and rationalisation are essential if an undertaking is to remain competitive on a world market. However, they present a very high risk of distortion of competition and should normally be financed from a company's own funds.

If an undertaking competing on an international market is unable to finance its own modernisation and restructuring, its ability to compete and its viability will eventually disappear. No aid for modernisation or rationalisation may therefore be granted to undertakings in the motor vehicle industry.

3.8. Operating aid

Operating aid creates lasting distortions of competition in sectors such as the motor vehicle industry. No new operating aid will therefore be authorised by the Commission, even in assisted areas. Furthermore, on the basis of Article 93(1) of the Treaty, the Commission will suggest that Member States currently granting this type of aid under existing schemes should gradually abolish operating aid benefiting one or several undertakings in the motor vehicle industry.

ANNEX I

COST-BENEFIT ANALYSIS IN THE CONTEXT OF THE EC FRAMEWORK ON STATE AID TO THE AUTOMOTIVE INDUSTRY

1. REGIONAL AID VERSUS DISTORTION OF COMPETITION

1.1. Effects on the sector

When dealing with Member States' proposals to grant regional aid in the automotive sector, the motor vehicle framework establishes that the Commission has to assess the benefits for regional development against possible adverse effects on the sector, such as the creation of important overcapacity.

Moreover, in view of the sensitive nature of the motor vehicle sector and the high risk of unwarranted distortions of competition, it is necessary to ensure that the regional aid is in proportion to the regional problems it seeks to redress.

The Commission has established an aid ceiling for each of the regional areas covered under Article 92(3)(a) or (c) of the Treaty. However, even when the ceiling for regional aid in the area where the project is to be developed is higher than the aid intensity proposed in favour of an automotive company, the level of regional aid exceeding the actual cost disadvantages, arising for that company in that assisted area, provides a competitive advantage to the aided company *vis à vis* the unaided competitors.

The risk of undue distortion of competition is particularly high in the automotive sector because the level of globalisation and the structural overcapacity affecting most manufacturers leads to fierce price competition. This intense competition reduces the profit margins which in turn forces the industry to make permanent cost reductions. Consequently, any overcompensation of regional handicaps may have adverse effects on unaided competitors. The risk of undue distortion of competition is also high because Member States and regions are put into competition by multinational automotive companies for the location of large-scale investment projects. Hence, there is a tendency for disproportionate aid allocation to such projects. Such competitive bidding may involve not only regional aid but also other horizontal aid, ad hoc aid and general measures.

Consequently, by submitting all cases of regional aid to a strict analysis the Commission aims to limit regional aid to what is strictly necessary to influence the locational choice of economically viable projects in the automotive industry and thereby to avoid unjustifiable distortion of competition.

1.2. Balance: how to assess it

In order to assess a Member State's proposal for granting regional aid to a car manufacturer for a large and mobile investment project, the Commission wishes to calculate to what extent regional aid relates to the structural handicaps faced by an investor in the assisted area. For this calculation it has since 1990 opted for a method called 'cost-benefit analysis'. This method is based on the study 'The effect of different State aid measures on intra-Community competition' by the Motor Industry Research Unit published in 1990 ([31]).

Because distortion of competition is caused by companies in the market, the Commission places itself deliberately in the position of the private investor when calculating costs or benefits associated with a particular location. By comparing the investment and operating costs of the chosen location in the assisted area with the best alternative location, the Commission can identify those costs and benefits. The present value of the calculated net incremental cost of the regional site can then be compared with the present value of the proposed regional aid. The balance between those values expressed as percentages of the eligible investment is the subject of a sectoral impact study of the project concerned.

2. COST-BENEFIT ANALYSIS AND COMMISSION'S APPROACH

2.1. What is cost-benefit analysis?

Cost-benefit analysis is, in general, a procedure for evaluating the desirability of a project by weighing its benefits against its cost. Results may be expressed in different ways, including the internal rate of

([31]) Published by the Office for Official Publications of the European Communities, ISBN 92-826-0381-4.

return, the net present value and the benefit cost ratio. Behind a number of practical approaches based upon the principle of the rationale of a private investor acting under market conditions, cost-benefit analysis has found a wide acceptance amongst private companies and government bodies in the appraisal of major investment projects.

2.2. Commission's approach

The Commission's approach is to use a variant of the cost-benefit analysis model for estimating the net incremental cost resulting for an automative company from its decision to locate a mobile investment project in a particular regional assisted area instead of the company's best alternative location ([32]). This method has between 1991 and 1996 been used to justify regional aid for 17 investment projects.

In the first place, the mobility is ascertained. The automotive group in favour of which the aid is proposed must prove in a clear and convincing way that there is an economically viable alternative location site for its project. This is obviously the case for greenfield projects and expansion projects which do not involve a replacement of existing installations.

It is to be noted that if the company has no viable alternative, because of industrial constraints, to carrying out the project in another site, new or already existing, then the regional aid in support of the location choice is not justified because there is no necessity at all for that aid: the automotive group would carry out its project anyway in the only possible existing location. Non-mobile investment projects focus on one of the following objectives: modernisation, rationalisation or replacement.

However, on the occasion of a complete model renewal (with or without effects on the plant's capacity) that involves the dismantlement of complete older production lines and their replacement by new ones, the company can make a case for mobility. On that occasion, the company may be tempted to close the site and relocate production. Such radical refurbishment of an existing site will be called a transformation ([33]) and may justify regional aid. A transformation may increase or decrease the overall capacity of the plant. The alternative to transformation is normally expansion at another existing site or a greenfield project.

The existence of the 'viable alternative' defines the 'mobile' character of the project. The 'mobility' requirement is to be demonstrated by the company on the basis of the location studies carried out in order to examine different alternative locations and propose the most advantageous site from those locations. It is important to note that the most attractive location can be placed outside the Community. In any case, the Commission verifies the rationality of the alternative location, having a special regard to the markets targeted by the company with its investment.

In conclusion, in order to assess a regional aid proposal the Commission examines the actual geographical mobility of the notified project. No regional aid can be approved which would not be necessary because the project would not be mobile, in the sense that the company has no real choice of locating the project in any other place.

The location study performed by or for the investor will in principle provide all the necessary input for completing the cost-benefit forms. A copy of the original study should also be transmitted to the Commission. All headings for which differences in costs ([34]) exist between the two sites under

([32]) Prior to the review of the framework, the alternative location always had to be the best possible location for the same project in a non-assisted area. If that option was not examined by the company, it was invited to select that location.

([33]) This notion of transformation is different from restructuring, which is reserved for companies in difficulty or sites that would be closed if the investment project did not go ahead.

([34]) Differences in corporate taxes are not considered as a cost element.

consideration can in principle be retained for the Commission's analysis. The sole exceptions to be eliminated are those handicaps for which a specific aid will be granted under a different objective (e.g. training). Another difference may be the number of years taken for the cost-benefit analysis for which the Commission has chosen a uniform period of three and five years (See 3.3 below).

The cost-benefit analysis provides for a calculation of the net incremental cost associated with the selection of the plant in an assisted area versus the best alternative location. The proportion between the present value of this net incremental cost and the present value of the eligible investment is called the 'regional handicap ratio'.

2.3. Market-impact analysis

In order to establish the effect of regional aid on competitors, the Commission will first define the relevant product market affected by the project concerned at European level, taking into account the prevailing substitutability of demand and supply in the sector. If substitutability is strong between different market segments or niches, the Commission will add those segment or niches to arrive at the relevant market. As such, the Commission does not, for example, make a distinction between most segments of the passenger car market unless the vehicle is sufficiently distinct in its use and production mode (e.g. off-road vehicles).

As most vehicle producers manufacture their own engines, the Commission has considered that the relevant market for engine production by a vehicle manufacturer is the vehicle market for which the engines are built. However, as concerns component systems or modules which are now also covered by the framework, the Commission is of the view that there is a separate market for each of those component modules. In fact, a car manufacturer will only decide to (continue to) produce a module itself after verification of its cost efficiency against outsourcing that module.

In the event of a notification of a global project involving vehicle or engine manufacture as well as the manufacture of the corresponding component modules, the Commission will define the relevant market as the combination of the vehicle market and the markets for the different modules.

The effect of regional aid will be assessed in detail and classified according to three categories, namely low, medium or high impact for competitors in the relevant market. Such analysis will be closely related to the changes in capacity and market share generated by the project.

The structural overcapacity currently affecting the motor vehicle industry at Community level has led the Commission to adopt a stricter approach concerning State aid to projects that contribute to an aggravation of this problem, independently of its location in assisted or non-assisted areas. For that reason, the 'regional handicap ratio' can be modified by adding or subtracting some percentile points (the so-called 'regional top-up').

The concept of overcapacity, its verification at group level, and the range of values established for the 'regional top-up' are explained in detail in section 3.4 below.

2.4. Technical expert report and confidentiality

Both the availability of a viable alternative location and the calculation of the extra costs and benefits are subject to an independent technical expert report.

Because of the sensitiveness of the results of the cost-benefit analysis to the data submitted by the beneficiary company itself, the Commission makes use of an external technical expert report to verify

the data submitted by that company. The Commission contracts a consultancy company with expertise in the automotive sector, which is chosen through a call for tenders procedure, subject to the Commission's public procurement procedures.

Most of the information and technical data submitted by the beneficiary in the context of the cost-benefit analysis is communicated to the Commission under a strict requirement for confidentiality. The cost-benefit analysis makes use of detailed information on the operating and investment cost of the project and of other confidential information on the company's plans for sales, production and capacity, all of which may be subject to business secrets protected by law. The consultany company employed by the Commission is subject to contractual provisions against any possible disclosure, facing heavy fines and responsibilities for such an eventuality. The Commission can guarantee also to the beneficiary company that documents marked confidential will not be circulated.

3. HOW TO DO IT (AN EXPLANATION OF THE METHOD)

3.1. The regional objective versus other objectives of the aided project

Before starting the analysis, it is important to determine whether the project is only serving a regional objective or also any other objective eligible for aid under the guidelines of the motor vehicle framework. If the project is also aided under other objectives (e.g. environmental, R&D, training), it will be important to ascertain that eligible expenditure and cost-benefit analysis do not involve any of these items since they will be separately aided. The position is somewhat different for innovation when linked to investment. That expenditure can be aided from a regional and an innovation point of view.

3.2. Comparison: alternative location of the project

The identification of the comparator plant for the project, which is a key element of the analysis, is carefully examined by the Commission and can be — as any other information or technical data submitted by the company — challenged by the technical experts:

— in principle, the company is requested to supply a full copy of the location study of the project which will provide evidence of the alternative site(s) considered before opting for the selected plant,

— if a complete study was not made, the company ([35]) would have to provide sufficient circumstantial evidence to demonstrate that it has actively pursued an alternative location which would in the short run have been more cost efficient but was not pursued for specific reasons and the Commission's experts would then have to verify this evidence.

In the Commission's cost-benefit analysis, the comparator site or benchmark is in principle situated within the EEA or one of the central and eastern European countries (CEEC), if the purpose of the investment is the production of vehicles or car components destined, to a large extent, for the European markets ([36]). In those rare cases where a company is only comparing one European site with a site outside Europe from which it would import the vehicles, the cost-benefit analysis may have to be

([35]) Producers of component systems to be located in the vicinity of a vehicle plant would normally not have made such a study. The alternative site is thus the same as for the vehicle producer. A car assembler who has been in competition with other sites will on the other hand not have access to the location study performed by the car company.

([36]) The study on the mobility of the investment and the cost-benefit analysis could be carried out on the basis of different comparison sites.

performed with a hypothetical alternative site. In cases where the company can demonstrate that more than half of the production is to be sold outside Europe, the comparator plant for the cost-benefit analysis can be situated outside Europe.

If the comparator site identified by the company is located in another assisted area of the Community covered by the exemptions provided for in Article 92(3) of the EC Treaty or Article 61(3) of the EEA Agreement, the possible difference between the respective aid ceilings does not constitute an advantage or a disadvantage for the cost-benefit analysis; that difference is regarded as neutral for the final result of the analysis.

3.3. Factors taken into account ([37])

As explained above, all information and technical data submitted by the company are checked and validated by the Commission and its technical experts. General reference data (inflation rates, average wages in the sector in the different countries, etc.) are compared with available statistics at Community level (Eurostat, Commission — DG II, etc.).

The cost-benefit analysis examines differences in investment cost as well as possible operating costs over a period of three years for existing plants, or five years for greenfield projects, from the first year when production of the new vehicles/engines starts, both in the plant located in the assisted area and in the comparator plant.

It must be pointed out that the concept of 'greenfield' project refers to a completely 'new' site in an area which is also new to the manufacturer. It requires the development of basic infrastructures, the installation of logistics, the recruitment and intensive training of a new workforce and the development of a network of local suppliers, amongst other factors. In the event that those factors could be assured by another unit of the business group already located near the site, the project is regarded as an expansion of existing facilities, even when it is actually in a 'greenfield' location ([38]).

The period of three or five years has been set following the recommendation of the experts as the most appropriate period to recover from start-up costs, depending on the nature of the project: the expansion of transformation of an existing facility requires, as a rule, a shorter period before full production can be reached than greenfield plants where the learning process is slower.

The Commission expects the companies to demonstrate that the net operating disadvantages decline over time in order to demonstrate the rationality of the locational choice which is normally based on the long-term comparative advantages of the site chosen by the investor as opposed to possible alternative sites.

The cost-benefit analysis takes into account the following factors:

Investment cost differences

Differences in additional investment cost ([39]) arising for the automotive group between the two locations must be identified in detail. The analysis considers at least five categories of cost: land, building and infrastructure, machinery and equipment, tools and dies and vendor tooling. Other categories may be identified when they correspond to assets that will be depreciated over their lifetime. These cost

([37]) This section would be better understood if read in parallel with the cost-benefit analysis sheets attached as an annex.
([38]) Decision 96/666/EC, OJ L 308, 29.11.1996, p. 46.
([39]) The investment cost may be larger than the eligible investment, which is defined by the regional aid scheme actually applied.

differences must be explained by the automotive company to the Commission and all available supporting documentation (including technical lay-outs of the plant before and after investment) must be submitted.

Usually, the differences in investment between the two plants of comparison requires an on-site visit by the Commission's experts. The examination of these elements is also a crucial element to detect the capacity bottlenecks of the aided plant in cases where production capacity increases are at stake.

The analysis of investment handicaps shows whether or not the location in the assisted area results in an advantage or disadvantage for the company due to the fact that the investment that would have been required in the comparator plant is more or less expensive than the one actually installed in the assisted area.

Operating cost differences

Differences in operating costs corresponding to the first full three or five years of production also have to be examined in detail. In the supportive material a distinction should be made between normal or permanent cost differences and start-up cost differences for each category. Data are to be given in the currency of the Member State providing the aid (exchange rate assumptions to be provided) and in current prices for historic years or constant prices for future years. The factors usually taken into account are:

Labour costs: differences in the wage bill of production at optimal productivity which can be broken down in differences in wage rates, in working hours and manpower;

Components/materials: differences in the cost of components and supplies, taking into account local suppliers policies, central purchases policies, etc.;

Inventories: differences in the financing cost of stocks for incoming material and finished products that appear as a consequence of the location choice (i.e. differences in number of days in stock on the plant and on the road);

Transport: differences in cost arising for the automotive company because of the peripheral location of the regional plant (both as regards incoming materials and finished products) resulting from differences in distances and unit transport costs;

Other operating handicaps: differences in cost of, for example, various utilities and guarantees.

3.4. End result of the cost-benefit analysis: 'regional handicap ratio' versus 'aid intensity'

The cost-benefit analysis model obtains the net incremental cost between the two locations. The nominal value is to be discounted using the reference rate of the Member State concerned valid at the start of the project. When operating handicaps are expressed in constant prices, the nominal value of those handicaps will be discounted by the real interest rate, which is equal to the reference rate minus the inflation rate for the country in question.

The Commission also examines the correct application of the regional aid scheme in arriving at the eligible expenditure. The relevant 'aid intensity' for the Commission's decision on the aid project is the ratio between the discounted aid flow and the discounted flow of eligible investment using the reference rate. This aid intensity is then expressed in gross grant equivalent.

Division of the net incremental cost in present values by the present value of the eligible investment produces the 'regional handicap ratio'.

This 'regional handicap ratio' is compared with the 'aid intensity' expressed in gross grant equivalent resulting from the Member State's proposal. Comparing both ratios, the following initial propositions can be drawn up:

— if the aid intensity is well below the regional handicap ratio, it is assumed that the automotive company will not receive an unjustified amount of aid; the aid will serve to compensate to a certain extent the financial disadvantages of the geographical choice,

— if the aid intensity is substantially higher than the regional handicap ratio, it may be assumed, at this point of the analysis, that the automotive company may receive an unjustified amount of aid; the aid may serve to overcompensate the financial disadvantages of the geographical choice,

— if the aid intensity is close to the regional handicap ratio, the market-impact analysis will define whether the proposal is acceptable.

3.5. Market-impact analysis: the 'regional top-up'

Taking into account the present surplus capacity in the European automotive industry, the Commission's assessment of regional aid cases in the motor vehicle industry puts a special emphasis on the production capacity of the vehicle maker ([40]) receiving the aid 'before' and 'after' investment and the situation of the vehicle's market segment that will be affected as a consequence of the aided project.

Aid proposals in support of investments that potentially aggravate the overcapacity problem of the industry can be modulated by reducing the 'regional handicap ratio' by up to two points; this could imply that the Commission has to start proceedings under Article 93(2) of the Treaty even when the proposed aid does not overcompensate the regional handicap.

On the contrary, a project contributing to an overall improvement to the overcapacity situation affecting the industry can benefit from increases of up to four points (in assisted areas) to the regional handicap estimated by the cost-benefit analysis.

The 'regional top-up' range of values is the following:

Impact on competitors	Adjustment factor	
	Article 92(3)(a) regions	Article 92(3)(c) regions
low	+ 4	+ 2
medium	+ 2	+ 1
high	– 1	– 2

([40]) In the case of component modules, the Commission will not take account of overcapacity considerations given that first-tier component suppliers are not considered to invest in new capacities unless they have firm purchase orders.

Note: the 'regional top-up' is expressed in percentile points that are added to (or subtracted from) the 'regional handicap ratio' estimated by the cost-benefit analysis.

A distinction between Article 92(3)(a) and Article 92(3)(c) areas is necessary in order to take into account the different situation of the regions and increase the incentive effect of regional aid for potential investors.

4. PROCEDURE

4.1. Pre-notification

Member States may wish to contact the Commission in advance of a notification to obtain advice to ensure that the subsequent notification is as complete as possible. This is particularly relevant when the aid nature of certain measures is uncertain, when an aid measure serves more than one objective, when it is doubtful whether a cost-benefit analysis is required or when a company has not carried out a location study.

4.2. Notification

The Member State should, with the help of the aided company, complete the standard notification form and cost-benefit analysis forms adding the necessary supporting material.

4.3. Appraisal

Upon registration of the notification, the Commission will inform the Member State as soon as possible and usually within 15 working days about any information ([41]) which may be lacking in order to make the notification complete for an assessment of all aspects of the case. At the same time, it will propose to the Member State a meeting in its offices or on the site of the investment to discuss the information already received and to be received.

On that occasion, the Member State and the Commission can be assisted by appropriate experts so that all technical and financial information can be discussed in detail. During the meeting, missing information for a full assessment of the case will be identified by the Commission and agreement reached by all parties on supportive material to be provided and on the prospective timetable for decision-making. Following that meeting ([42]), the Commission will confirm its final request for further information in writing.

Once the additional information which corresponds to the requests of the Commission is received, the decision will normally be adopted within 30 working days for notified aid under an approved aid scheme(s) or two months for notified ad hoc aid.

([41]) Given the fact that every case has its own pecularities, it is normal to expect that the notification does not provide comprehensive information on all technical and financial aspects of a project. In cases where the Member State has consulted the Commission before notification, the need for additional information will of course be limited.

([42]) If the company argues for considerable investment cost differences between two existing sites, it may also be necessary for the Commission's experts to visit the alternative site.

However, within this deadline the Commission will invite the Member State, which can if appropriate be assisted by experts, to review the cost-benefit analysis in a meeting in Brussels. Any errors and misinterpretations can then still be corrected before a final version is arrived at.

5. COST-BENEFIT ANALYSIS FORMS AND GLOSSARY OF TERMS

See Annex II.

ANNEX II

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART I — GENERAL INFORMATION

Form Title	No of pages
Form 1 Supporting documentation	2
Form 2 Project overview	5
Form 3 Market information	4

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART I — GENERAL INFORMATION

Form 1 — Supporting documentation

(For Commission's use only)

State aid no .....

Supporting documentation

All information provided in the forms must be reference to supporting documents. Please list below the documents attached allocating a unique reference for use in completion of the relevant form set:

Document	Reference
Example: Project AUTO X appraisal, December 1996	*PA.. 96*
I. *General information*	
Group's and company's most recent financial accounts	
Copy of the national legal basis under which aid may be granted	
II.A. *Mobile regional investment project*	
Location study	
Full feasibility study	
II.B.1. *Rescue*	
Rescue plan	
II.B.2. *Restructuring*	
Restructuring plan	
II.C. *Research and development*	
Research plan and budget	
II.D. *Innovation*	
Project appraisal	

II.E. *Environment protection and energy savings*	
Project appraisal	
II.F. *Training*	
Training programme	
OTHER SUPPORTING DOCUMENTS	

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE SECTOR

PART I — GENERAL INFORMATION

Form 2 — Project overview

(For Commission's use only)

State aid no .....

Completion date: ...../...../.....

1 National administration

1a Member State: _____

1b Authority in charge of the file:

Name	Address	Contact person
_____	_____	Name: _____
_____	_____	Telephone: _____
_____	_____	Fax: _____
_____	_____	e-mail: _____

2 Recipient

2a Company name (1): _____

2b Ownership (2): (Please indicate name, nationality and ownership share)

1. _____ ____ %
2. _____ ____ %
3. _____ ____ %
4. Other ____ ____ %

2c Department in charge of the project:

Name	Address	Contact person
_____	_____	Name: _____
_____	_____	Telephone: _____
_____	_____	Fax: _____
_____	_____	e-mail: _____

2d Principal activity (Please tick one box only)

☐ Motor vehicle manufacturer/assembler

☐ System components manufacturer/assembler (Please specify) _____

☐ Engine manufacturer/assembler

2e Group financial results (3) (most recent)

Currency _____ Units: ☐ million ☐ billion (Please tick one box only)

	Turnover	*Net profit*
Last year: ☐☐/☐☐	☐☐☐☐☐	☐☐☐☐☐
Year before: ☐☐/☐☐	☐☐☐☐☐	☐☐☐☐☐

2f Recipient company financial results (3) (most recent)

Currency _____ Units: ☐ million ☐ billion (Please tick one box only)

	Turnover	*Net profit*
Last year: ☐☐/☐☐	☐☐☐☐☐	☐☐☐☐☐
Year before: ☐☐/☐☐	☐☐☐☐☐	☐☐☐☐☐

3 Project classification (according to aid objective) [4]

☐ Mobile regional investment ☐ Rescue & restructuring ☐ Research & development

☐ Innovation ☐ Environment protection/energy saving ☐ Training

4 Project overview

4a Project objectives and scope

4b Brief description of the product(s), where relevant

4c Brief description of the relevant market segments(s), where relevant

4d If the project results in a transfer of activity from another area, please provide details

5 Project details

5a Location: Region: _____ Assisted area: ☐ Yes ☐ No

County: _____

Town/Village: _____

Postcode: _____

5b Project timing [5]

	month	year	
starting:	☐☐	☐☐☐☐	No of months ☐☐
ending:	☐☐	☐☐☐☐	

5c Project cost (6): Currency _____ Units: ☐ million ☐ billion (Please tick one box only)

Total project cost

		Reference			Reference
Capital cost(s)			Non capital cost(s)		
Land			Operating costs		
Buildings			R&D		
Plant & machinery			Other (specify)		
Equipment					
Intangible					
Other					

5d Project financing

		Reference
own resources		
private capital contributions		
external borrowing		
private borrowing		
public borrowing		
national public body		
Community assistance		
Total		

6 Effects of the project

	Plant		Reference	Group		Reference
	With project	Without project		With project	Without project	
6a (*) on capacity (7)						
6b on employment (8)						
6c on production (9)						
6d on market share						
6d.1 domestic	%	%		%	%	
6d.2 other EEA	%	%		%	%	
6d.3 non EEA	%	%		%	%	

(*) Please indicate the assumptions underpinning the definition of capacity (efficiency rates, ...) and where production bottlenecks are located.

7 Public assistance

7a Please indicate the following information on envisaged public support: type(s) of aid scheme(s) and legal basis(es) under which the support would take place, and the public entity(ies) involved

		Type [10]	Aid scheme [11]	National legal basis [12]	Public entity [13]
7a.1	1.				
7a.2	2.				
7a.3	3.				
7a.4	4.				
7a.5	5.				

7b Please indicate by year the gross value, expressed in nominal terms, of each type of public support listed in 7s
Please provide us with the calendarisation of the payments of the aids

Currency _____ Units: ☐ million ☐ billion (Please tick one box only)

		Year 1:	Year 2:	Year 3:	Year4:	Year 5:	Total	Reference
7b.1	1.							
7b.2	2.							
7b.3	3.							
7b.4	4.							
7b.5	5.							
7b.6	Total							
7b.7	Estimation of total public support in gge (gross grant equivalent) [14]							
7b.8	Total State aid							
7b.9	Please indicate the discount [15] factor used to compute the State aid net present value (7b.10)	%						
7b.10	State aid net present value [16]							

If there are more than five types of aid or aid schemes, please use a copy of this page (Form 2 of 3, Page 4 of 5) and provide the same information

7c Please indicate if any of the envisaged public support does not represent State aid and explain briefly why

Envisaged support	Description	Reference

8 Other pending application(s) for public support

Please indicate other pending application(s), at company and/or group level, for public support in Europe and the authority(ies) involved (EIB, EBRD, R&D Funds...)

Currency _____ Units: ☐ million ☐ billion (Please tick one box only)

Public entity	Date of application		Type of aid	Amount	Date of outcome	
	Month	Year			Month	Year

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART I — GENERAL INFORMATION

Form 3 — Market information

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector:

☐ Motor vehicles

☐ Engines

☐ Components systems
(Please specify)

.....

1 Please indicate the number of models ([17]) supplied by the Group within the EEA ☐

2 Please describe briefly the models supplied by the Group within the EEA in order of importance (on the relevant market)

	Description	Reference
2a Model 1		
2b Model 2		
2c Model 3		
2d Model 4		
Other		

3 Please indicate market forecast expressed in millions/thousands of units under the following breakdown

3a National market [18]

Currency: Units: ☐ million ☐ billion (Please tick one box only)

		Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3a.1	Model 1						
3a.2	Model 2						
3a.3	Model 3						
3a.4	Model 4						
3a.5	Other						
3a.6	Total						

3b Other EEA markets [19]

		Year 1:	Year 2:	Year 3.	Year 4.	Year 5:	Reference
3b.1	Model 1						
3b.2	Model 2						
3b.3	Model 3						
3b.4	Model 4						
3b.5	Other						
3b.6	Total						

3c CEEC markets [20]

		Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3c.1	Model 1						
3c.2	Model 2						
3c.3	Model 3						
3c.4	Model 4						
3c.5	Other						
3c.6	Total						

3d Total Europe (national + other EEA + CEEC)

		Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3d.1	Model 1						
3d.2	Model 2						
3d.3	Model 3						
3d.4	Model 4						
3d.5	Other						
3d.6	Total						

3e Rest of the world

		Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3e.1	Model 1						
3e.2	Model 2						
3e.3	Model 3						
3e.4	Model 4						
3e.5	Other						
3e.6	Total						

3f Grand total (3d+3e)

		Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3f.1	3d.6+3e.6						

4 Please indicate overall company's sales (all models) in millions/thousands of units under the following breakdown. Sales in national market and other EEA markets must include imports

☐ thousand ☐ million (Please tick one box only)

	Markets	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
4a.1	National						
4a.2	Other EEA						
4a.3	CEEC						
4a.4	Rest of the world						
4a.5	Total						

5 Please indicate forecast group sales volumes (including imports) expressed in millions/thousands of units following the breakdown below

	Markets	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
5a.1	National						
5a.2	Other EEA						
5a.3	CEEC						
5a.4	Rest of the world						
5a.5	Total						

Footnotes

(1) Company name — Name of the national company carrying out manufacturing/ assembling activities in the Member State submitting the application (Ford UK, Fiat France, etc.).
(2) Ownership — Group or groups to which the company belongs.
(3) Financial results — Financial results of the Group's/Company's financial year (Example 95/96 or 1996).
(4) Project classification — A project may be classified according to the aid objectives under which public support is being sought by the company.
(5) Project timing — Start date (month and year): when the first investment cash flow takes place; end date (month and year): when the last investment cash flow takes place.
(6) Project cost — Nominal value of the investment costs and expenses budgeted for the completion of the project over the relevant period.
(7) Capacity — Maximum hourly capacity (line speed) taking account of bottlenecks multiplied by the number of hours per year the plant 'normally' operates (is expected to operate), including mothballed capacity.
(8) Employment — The number of full time and full time equivalent employees.
(9) Production — The total number of units produced.
(10) Types of aid — Grant, interest subsidy, tax credit, loan, loan guaranty, equity participation, reduction in social security contributions.
(11) Aid schemes — Approved aid schemes: regional development, research and development, training, environmental protection/energy saving, ad hoc.
(12) National legal basis — Law, regulation or other legal form describing the conditions under which public support may be granted.
(13) Public entity — The national, regional, local authority providing public support.
(14) GGE (Gross grant equivalent) — please refer to the relevant document communicated/published by the Commission.
(15) Discount factor or reference rate; please refer to the relevant document communicated/published by the Commission.
(16) State aid net present value — State aid cash flows discounted to the base year by using the official discount rate over the appropriate investment period.
(17) Model — Product type including different versions (Example for cars: Ford Mondeo, Renault Laguna, etc.).
(18) National market — Market of the Member State notifying the public support.
(19) EEA markets — EEA: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, United Kingdom, Iceland, Liechtenstein, Norway.
(20) CEEC (central and east European countries): Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia.

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PARTE II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form Title		No of pages
Form 1	Cost-benefit analysis summary	1
Form 2	Cost-benefit analysis assumptions — Location A	3
Form 3	Cost-benefit analysis assumptions — Location B	2
Form 4	Sales and cost breakdown by year — Location A	2
Form 5	Sales and cost breakdown by year — Location B	2
Form 6	Public support	1

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 1 — Cost-benefit analysis summary

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector: ☐ Motor vehicles

☐ Engines

☐ Components systems (Please specify)

.....

1 Currency: Units: ☐ million ☐ billion (Please tick one box only)

Description		Location A (1) NPV (2)	Location B (1) NPV (2)	Net cost-benefit (A–B)	Reference A	Reference B
2	Total operating costs				Form 4	Form 5
2a	Labour				Form 4	Form 5
2b	Components/materials				Form 4	Form 5
2c	Rent				Form 4	Form 5
2d	Inventory carrying costs				Form 4	Form 5
2e	Energy/water				Form 4	Form 5
2f	Telecommunications				Form 4	Form 5
2g	Inward transport				Form 4	Form 5
2h	Outward transport				Form 4	Form 5
2i	Training				Form 4	Form 5
2j	Other				Form 4	Form 5
3	Total investment costs					
3a	Land purchase				Form 4	Form 5
3b	Building/construction				Form 4	Form 5
3c	Machinery/equipment				Form 4	Form 5
3d	Tools & dies				Form 4	Form 5
3e	Supplier tooling				Form 4	Form 5
3f	Other				Form 4	Form 5
4	Other				Form 4	Form 5
5	Total costs					
6	Net incremental costs for implementing (3) the project in location A					
7	Eligible investment (4)					
8	Handicap intensity (5)			☐☐☐ %		

Form 1 of 6
Page 1 of 1

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE SECTOR

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 2 — Cost-benefit analysis assumptions — Location A

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector: ☐ Motor vehicles

☐ Engines

☐ Components systems
(Please specify)

.....

	Description	Year 1:	Year 2.	Year 3·	Year 4	Year 5	Reference
1	Discount rate % p a. (6)	%					
2	Inflation rate % p a (7)	%					
2a	Real adjustment rate	%					
3	Exchange rates (8)	%					
4	Budgeted output/sales (units)						
4a	Model 1						
4b	Model 2						
4c	Model 3						
4d	Model 4						
4e	Other						
5	Ex-factory unit price Currency· _____ Units· _____						
5a	Model 1						
5b	Model 2						
5c	Model 3						
5d	Model 4						
5e	Other (9)						
6	Production capacity (10) utilisation %						
6a	Group capacity utilisation (11)	%	%	%	%	%	
6b	% 'Mothballed' group capacity (12)	%	%	%	%	%	
6c	Company capacity utilisation	%	%	%	%	%	
6d	% 'Mothballed' comp capacity (13)	%	%	%	%	%	

	Description	Year 1:	Year 2:	Year 3.	Year 4:	Year 5:	Reference
7	Total labour force (No of employees required)						
7a	Production (sub-total)						
7a.1	Management						
7a.2	Other salaried						
7a.3	Direct hourly						
7a.4	Indirect hourly						
7a.5	Trainees						
7b	Other (sub-total)						
7b.1	Salaried						
7b.2	Hourly paid (no of hours)						
8	Annual average wage [14] Currency: _____ Units. _____						
8a	Production						
8a.1	Management						
8a.2	Other salaried						
8a.3	Direct hourly						
8a.4	Indirect hourly						
8a.5	Trainees						
8b	Other salaried						
9	Average standard hourly wage rate [15] Currency: _____ Units: _____						
9a	Production						
9b	Other						
	Currency: _____ Units: _____						
10	Inventory (float)						
10a	Finished products						
10a.1	Thousand units						
10a.2	Value						
10b	Semi-finished products						
10b.1	Thousand units						
10b.2	Value						
10c	Components/materials						
10c.2	Value						
10d	Total inventory value						
10e	Rate (%) for inventory carrying costs computation	%	%	%	%	%	
	Currency: _____						
11	Energy consumption						
11a	Electricity						
11a.1	Units. _____						
11a.2	Unit cost ____/____						
11b	Fuel						
11b.1	Units: _____						
11b.2	Unit cost: ____/____						
11c	Water						
11c.1	Units: _____						
11c.2	Unit cost. ____/____						
12	Telecommunications						
12a.1	Units: _____						
12a.2	Unit cost. ____/____						

13 Please indicate the Group's plants and their production capacities ([10]), in thousands of units before and after the investment project

Plant name	Country	Production capacity		Difference	Reference
		Before project	After project		
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
TOTAL					

14 Please indicate if production capacity would be shifted from one plant to another following the project's implementation or within the time scope of the project

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE SECTOR

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 3 — Cost-benefit analysis assumptions — Location B

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector:

☐ Motor vehicles

☐ Engines

☐ Components systems
(Please specify)

.....

	Description	Year 1.	Year 2	Year 3·	Year 4:	Year 5·	Reference
1	Discount rate % p.a (6)	%					
2	Inflation rate % p.a. (7)	%					
2a	Real adjustment rate	%					
3	Exchange rates (8)	%					
4	Budgeted output/sales (units)						
4a	Model 1						
4b	Model 2						
4c	Model 3						
4d	Model 4						
4e	Other						
5	Ex-factory unit price Currency: _____ Units. _____						
5a	Model 1						
5b	Model 2						
5c	Model 3						
5d	Model 4						
5e	Other (9)						
6	Production capacity (10) utilisation %						
6a	Group capacity utilisation (11)	%	%	%	%	%	
6b	% 'Mothballed' group capacity (12)	%	%	%	%	%	
6c	Company capacity utilisation	%	%	%	%	%	
6d	% 'Mothballed' comp. capacity (13)	%	%	%	%	%	

	Description	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
7	Total labour force (No of employees required)						
7a	Production (sub-total)						
7a.1	Management						
7a.2	Other salaried						
7a.3	Direct hourly						
7a.4	Indirect hourly						
7a 5	Trainees						
7b	Other (sub-total)						
7b.1	Salaried						
7b.2	Hourly paid (no of hours)						
8	Annual average wage (14) Currency: _____ Units. _____						
8a	Production						
8a.1	Management						
8a.2	Other salaried						
8a.3	Direct hourly						
8a.4	Indirect hourly						
8a.5	Trainees						
8b	Other salaried						
9	Average standard hourly wage rate (15) Currency: _____ Units: _____						
9a	Production						
9b	Other						
	Currency _____ Units: _____						
10	Inventory (float)						
10a	Finished products						
10a.1	Thousand units						
10a.2	Value						
10b	Semi-finished products						
10b.1	Thousand units						
10b.2	Value						
10c	Components/materials						
10c.2	Value						
10d	Total inventory value						
10e	Rate (%) for inventory carrying costs computation	%	%	%	%	%	
	Currency _____						
11	Energy consumption						
11a	Electricity						
11a.1	Units: _____						
11a.2	Unit cost ___/___						
11b	Fuel						
11b.1	Units: _____						
11b.2	Unit cost: ___/___						
11c	Water						
11c 1	Units: _____						
11c.2	Unit cost: ___/___						
12	Telecommunications						
12a.1	Units: _____						
12a.2	Unit cost: ___/___						

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 4 — Sales and cost breakdown by year — Location A

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector:

- ☐ Motor vehicles
- ☐ Engines
- ☐ Components systems (Please specify)

.....

Currency: Units: ☐ million ☐ billion (Please tick one box only)

	Description	NPV (2)	Year 1	Year 2:	Year 3:	Year 4:	Year 5.	Reference
1	Total plant sales							
1a	Model 1							
1b	Model 2							
1c	Model 3							
1d	Model 4							
1e	Other							
2	Total operating costs							
2a	Total labour							
2a 1	Labour production							
2a.1.1	Management							
2a 1.2	Other salaried							
2a.1.3	Direct hourly							
2a.1 4	Trainees							
2a.2	Labour other							
2a 2.1	Salaried							
2a.2 2	Direct hourly							
2b	Total components/materials (16)							
2b.1	Production							
2b.1 1	Internally sourced							
2b.1.2	Externally sourced							
2b 1.2.a	local supply							
2b 1.2 b	non-local supply							
2b.2	Other							
2c	Rent							
2d	Inventory carrying costs							
2e	Energy/water							
2f	Telecommunications							
2g	Inward transport							
	Semi-finished products							
	Components/materials							
2h	Outward transport							
	Finished products							
	Semi-finished products							
2i	Training							
2j	Other							

Currency:		Units: ☐ million ☐ billion (Please tick one box only)						
	Description	NPV (2)	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3	Total investment costs							
3a	Land purchase							
3b	Building/construction							
3c	Machinery/equipment							
3d	Tools & dies							
3e	Supplier tooling							
4	Total other costs							
4a								
4b								
4c								
5	Total costs							

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 5 — Sales and cost breakdown by year — Location B

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector:

☐ Motor vehicles

☐ Engines

☐ Components systems (Please specify)

.....

Currency: Units: ☐ million ☐ billion (Please tick one box only)

	Description	NPV (2)	Year 1:	Year 2.	Year 3:	Year 4:	Year 5:	Reference
1	Total plant sales							
1a	Model 1							
1b	Model 2							
1c	Model 3							
1d	Model 4							
1e	Other							
2	Total operating costs							
2a	Total labour							
2a 1	Labour production							
2a.1 1	Management							
2a.1 2	Other salaried							
2a.1.3	Direct hourly							
2a 1.4	Trainees							
2a 2	Labour other							
2a.2.1	Salaried							
2a.2 2	Direct hourly							
2b	Total components/materials (16)							
2b 1	Production							
2b 1 1	Internally sourced							
2b.1.2	Externally sourced							
2b.1.2.a	local supply							
2b.1 2.b	non-local supply							
2b.2	Other							
2c	Rent							
2d	Inventory carrying costs							
2e	Energy/water							
2f	Telecommunications							
2g	Inward transport							
	Semi-finished products							
	Components/materials							
2h	Outward transport							
	Finished products							
	Semi-finished products							
2i	Training							
2j	Other							

Currency:		Units: ☐ million ☐ billion (Please tick one box only)						
	Description	NPV (²)	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
3	Total investment costs							
3a	Land purchase							
3b	Building/construction							
3c	Machinery/equipment							
3d	Tools & dies							
3e	Supplier tooling							
4	Total other costs							
4a								
4b								
4c								
5	Total costs							

NOTIFICATION TO THE COMMISSION OF A PUBLICLY ASSISTED PROJECT IN THE AUTOMOTIVE INDUSTRY

PART II.A — MOBILE INVESTMENT PROJECT IN AN ASSISTED AREA

Form 6 — Public support

(For Commission's use only)

State aid no .....

Member State: .....

Company: .....

Completion date: ...../...../.....

Sector:

- ☐ Motor vehicles
- ☐ Engines
- ☐ Components systems (Please specify)

.....

1 Please indicate the amounts of public support expressed in nominal terms

Currency: Units: ☐ million ☐ billion (Please tick one box only)

	Support Type	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
1a	Grants						
1b	Equity participation						
1c	Loans						
1d	Loan guarantees						
1e	Tax relief/credit						
1f	Reduction in social security contributions						
1g	Other						
1h	Total public support						

2 Please indicate your estimate of public support in gross grant equivalent terms ([17])

	Gross grant equivalent	Year 1:	Year 2:	Year 3:	Year 4:	Year 5:	Reference
2a	Grants						
2b	Equity participation						
2c	Loans						
2d	Loan guarantees						
2e	Tax relief/credit						
2f	Reduction in social security contributions						
2g	Other						
2h	Total						

3 Please indicate the net present value of the State aid expressed in gross grant equivalent terms (2h) ([18])

State aid net present value

Footnotes

(1) Location A — Assisted area where the project would be supported with public funds.
Location B or comparator plant, commercially viable alternative location.
(2) NPV (Net present value) — Value of cash flows discounted to the base year by using the official discount rate over the appropriate investment period.
(3) Net incremental costs for implementing the project in location A — The additional cost for establishing the project in Location A (the disadvantaged area) as opposed to Location B (commercially viable alternative).
(4) Eligible investment — The share of the investment which is considered to be eligible for State aid by the national administration according to the aid scheme.
(5) Handicap intensity — Net incremental costs (6) divided by the NPV of investment costs in Location A (Operating costs + Investment costs) expressed as a percentage.
(6) Discount rate or reference rate; please refer to the relevant document communicated/published by the Commission.
(7) Inflation rate — Inflation rate forecasts, referring to the supporting documents, and ensuring that the source (official or otherwise) is specified.
(8) Exchange rate — Exchange rate forecasts, referring to the supporting documents, and ensuring that the source (official or otherwise) is specified.
(9) Ex-factory unit price, Other — Weighted ex-factory unit price for the group of products included in the item 'Other'.
(10) Production capacity — Maximum hourly capacity (line speed) taking account of bottlenecks multiplied by the number of hours per year the plant 'normally' operates (is expected to operate), including 'mothballed' capacity.
(11) % Group production capacity utilisation — The percentage of the group's total capacity to be utilised, including that of the plant(s) for which public support is sought.
(12) % 'Mothballed group capacity' — (Mothballed group capacity)/(Total group capacity) expressed as a percentage.
(13) % 'Mothballed company capacity' — (Mothballed company capacity)/(Total company capacity) expressed as a percentage.
(14) Annual average wage — Salaries plus social security contributions.
(15) Average standard hourly wage rate — Average hourly wage rate per employee, including social security contributions.
(16) Operating costs — components/materials — Ex-factory cost of components (components systems) purchased. Transport cost component will be indicated under a separate item.
(17) GGE (Gross grant equivalent) — please refer to the relevant document communicated/published by the Commission.
(18) State aid net present value — State aid cash flows discounted to the base year by using the official discount rate over the appropriate investment period (3 or 5 years).

III — SHIPBUILDING

Commission letter to Member States SG(88) D/6181 of 26 May 1988

Dear Sir

Council Regulation (EEC) No 4028/86 of 18 December 1986 on fisheries structures establishes a structural objective for the Community fishing sector. This is accompanied by an aid policy which, on the one hand provides for the possibility of co-financing the construction of new fishing vessels for the Community fleet, complying with certain conditions laid down in a multiannual guidance programme, through support from Community and national resources, the latter normally allowable up to a level of 30 % with the possibility of increasing to a level of 65 % in the case of insufficient Community funds and, on the other hand, does not envisage any aid support for such vessels which do not comply with the guidance programme.

Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding establishes a structural objective for the Community's shipbuilding sector within the prevailing world crisis in this area in which a certain level of shipbuilding activities is maintained inside the Community through a selective aid policy allowing production aid, irrespective of whether it is granted directly to yards or indirectly through shipowners, up to a total accumulated ceiling of 28 %. The directive includes construction and conversion of fishing vessels of not less than 100 grt. For small vessels costing less than ECU 6 million it prescribes a lower level of aid and the Commission has declared in the minutes of the Council that it will not allow aid exceeding 20 % for such vessels.

As the structural policies expressed in the two legal acts are not immediately compatible, the Commission finds it necessary to advise Member States on how it intends to apply the acts.

In the specific and exclusive framework for constructing new vessels intended exclusively for the Community fishing fleet, Community legislation provides that vessels built outside the guidance programme should not benefit from any aid support, either from national or Community sources, whilst on the other hand it provides for the promotion of the construction of vessels falling inside this programme with a particularly high level of aid. In such a situation the aid-intensity ceilings of the fisheries regulation should prevail over the more restrictive ceiling laid down in the shipbuilding directive since the former is to be seen as a *lex specialis* in relation to the directive, a *lex generalis*. In other cases Article 49 of the fisheries regulation operates to apply Articles 92 to 94 of the EEC Treaty. In its assessment of the common interest under the terms of Article 92(3)(c) of the EEC Treaty, the Commission hereby informs you that it will consider it as incompatible with the common market aid under the rules of the sixth Council directive for the construction of fishing vessels for the Community fleet.

This implies that the construction of fishing vessels for the Community fleet comes under the aid policy of Council Regulation No 4028/86 on fisheries structures. Thus aid levels permitted under this regulation for vessels approved under the multiannual guidance programme prevail whilst vessels not complying with this programme cannot receive any aid support.

On the other hand, fishing vessels of not less than 100 grt constructed for third countries are subject to the rules of Council Directive 87/167 on aid to shipbuilding. Such rules will be interpreted in the light of the Commission's international obligations.

Furthermore it is emphasised that the general principle expressed in Article 3(3) of the directive that the granting of aid must not lead to distortion of competition between national shipyards and shipyards in other Member States in the choice of placing orders continues to prevail in all cases.

The Commission may review aforementioned rules of application of the two legal acts in the light of their established impact on both the fisheries and shipbuilding policy of the Community.

Yours faithfully

Commission letter to Member States SG(89) D/311 of 3 January 1989

Dear Sir

Article 4(7) of the Sixth Council directive of 26 January 1987 on aid to shipbuilding establishes that aid to shipbuilding and ship conversion granted as development assistance to a developing country shall not be subject to the prevailing maximum production aid ceiling, set by the Commission in accordance with Article 4(2) of the directive.

Such aid may be deemed compatible with the common market provided that it complies with the terms laid down for that purpose by OECD working party no 6 in its agreement concerning the interpretation of Articles 6 to 8 of the OECD Council resolution of 3 August 1981 (understanding on export credits for ships).

Any such individual proposal is subject to prior notification to the Commission. On the basis of the notification, the Commission shall verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the understanding.

As regards the latter point, the Commission ensures that the proposed aid complies with the criteria laid down in OECD document C/WP6(84)3 of 18 January 1984 concerning the interpretation of Article 6 of the understanding on export credits for ships.

Accordingly, the following criteria must be adhered to by Member States granting development aid:

1. The aid may not be granted for construction of ships which will be operated under a flag of convenience.

2. In the event that the aid cannot be classified as public development aid in the framework of OECD the donor must confirm that the aid is part of an intergovernmental agreement.

3. The donor must give appropriate assurances that the real owner is resident in the beneficiary country and that the beneficiary company is not a non-operational subsidiary of a foreign company.

4. The beneficiary must give undertakings not to sell the ship without prior government approval.

Furthermore the aid granted must contain a grant element of at least 25 % in accordance with the OECD method of calculation, see OECD document C/WP6(85)62 of 21 October 1985.

On the other hand, the understanding does not provide for any criteria applicable to the classification of countries eligible for development aid. For this purpose the Commission has hitherto relied upon the OECD DAC list of developing countries. This list is a compilation of countries to whom donors do, or are prepared to, give aid.

Having regard to competition considerations and the aid policy laid down in the sixth directive, the application of this list has proved insufficient. In its interpretation of the development content of aid notified under Article 4(7) of the directive, the Commission has therefore decided to establish its own list of countries eligible for development aid under Article (4)7 of the directive.

Thus the Commission will consider compatible with the common market the granting of development aid to the following countries under the terms of Article 4(7) of the sixth directive.

(a) All ACP countries, see decision of the Council and the Commission of 24 March 1986 on the conclusion of the third ACP-EEC Convention (OJ L 86, 31.3.1986).

(b) All overseas countries and territories, see Council Decision 86/283/EEC of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community (OJ L 175, 1.7.1986, p. 46).

(c) All countries not included in (a) or (b) above which are classified on the OECD DAC list as least-developed countries (LLDC), low-income countries (LIC) or lower middle-income countries (LMIC). These countries are listed in Annex I.

Countries appearing in the upper middle-income countries (UMIC) classification will not be considered eligible.

The Commission will in any future revision of countries eligible for development aid apply the same criteria as mentioned above.

In order to safeguard Community shipbuilding interests the Commission would, however, allow Member States to grant development aid to countries not falling under the above categories provided it can be sustained by Member States that a third country participant to the OECD understanding is planning to grant development aid for a particular contract. In this event the Commission may deem compatible with the common market development aid to be granted for this contract up to the same level as that planned by a third country participant to the OECD understanding in terms of the OECD grant element.

In order to tighten up the application of Article 4(7) of the directive and ensure compliance with the criteria referred to under points 1 to 4 above, Member States are required to formally engage in each individual notification of development projects under Article 4(7) of the directive that these criteria are adhered to.

In this context Member States are advised that as regards the criterion of flag of convenience (point 1) the Commission will consider the countries listed in Annex II as having a flag of convenience.

The provisions contained in this letter enter into force on the date of notification.

Yours faithfully

Commission letter to Member States SG(97)D/4345 of 10 June 1997

Sir,

Article 4(7) of the seventh Council Directive 90/684/EEC as last amended by Council Regulation (EC) No 1904/96 on aid to shipbuilding establishes that aid to shipbuilding and shipconversion granted as development assistance to developing countries shall not be subject to the prevailing maximum production aid ceiling, set by the Commission in accordance with Article 4(2) of the directive.

The Commission letter to Member States SG(89) D/311 of January 1989 clarified the criteria which must be adhered to by Member States granting development aid. Annexed to the letter were a list of countries eligible for aid under Article 4(7) the directive (Annex I) and a list of countries considered as flags of convenience (Annex II).

In the letter it was stated that the Commission will consider compatible with the common market the granting of development aid to the following countries:

(a) All ACP countries;

(b) All overseas countries and territories in association with the EC;

(c) All countries which are classified as least-developed countries (LLDC), low income countries (LIC) or lower middle-income countries (LMIC) in accordance with the OECD DAC (Development Assistance Committee) list.

The Commission has decided to update the list of countries eligible for aid. As envisaged in the letter SG(89) D/311 the Commission will in any future revision of countries eligible for development aid apply the same criteria as those mentioned above.

Thus, annexed to this letter is the most recent listing of ACP Countries, overseas countries and territories in association with the EC and countries which are classified on the OECD DAC list as least-developed countries (LLDC), low-income countries (LIC) or lower middle-income countries (LMIC), see Annex I. Annex I of this letter replaces Annex I attached to Commission letter SG(89) D/311.

In the future, countries which enter into one of the three categories mentioned in a) b) and c) can be included on the list of countries eligible for development aid.

In accordance with the letter from 1989 the aid may not be granted for construction of ships which will be operated under a flag of convenience. An updated list of flags of convenience is attached to this letter as Annex II. Annex II of this letter replaces Annex II attached to Commission letter SG (89) D/311.

As stated in the letter from 1989, in order to safeguard Community shipbuilding interests the Commission would, however, allow Member States to grant development aid to countries not falling under the above categories provided it can be sustained by Member States that a third country participant to the OECD understanding is planning to grant development aid for a particular contract. In this event the Commission may deem compatible with the common market development aid to be granted for this contract up to the same level as that planned by a third country participant to the OECD understanding in terms of the OECD grant element.

The provisions contained in this letter enter into force on the date of notification.

Yours faithfully

ANNEX I

LIST OF COUNTRIES ELIGIBLE FOR AID UNDER ARTICLE 4(7) OF COUNCIL DIRECTIVE 90/684/EEC AS AMENDED BY COUNCIL DIRECTIVE 94/73/EEC AND COUNCIL REGULATION (EC) NO 1904/96 ON AID TO SHIPBUILDING (1)

(A) All ACP countries

- Angola
- Antigua and Barbuda
- Bahamas
- Barbados
- Belize
- Benin
- Botswana
- Burkina Faso
- Burundi
- Cameroon
- Cape Verde
- Central African Republic
- Chad
- Comoros
- Congo
- Côte d'Ivoire
- Djibouti
- Dominican Republic
- Dominica
- Equatorial Guinea
- Eritrea
- Ethiopia
- Fiji
- Gabon
- Gambia
- Ghana
- Grenada
- Guinea
- Guinea-Bissau

(1) Note that a country categorised in (A) (B) or (C) on this list is *not* eligible for aid if it is listed on the list of flags of convenience, see Annex II.

- Guyana
- Haiti
- Jamaica
- Kenya
- Kiribati
- Lesotho
- Liberia
- Madagascar
- Malawi
- Mali
- Mauritania
- Mauritius
- Mozambique
- Namibia
- Niger
- Nigeria
- Papua New Guinea
- Rwanda
- Saint Christopher and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- São Tomé and Principe
- Western Samoa
- Senegal
- Seychelles
- Sierra Leone
- Solomon Islands
- Somalia
- Sudan
- Suriname
- Swaziland
- Tanzania
- Togo
- Tonga
- Trinidad and Tobago
- Tuvalu
- Uganda
- Vanuatu
- Zaire
- Zambia
- Zimbabwe

B) Overseas countries and territories in association with the EC

Country having special relation with the Kingdom of Denmark

- Greenland

Overseas territories of the French Republic

- Mayotte
- St Pierre and Miquelon
- New Caledonia and Dependencies
- French Polynesia
- French Southern and Antarctic Territories
- Wallis and Futuna Island

Overseas countries of the Kingdom of the Netherlands

- Aruba
- Netherlands Antilles:
  - — Bonaire
  - — Curaçao
  - — Saba
  - — Saint Eustatius
  - — Saint Martin

Overseas countries and territories of the United Kingdom of Great Britain and Northern Ireland

- Anguilla
- Cayman Islands
- Falkland Islands
- South Sandwich Islands and South Georgia
- Montserrat
- Pitcairn
- Saint Helena and Dependencies
- British Antarctic Territory
- British Indian Ocean Territory
- Turks and Caicos Islands
- British Virgin Islands

C) Countries not included in (A) or (B) classified on the OECD DAC list as least-developed countries (LLDC), low-income countries (LIC) or lower middle-income countries (LMIC)

- Afghanistan (LLDC)
- Albania (LIC)

- Algeria (LMIC)
- Armenia (LIC)
- Azerbaijan (LIC)
- Bangladesh (LLDC)
- Bhutan (LLDC)
- Bolivia (LMIC)
- Bosnia and Herzegovina (LIC)
- Cambodia (LLDC)
- China (LIC)
- Colombia (LMIC)
- Costa Rica (LMIC)
- Cuba (LMIC)
- East Timor (LMIC)
- Ecuador (LMIC)
- Egypt (LMIC)
- El Salvador (LMIC)
- Former Yugoslav Republic of Macedonia (LMIC)
- Georgia (LIC)
- Guatemala (LMIC)
- Honduras (LIC)
- India (LIC)
- Indonesia (LMIC)
- Iran (LMIC)
- Iraq (LMIC)
- Jordan (LMIC)
- Kazakhstan (LMIC)
- Kyrgyzstan (LIC)
- Laos (LLDC)
- Lebanon (LMIC)
- Maldives (LLDC)
- Marshall Islands (LMIC)
- Micronesia (LMIC)
- Moldova (LMIC)
- Mongolia (LIC)
- Morocco (LMIC)
- Myanmar (LLDC)
- Nepal (LLDC)
- Nicaragua (LIC)
- Niue (LMIC)
- North Korea (LMIC)

- Palau (LMIC)
- Pakistan (LIC)
- Palestinian Administered Areas (LMIC)
- Panama (LMIC)
- Paraguay (LMIC)
- Peru (LMIC)
- Philippines (LMIC)
- Sri Lanka (LIC)
- Syria (LMIC)
- Tajikistan (LIC)
- Thailand (LMIC)
- Tokelau (LMIC)
- Tunisia (LMIC)
- Turkey (LMIC)
- Turkmenistan (LMIC)
- Uzbekistan (LMIC)
- Venezuela (LMIC)
- Vietnam (LIC)
- Yemen (LLDC)
- Yugoslavia (LMIC)

ANNEX II

FLAGS OF CONVENIENCE

- Antigua and Barbuda
- Bahamas
- Bermuda
- Cayman Islands
- Cyprus
- Honduras
- Lebanon
- Liberia
- Malta
- Marshall Islands
- Panama
- St Vincent
- Vanuatu
- Mauritius

These countries appear on the OECD list of countries maintaining an open register.

Commission letter to Member States SG(92) D/06981 of 19 March 1992

Your Excellency

By letter of 26 May 1988 (SG(88)D/6181) the Commission informed Member States of its decision of 29 March 1988 as regards the interpretation of the coexistence of the sixth Council directive of 26 January 1987 on aid to shipbuilding [1] and Council Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector [2].

In a multilateral meeting of 27 September 1991 the Danish delegation requested the Commission to clarify in writing how the decision of 29 March 1988 is implemented by the Commission.

Council Regulation (EEC) No 4028/86 has been amended by Council Regulation (EEC) No 3944/90 of 20 December 1990 [3] in order to take into account the European Parliament's resolution on a reasonable standard of living for small-scale fishermen (OJ C 47, 27.2.1989) and to bring within the scope of the resolution fishing vessels previously excluded from support under the guidelines. Under the regulation support can, *inter alia*, be given for modernisation of the fisheries fleet if conforming to the objectives of the multiannual guidance programmes and/or zonal programmes. The levels of support, which are laid down in Annex 2 of Council Regulation (EEC) No 3944/90 and depend on the availability of sufficient Community funds, are as follows:

Area	Community support	Member State support
Vessels under 9 m length:		
— designated areas (*)	35 %	between 5 and 25 %
— other areas	20 %	between 5 and 25 %
Vessels over 9 m length and under 33 m:		
— designated areas (*)	30 %	between 5 and 25 %
— other areas	15 %	between 5 and 25 %
Vessels over 33 m length:		
— designated areas (*)	20 %	between 5 and 25 %
— other areas	5 %	between 5 and 25 %

(*) Designated areas are Greece, Andalusia, the Canary Islands, Ceuta-Melilla, Galicia, west Scotland, the departments of Quimper and Lorient, Ireland, Northern Ireland, Mezzogiorno, Portugal, the French overseas departments, Veneto and Mecklenburg-Western Pomerania.

In the case of insufficient Community funds, Member States can make up the shortfall only if the level of such aid does not result in exceeding, in subsidy equivalent, the overall level of State and Community support permitted under the rules of Regulation (EEC) No 4028/86.

(1) OJ L 69, 13.3.1987.
(2) OJ L 376, 31.12.1986.
(3) OJ L 380, 31.12.1990.

The seventh Council directive of 21 December on aid to shipbuilding (4) *inter alia* contains provisions as regards the maximum allowable level of contract-related operating aid granted to shipowners and shipyards, the prevention of unfair competition, notification of aid schemes and monitoring of the implementation of approved aid schemes. This directive, as a matter of course, also contains a provision stating that aid granted by a Member State to its shipowners or third parties in that Member State for shipbuilding or ship conversion shall not result in distortion of competition in the placing of orders between national yards and yards from other Member States. The directive includes within its scope the construction and conversion of fishing vessels of not less than 100 grt.

Since the structural policies expressed in the fisheries regulation and the shipbuilding directive were not immediately compatible, the Commission in its letter SG(88)D/6181 of 26 May 1988 informed the Member States of how it intended to apply these acts. In this letter it was stated that for the promotion of the construction, or conversion of fishing vessels inside the multiannual guidance programmes the aid intensity ceilings of the fisheries regulation would prevail over the more restrictive ceiling prescribed under the shipbuilding directive. On the other hand, State aid under the provisions of the shipbuilding directive for the construction, or conversion of fishing vessels for the Community fleet, which were not part of an approved multiannual guidance programme, were considered incompatible with the common market and therefore excluded. In all other respects, fishing vessels of more than 100 grt constructed for third country owners would remain subject to the rules of the shipbuilding directive. It was emphasised in the letter that the general principle expressed in Article 3 of the shipbuilding directive that the granting of aid must not lead to distortion of competition between national shipyards and shipyards in other Member States in the choice of placing orders would continue to prevail in all cases.

The amendment of the fisheries regulation and the replacement of the sixth by the seventh shipbuilding directive (both in 1990) do not affect the Commission's interpretations of these two legal acts as set out in its letter of 26 May 1988. In the minutes of the Council meeting of 21 December 1990 the Council stated that aid for the construction or conversion of fishing vessels granted to Community shipowners under the structural policy for fisheries will be governed by the relevant Community provisions, for as long as this proves a suitable means of furthering the structural policy in the fishery sector. In all Commission decisions to approve aid schemes notified under the seventh directive on aid to shipbuilding in 1991, reference has been made to the framework laid down in the Commission's letter of 26 May 1988.

In practice the Commission's way of implementing these two legal acts comes down to the following. National aid schemes to support national fishermen's efforts to modernise their fleet have to be notified to the Commission to enable it to assess the compatibility of such schemes with the general principles laid down in Article 2 and Article 3(3) of the seventh directive as well as compliance with the provisions of the fisheries regulation as regards the objectives of the multiannual guidance programmes and/or zonal programmes. In order to enable the Commission to monitor the implementation of such approved aid schemes Member States are obliged to provide the necessary information both under Article 12(1) of the seventh directive and the requirements of the fisheries regulation.

While aid levels permitted under Council Regulation (EEC) No 4028/86 for fishing vessels approved under the multiannual guidance programmes prevail and vessels not complying with this programme cannot receive any aid support, subsidies under the shipbuilding directive can be granted for the benefit of contracts to build or convert a fishing vessel for a shipowner outside the territory of the Community.

As regards aid for building fishing vessels for the Community fleet the availability of aid at all and the intensity of such aid is ruled by the fisheries regulation, while all other competition provisions of

(4) 90/689/EEC, OJ L 380, 31.12.1990.

the shipbuilding directive apply for such vessels beyond 100 grt. This implies, for example, that if Member States in individual cases of competition for a contract to build or convert a fishing vessel feel that competition is distorted, due to the application of the various national aid schemes in support of the shipbuilding industry of the Community, their governments can request the Commission, pursuant to Article 4(5) of the seventh directive, to investigate the different aid intentions in order to ensure that the planned aid does not affect trading conditions to such an extent that the common interest would be damaged. The way in which the Commission will implement this general principle under the shipbuilding directive has been laid down in a Commission declaration to the minutes of the Council meeting of 26 January 1987. In practice this means that the Commission will ensure that shipowners are free in their choice of a building yard within the territory of the Community and that different aid levels available to yards in various Member States are not used to distort competition by the topping-up of the aid granted to the shipowner.

In the case of extra-Community competition for a contract for building a fishing vessel for the Community fleet for which Community yards are also competing, Article 4(5) of the shipbuilding directive allows for accepting the highest of the proposed aid supports to the competing yards — but within the overall maximum aid support ceiling laid down in the fisheries regulation — if this is judged necessary to avoid the contract being placed outside the Community.

If on the other hand, extra-Community competition exists for a building contract which does not qualify for aid under the Community fisheries regulation most Member States have provisions to exclude such foreign-built vessels from access to Community waters.

Yours faithfully

Agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry (*)

At its meeting on 19 December 1994 the Council decided to conclude an OECD agreement aimed at restoring normal competitive conditions in the commercial shipbuilding and repair industry.

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PREAMBLE AND TEXT OF THE AGREEMENT

THE PARTIES TO THIS AGREEMENT,

Conscious of the importance to international and national commerce of a healthy commercial shipbuilding and repair industry;

Having regard to the aims of the Organisation for Economic Cooperation and Development and considering the important role of its Council Working Party on Shipbuilding in promoting normal competitive conditions in the shipbuilding industry and noting in particular its work concerning the 'Revised general arrangement for the progressive removal of obstacles to normal competitive conditions in the shipbuilding industry' (RGA), the 'Understanding on export credits for ships' and the 'Revised guidelines for government policies in the shipbuilding industry';

Taking into account principles governing international trade as set forth in the General Agreement on Tariffs and Trade 1994 (hereafter referred to as GATT 1994);

Noting the severe structural disequilibrium and market trends which depressed for many years the world shipbuilding and repair industry, the increased competition, the deteriorating price levels and the implementation of measures of public assistance;

(*) OJ C 355, 30.12.1995, p. 1.

Desiring to improve transparency regarding obstacles to normal competitive conditions in the commercial shipbuilding and repair industry and to have the Organisation for Economic Cooperation and Development reinforce its collection of data about and monitoring of the market situation, prices, and policies in that industry;

Recognising the need to intensify their commitment to reach normal competitive conditions and to provide for an effective means of protection against sales of ships under their normal value which cause injury;

Recognising also that special characteristics of ship purchase transactions have made it impractical to apply countervailing and anti-dumping duties, as provided under Article VI of GATT 1994, the agreement on subsidies and countervailing measures, and the agreement on the implementation of Article VI of GATT 1994;

Recognising further the need to provide for a speedy, effective and equitable resolution of disputes about these matters,

HEREBY AGREE AS FOLLOWS:

Article 1

Restoration and maintenance of normal competitive conditions

1. The parties shall, in accordance with the specific provisions set out in Annex II, eliminate all existing measures or practices which are inconsistent with normal competitive conditions in the commercial shipbuilding and repair industry pursuant to Annex I (hereafter referred to as 'measures of support').

2. The parties shall not introduce any new measures of support.

3. The parties recognise that the sale of commercial ships at less than their normal value is to be condemned if it causes or threatens material injury to an established shipbuilding and repair industry in the territory of another party, or materially retards the establishment of a domestic shipbuilding and repair industry. In order to remedy or prevent such injurious pricing, Annex III is applicable.

Article 2

Scope of the agreement

1. This agreement covers the construction and repair of any self-propelled seagoing vessels of 100 gross tons and above used for transportation of goods or persons or for performance of a specialised service (for example, ice breakers and dredgers) and tugs of 365 kW and over.

2. This agreement excludes:

(a) military vessels and modifications made or features added to other vessels exclusively for military purposes. This exclusion is subject to the requirement that any measures or practices taken in respect of such vessels, modifications or features are not disguised actions taken in favour of commercial shipbuilding and repair inconsistent with this agreement. If a party considers that this requirement has not been met, it may, without prejudice to its rights to initiate the other procedures

foreseen in this agreement, request further information, which the other party shall cooperate to provide as fully and quickly as possible;

(b) fishing vessels destined for the building or repairing party's fishing fleet. This exclusion is subject to the requirement that the party provided full transparency in accordance with Article 4.

3. For purposes of this agreement:

(a) a vessel is considered 'self-propelled seagoing' if its permanent propulsion and steering provide it with all the characteristics of self-navigability in the high seas;

(b) 'repair' includes, *inter alia*, conversion and reconditioning of self-propelled seagoing vessels as defined in subparagraph (a) above; and

(c) 'military vessels' are vessels which according to their basic structural characteristics and ability are intended to be used exclusively for military purposes.

Article 3

Parties Group

1. A Parties Group, composed of a representative of each of the parties to this agreement, shall examine the functioning of the agreement and carry out the other functions provided for in this agreement.

2. The Parties Group shall annually elect a chairman, who will serve in his personal capacity. The chairman shall convene meetings of the Parties Group annually or, upon request of a party, more frequently. If the country of which the chairman is a national, or in which the chairman has his usual residence or is employed, is an interested party in any advisory opinion, derogation, or dispute settlement procedure pursuant to Articles 5 or 8, the Parties Group shall, at the request of any party, elect an alternate chairman to perform the functions of chairman relating to those procedures.

3. The Parties Group shall act by consensus, except as otherwise provided. A party may abstain and express a differing view without barring consensus.

4. The Secretary-General of the OECD shall provide the Secretariat for the Parties Group, the costs for which shall be borne by the parties as approved and apportioned by the Parties Group.

Article 4

Provision and review of information

1. In order to ensure transparency, each party shall provide the Parties Group, through the Secretariat:

(a) every six months, all publicly available information on contract price trends and on the credit terms and conditions of all ships covered by this agreement and sold during the previous six months;

(b) as far in advance as possible, relevant information on any assistance it proposes to provide specifically to the commercial shipbuilding and repair industry, including relevant information

on assistance excluded from the prohibitions of this agreement by Annex I, Section B.1.h and prompt supplementary information on any such assistance it has so provided and assistance provided under Annex II A;

(c) information and notifications regarding credit terms and facilities which are called for by the understanding on export credits for ships, as defined in Annex I, Section A.1. and corresponding information and notifications for the home credit schemes authorised by Annex I, Section B.2.2.;

(d) for yards able to build merchant ships over 5000 gt, publicly available information on capacity developments and on the structure of ownership (capital structure, share of direct and indirect public ownership); financial statements (balance sheet, profit and loss statement) including, if available, separate accounts covering the shipbuilding activities of holdings; transfer of public resources (including debt guarantees, bond infusion, etc.); exemptions from financial or other obligations (including tax privileges, etc.), capital contribution (including equity infusions, withdrawal of capital, dividend, loans and their refunding, etc.), debt write-off; and transfer of losses.

2. Any party may request from any other party, either directly or through the Secretariat, information that it believes to be relevant to the provision of any measures of support and may provide the Parties Group with information on measures of support maintained or permitted by another party.

3. The Parties Group shall, once every three years, review in depth the competitive conditions prevailing on each party's territory. This will include the examination of the possible impact on normal competitive conditions of the evolution in ownership of yards. Information required for this review may be requested from the parties by the Secretariat.

4. Each party shall cooperate fully in the effort to obtain information requested under this agreement.

5. The provisions of this article shall not require any party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private. Information provided on a confidential basis shall not be disclosed without the express consent of the party supplying the information.

Article 5

Opinions and derogations

1. Any party may request that the Parties Group provide a written opinion on the consistency with this agreement of measures or practices (1)

(a) it proposes or has taken or engaged in; or

(b) taken or engaged in by another party.

The Parties Group shall provide such an opinion within 60 days of the request.

2. An opinion adopted by consensus of all the members of the Parties Group shall be final and binding upon all the parties regarding that particular measure or practice.

(1) Measures or practices' include matters falling under Article 1(1) and (2), as well as under paragraph 3.

3. If, with respect to an opinion requested under subparagraph 1 (b) there is an objection by a requesting party or by the party the measure or practice of which is the subject of the opinion, the Parties Group shall act by consensus of the other parties. An opinion adopted in this manner shall be advisory.

4. The initiation of an opinion proceeding by a party shall not prejudice the right of any party to initiate a panel under Article 8. If a disputed measure or practice is submitted for panel consideration, opinion proceedings shall terminate upon request by a party to the dispute made to the Parties Group within 15 days of the request to establish a panel or of the request for the opinion.

5. A Party which considers that, in response to extraordinary circumstances, it must temporarily take a measure or engage in a practice inconsistent with this agreement, may do so only in conformity with the terms and conditions of a derogation which may be granted by the Parties Group. In critical circumstances which do not allow time for prior consideration by the Parties Group, action may be initiated provisionally, on condition that any action taken shall be rescinded no later than 30 days from initiation, and any benefit provided shall be recovered, unless its continuation is approved by the Parties Group which shall meet within this period.

Article 6

Notification of inconsistent measures

Whenever a party has reason to believe that a measure or practice has been introduced or is being maintained by another party, contrary to the terms of Article 1(1) or (2), that party shall notify the Parties Group, specifying the Section or Sections of Annex I and II with which it believes the measure or practice is inconsistent.

Article 7

Consultations

1. A party which has reason to believe that a measure of support has been or is being introduced or maintained by another party, contrary to the terms of Article 1(1) or (2), may request consultations with the other concerned party. The request shall include a statement of available information with regard to the existence and nature of the measure of support in question.

2. If a party considers that an injurious pricing charge proceeding has been carried out regarding a shipbuilder in its territory by another party in a manner not in conformity with Article 1(3), and Annex III, it may request consultations with that other party no later than 60 days after the notification to the shipbuilder of the decision imposing the injurious pricing charge.

3. A party may request consultations with any other party or parties concerning any other matter respecting the operation of this Agreement, including possible initiation of a proceeding under Annex III.

4. The requesting party or parties shall inform the Parties Group of the request for consultations and of the reasons for the request.

5. The requested party or parties shall provide adequate opportunity for such consultations and shall enter into them within 30 days of such a request. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution in conformity with this agreement.

6. The parties to the consultations shall inform the Parties Group of significant developments in the consultations as they occur and of their results.

Article 8

Dispute panel proceedings

1. If a mutually acceptable solution has not been reached in consultations under Article 7(1), on a measure of support introduced, or under Article 7(2), on a charge imposed, within 30 days after the beginning of consultations or 60 days after the date of the request, whichever is sooner, any party to the consultation may request the establishment of a panel to consider the dispute, in accordance with Annex IV. This right is independent of whether an affected shipbuilder has taken an appeal to the courts of a party.

2. A party seeking to redress a violation by another party of the obligations subject to the provisions of this article and Annex IV of this agreement, shall have recourse to, and abide by, the rules and procedures of this agreement. In such a case, the party shall not make a determination to the effect that a violation has occurred except in accordance with the abovementioned provisions. Each party shall ensure the conformity of its laws, regulations and administrative procedures with its obligations under this paragraph.

3. If a party to the dispute seeks, as a remedy, the collection of a charge from a shipbuilder, or is contesting the imposition of an injurious pricing charge on its shipbuilder, that shipbuilder shall, subject to the consent of its party, be entitled to participate in the panel proceeding and shall be given a full and fair opportunity to present its case against the imposition of the charge. The shipbuilder may be excluded from government-to-government aspects of the proceeding by agreement of the parties to the dispute.

4. Any other party to this agreement with an interest in the dispute shall be provided an opportunity to make its views on the dispute known to the panel.

5. If the dispute involves a measure of support in Annex I, the panel shall determine whether such measure of support is inconsistent with this agreement. If the panel finds the measure of support to be inconsistent:

(a) the party responsible for such measure of support shall eliminate or modify it to conform with the agreement, within a time limit set by the panel;

(b) the panel shall include in its findings a determination of (i) which shipbuilders benefited from the measure of support; (ii) the amount of the benefit received by each shipbuilder concerned under such measure of support; and (iii) interest on the benefit at the commercial interest reference rate (CIRR) of the country in question from the date of receipt of the benefit. For subsidies within the meaning of Article 1 of the GATT agreement on subsidies and countervailing measures, the benefit shall be determined in accordance with Article 14 of that agreement. For other measures, the panel shall follow any generally accepted trade practice and/or understanding.

(c) the party responsible shall, within a time limit set by the panel, collect from the shipbuilders concerned a charge in the amount determined under subparagraph (b), or if collection is not legally possible, it may, with the agreement of the adversely affected party or parties, take other appropriate action to remove or offset the benefits obtained.

6. If the dispute involves an injurious pricing charge, the panel shall examine whether the charge was imposed in accordance with Annex III.

(a) The panel shall, in its assessment of the facts of the matter, determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

(b) The panel shall interpret the agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the agreement admits more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the agreement if its rests upon one of those permissible interpretations (2); and

(c) Where the panel finds that imposition of a charge was inconsistent with the agreement, the panel may recommend, in light of the nature of the inconsistency, either that the investigating authority terminate the investigation or that it reconsider its determination in light of the panel's findings. If the panel recommends reconsideration, it may suggest ways in which the investigating authority could implement the recommendation. The investigating authority shall make its determination consistent with the findings of the panel.

7. If the amount required is not paid within the time limit set by the panel, interest shall accrue at the CIRR of the currency of the charge from, in the case of a charge under paragraph 5, the expiry of that time limit and, in the case of a charge under paragraph 6, the expiry of the time limit for payment provided in Annex III, Article 7(3), until the date of payment.

8. The decisions of the panel shall be final and binding upon the parties to the dispute, unless rejected by the Parties Group within 30 days.

9. With regard to a dispute concerning a measure of support in Annex I, in the event a party to the dispute does not implement the panel's decisions as provided in paragraphs 5(a) and 5(c) above, or implement appropriate alternative compensation or remedial action by agreement with the adversely affected party or parties, and until implementation occurs, the following actions may be taken, and shall not be subject to complaint under any other agreement:

(a) the Parties Group, acting by consensus minus one, may deny benefits of Article 1(3), and Annex III to shipbuilders which received the benefit but did not pay the charge or comply with the agreed alternative compensation or remedial action, by making such shipbuilders ineligible to be considered injured by the pricing of vessels sold by shipbuilders of other parties;

(b) the adversely affected party or parties to the dispute may suspend equivalent concessions under the GATT, subject to disapproval of the amount of the concessions suspended by the Parties Group acting by consensus minus one. In determining such suspensions, preference shall be given to those that are related to the product or products associated with the violation. If a party concerned objects to the amount or the product related to the suspension of concessions proposed, it may refer the matter to the panel.

10. In the event the shipbuilder concerned does not pay a charge imposed pursuant to Annex III, void the sale of the vessel at a price below normal value, or comply with another lawful alternative equivalent

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(2) For the purpose of this agreement, the phrase 'permissible interpretation' means 'permissible method of implementation'. In determining the permissibility of an implementation method, due regard shall be given to special characteristics of commercial shipbuilding and of the provisions of this agreement relating to injurious pricing, including, particularly, its provision for payment of an injurious pricing charge by the shipbuilder concerned. Where the panel finds that the relevant provision of this agreement relating to injurious pricing admits more than one permissible method of implementation, the Parties Group shall, in order to prevent future disputes from arising, endeavour to reach a unified method of implementation and, if necessary, to make an amendment to the relevant provision.

remedy acceptable to the investigating authority in the applicable time limit ([3]), the investigating party may deny onloading and offloading privileges to certain vessels built by the shipbuilder in question, to the extent sufficient but not excessive to achieve the purpose of Annex III. Such denial of onloading and offloading privileges shall not be subject to complaint under any other agreement.

(a) The investigating party may initially impose this countermeasure, subject to 30 days prior public notice, and pending compliance by the shipbuilder, for a maximum period of four years after delivery on vessels contracted for during a maximum period of four years from the end of the public notice period;

(b) A party to the dispute may request the establishment of a panel to consider countermeasure cases, where there is no panel already in existence to consider the underlying injurious pricing determination:

(i) a panel shall increase or decrease the periods and/or authorise additional parties to apply the countermeasure, if necessary for the countermeasure to be sufficient but not excessive to achieve the purpose of Annex III;

(ii) in accordance with Section 11 of Annex IV, a panel may provisionally suspend or reduce the imposition of a countermeasure, pending completion of its consideration of the matter if, considering the prospects of the party complaining about the countermeasure prevailing on the merits, such action is necessary to preclude irreparable harm;

(c) the Secretariat will prepare, update periodically and circulate to the parties, the lists of the vessels which are subject to the countermeasure or remedial action. The parties shall supply information to the Secretariat on the vessels concerned.

Article 9

Dispute settlement for export credits

1. With respect to any dispute with regard to measures of support covered by Annex I, Section A.1, the parties shall make full use of the consultation mechanisms provided by the understanding on export credits for ships, referred to in Annex I.

2. If, however, any such dispute is not satisfactorily resolved through a full use of the mechanisms, and a party to the dispute believes that such a measure of support significantly undermines the balance of rights and obligations under this agreement, that party may seek review of the matter by the Parties Group in order to establish if the measure of support has significantly undermined the balance of rights and obligations under this agreement. If an affirmative determination is made, the Parties Group shall establish the conditions under which the offending party is to discontinue the measure of support giving rise to the dispute.

3. If appropriate, the Parties Group may recommend amending the agreement or the understanding.

([3]) For a charge which has been brought before a panel for examination, the applicable time limit is that set by the panel for compliance.

Article 10

Security interests

1. Subject to the requirement that measures or practices with respect to security interests are not disguised actions taken in favour of the commercial shipbuilding and repair industry inconsistent with the agreement, nothing in this agreement shall be construed:

(a) to require any party to furnish any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any party from taking any action which it considers necessary for the protection of its essential security interests:

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. If a party is of the opinion that measures or practices taken by another party are disguised action taken in favour of the commercial shipbuilding and repair industry, it may, without prejudice to its right to initiate the other procedures foreseen in this agreement, request further clarification. The other party shall cooperate to discuss whether or not a measure or practice relates to essential security and to provide the available information as fully and quickly as possible through the appropriate responsible government channels.

Article 11

Review and amendment of the agreement

1. The Parties Group shall review this agreement triennially. The Parties Group also review this agreement if the market share in terms of world production represented by the parties to the agreement falls below 70 per cent of gross tonnage.

2. Any party may propose to the Parties Group amendments to this agreement.

Any amendment adopted by the Parties Group shall enter into force upon the deposit of an instrument of acceptance by all the Parties, or at such later date as may be specified by the Parties Group at the time of adoption of the amendments.

Article 12

Signature, ratification, acceptance, approval and accession

1. Until its entry into force, this agreement shall be open for signature at the OECD by the European Community, Finland, Japan, Republic of Korea, Norway, Sweden, the United States of America, and

any State invited by them which has a commercial shipbuilding and repair industry. This agreement shall be subject to ratification, acceptance or approval which the signatories shall seek to accomplish before 1 January 1996.

2. After entry into force, States with a commercial shipbuilding and repair industry may, subject to the approval of the Parties Group, become party to this agreement by accession.

3. Ratification, acceptance, approval and accession shall be effected by the deposit of a formal instrument to that effect with the depositary.

Article 13

Entry into force

1. This agreement, of which the Annexes form an integral part shall enter into force on 1 January 1996, subject to deposit of instruments of ratification, acceptance or approval, in accordance with Article 12, by the European Community, Finland, Japan, Republic of Korea, Norway, Sweden and the United States of America (*). If one or more of them has not deposited such instrument by that date, the Agreement shall enter into force 30 days after the last instrument has been deposited.

2. Parties accept the Understanding on export credits for ships, referred to in Annex I, Section A.1. of this agreement.

Article 14

Withdrawal

1. Any party may withdraw from this agreement by giving written notice of its intention to do so to the depositary, such withdrawal to take effect one year from receipt of such notice. Within this period, at the request of any of the parties, the Parties Group shall meet to review this agreement. Within 30 days after such a Parties Group meeting, any other party, by written notification to the depositary, may withdraw from this agreement as of the date of withdrawal of the party which first gave notice.

Article 15

Depositary

1. The Secretary General of the OECD shall be the depositary of this agreement.

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* *

(*) If Finland, Norway or Sweden becomes a Member of the European Community, its ratification of this agreement will not be required for entry into force. Upon its entry into the European Community, it will adopt the same status with respect to this agreement as the Members of the European Community prior to the entry of any one of them.

ANNEX I — MEASURES OF SUPPORT INCONSISTENT WITH NORMAL COMPETITIVE CONDITIONS IN THE COMMERCIAL SHIPBUILDING AND REPAIR INDUSTRY

The following measures of support [1] are inconsistent with normal competitive conditions when specifically provided [2], directly or indirectly, to the commercial shipbuilding and repair industry by a party, including the constituent states or regional or local authorities of a party or their agencies or instrumentalities, or through public resources or public intervention in any form:

A. EXPORT SUBSIDIES

1. Officially supported export credits [3]

Export credit facilities inconsistent with the provisions of the understanding on export credits for ships, as set out in C/WP6 (94) 6, and amendments thereto adopted in accordance with clause 14 of that understanding.

2. Export subsidies

Subsidies contingent, in law or in fact [4], whether solely or as one of several other conditions, upon export performance, including those illustrated in accompanying note 8 to this Annex [5].

B. DOMESTIC SUPPORT [6]

1. Direct domestic support

The following measures of support are inconsistent when provided directly to the shipbuilder or ship repairer:

(a) grants;

(b) loans on terms and conditions more favourable than those of a comparable commercial loan which a firm can actually obtain on the market;

(c) loan guarantees that support loans on terms and conditions more favourable than those that the firm would obtain on a comparable commercial loan absent the government guarantee, or on terms and conditions more favourable than those otherwise permitted by this agreement;

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[1] See accompanying note 1 to this Annex.
[2] Specificity shall be determined in accordance with the principle set out in Article 2 of the GATT agreement on subsidies and countervailing measures.
[3] See accompanying note 3 to this Annex.
[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
[5] Measures referred to in the accompanying note 8 to this Annex as not constituting export subsidies shall not be prohibited under this agreement.
[6] See accompanying note 2 to this Annex.

(d) forgiveness of debts;

(e) provision of equity capital inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that party;

(f) provision of goods and services at less than the adequate remuneration;

(g) tax policies and practices benefiting the shipbuilding and repair industry, such as tax credits;

(h) other assistance except for: (i) assistance to cover the cost of measures for the exclusive benefit of workers who lose retirement benefits or who are made redundant or otherwise separated permanently from employment in the respective shipbuilding enterprise, when such assistance is related to the discontinuance or curtailment of shipyards, bankruptcy, or change of activities away from shipbuilding; and (ii) research and development assistance granted in accordance with the provisions in Section B.3.

2. Indirect domestic support ([7])

(1) The following measures of support are inconsistent where the benefit is passed or may reasonably be expected to be passed to the shipbuilder or ship repairer indirectly, through a shipowner or other third parties ([8]). Domestic build requirements, in law or in fact, are inconsistent.

(a) grants;

(b) loans and loan guarantees:

(i) home credits, linked to the contract value of a new vessel, granted to a domestic shipowner or other domestic third parties placing orders for such vessel on terms and conditions more favourable than those of a comparable commercial loan which a firm can actually obtain on the market, subject to paragraph 2 and paragraph 3 below;

(ii) other loans, on terms and conditions more favourable than those of a comparable commercial loan which a firm can actually obtain on the market;

(iii) loan guarantees that support loans on terms and conditions more favourable than those that the firm would obtain on a comparable commercial loan absent the government guarantee, or on terms and conditions more favourable than those otherwise permitted by this agreement;

(c) forgiveness of debts;

(d) tax policies and practices benefiting the shipbuilding and repair industry such as tax credits;

(e) any assistance provided to suppliers of goods and services to the shipbuilding and repair industry if such assistance specifically provides benefits to that industry of a country; or

(f) any indirect assistance that is similar to measures and practices (a) to (e) of this paragraph, except for research and development which is dealt with under Section 3 below.

([7]) See accompanying note 3 to this Annex.
([8]) See accompanying note 4 to this Annex.

(2) Paragraph 1 (b) (i) and (iii) shall not apply to loans and loan guarantees to domestic purchasers on the same terms and conditions as may be granted pursuant to the understanding on export credit for ships [C/WP6 (94) 6], including, *inter alia*, terms and conditions regarding interest rate, downpayment, grace period, duration, equal instalments and guarantee premiums. Eligibility for such loans and loan guarantees may be limited to purchase of ships from domestic shipyards.

(3) In accordance with terms and conditions to be agreed upon by the Council Working Party, paragraph 1 (b) (i) and (iii) above shall also not apply to loans and loan guarantees which:

(a) provide more favourable terms and conditions for a domestic shipowner placing an order for a new vessel at a foreign shipyard than those placing an order at a domestic shipyard; or

(b) make such schemes subject to an open international bidding procedure;

(c) provide a total 'soft' or concessional element no greater than that of the loans permitted under paragraph 2 above.

3. Research and development ([9])

(1) Assistance provided by public authorities in the form of grants, preferential loans, preferential tax treatment or other means for research and development to the shipbuilding an ship repair industry, except for:

(a) fundamental research as defined in accompanying note 5 (b);

(b) basic industrial research, where the aid intensity is limited to 50 per cent of the eligible costs;

(c) applied research, where the aid intensity is limited to 35 per cent of the eligible costs;

(d) development, where the aid intensity is limited to 25 per cent of the eligible costs;

(2) The maximum allowable aid intensity for research and development related to safety and the environment may be 25 percentage points higher than those percentages mentioned under (b), (c) and (d) above under the condition that the Parties Group has approved the project by consensus minus one, or more than 25 percentage points higher if the Parties Group has approved the project by consensus.

(3) The maximum allowable aid intensity for research and development carried out by small and medium-sized shipbuilding enterprises shall be 20 percentage points higher than those percentages mentioned at (b), (c) and (d) above. Small and medium-sized enterprises are those with less than 300 employees whose yearly sales figure does not exceed ECU 20 million and which are not more than 25 per cent owned by a large company.

(4) Information on the results of research and development is to be published promptly, at least annually.

C. OFFICIAL REGULATIONS AND PRACTICES

1. Administrative acts, guidance, or practices which authorise, encourage or require shipbuilders or ship repairers to enter into anti-competitive arrangements with competitors including but not limited to agreements to fix prices, rig bids, allocate markets, restrain production or sales, or engage in predatory practices ([10]).

([9]) See accompanying note 5 to this Annex.
([10]) See accompanying note 6 to this Annex.

2. Domestic build or repair or domestic content requirements that discriminate in favour of the commercial shipbuilding and repair industry of the party, or official regulations or practices that have similar effects including, *inter alia*, cargo reservation schemes directly linked with domestic shipbuilding or repair requirements ([11]).

Accompanying notes to Annex I

Note 1

Disciplines in Annex I include measures of support provided to related entities, where a 'related entity' is any natural or juridical person (i) who owns or controls a shipbuilder; or (ii) is owned or controlled by a shipbuilder, directly or indirectly, whether through stock ownership or otherwise. A rebuttable presumption of control arises when a person or shipbuilder owns or controls an interest of 25 per cent in the other.

Note 2

Section B does not apply to measures of support dealt with in Section A.

Note 3

Item A (1) and B (2):

Transparency and review of export and home credit schemes

Within two years of entry into force of this agreement, the Parties Group shall set up a Working Group to review the functioning of Annex I, Sections A.1 and B.2.2.

(i) examining the reports submitted each year on the value, tonnage, interest rates, etc. on all ships financed through officially supported export credits and home credit schemes; and

(ii) evaluating the adequacy of the notification procedures provided for in Article 4.1.c. in terms of revealing measures or practices that are inconsistent with the agreement.

The Working Group is to examine whether the use of such measures has significantly undermined the balance of rights and obligations of this agreement. If this is the case, the Working Group may recommend to the Parties Group appropriate amendments to the agreement or the understanding.

Note 4

Item B (2):

A measure of support is understood to be provided through a shipowner or other third parties where, e.g. the benefit is passed or may reasonably be expected to be passed to the shipbuilder or ship repairer or where the work is required by law or encouraged in fact to be carried out at the yards of a specific country.

([11]) See accompanying note 7 to this Annex.

Note 5

Item B (3):

The following definitions apply to research and development:

(a) eligible costs:

(i) costs of instruments, materials, land and buildings to the extent that they are used for the specific research and development project;

(ii) costs of researchers, technicians and other supporting staff to the extent that they are engaged in the specific research and development project;

(iii) consultancy and equivalent services including bought in research, technical knowledge, patents, etc;

(iv) overhead costs (infrastructure and support services) to the extent that they are related to the research and development project, on condition that they do not exceed 45 per cent of the total costs of the project for basic industrial research and 20 per cent for applied research and 10 per cent for development;

(b) the term 'fundamental research' means research activities independently conducted by higher education or research establishments for the enlargement of general scientific and technical knowledge, not linked to industrial or commercial objectives;

(c) basic industrial research is understood to mean original theoretical and experimental work whose objective is to achieve new and better understanding of the laws of science and engineering in general and as they might apply to an industrial sector or to the activities of a particular undertaking;

(d) applied research is understood to mean investigation or experimental work on the basis of the results of the basic research with a view to facilitating the attainment of specific practical objectives such as the creation of new products, production processes and services. It normally ends with the creation of a first prototype and does not include efforts whose principal aim is the design, development or testing of specific items of services to be considered for sale;

(e) development is understood to mean work based on the systematic use of scientific and technical knowledge in a design, development, testing or evaluation of a potential new product, production processes or service or of an improvement of an existing product or service to meet specific performance requirements and objectives. This stage will normally include pre-production models such as pilot and demonstration projects but does not include industrial application and commercial exploitation;

(f) public assistance for research and development specifically provided to the shipbuilding and repair industry includes, but is not limited to, the following cases:

(i) research and development projects carried out by the shipbuilding or ship repair industry or research institutes controlled by or financed by this industry;

(ii) research and development projects carried out by the shipping industry or research institutes controlled by or financed by this industry when the project is directly related to shipbuilding or repair;

(iii) research and development projects carried out by universities, public or independent private research institutes and other industrial sectors in collaboration with the shipbuilding industry;

(iv) research and development projects carried out by universities, public and or independent private research institutions and other industrial sectors, when at the time the project is carried out, it is reasonably anticipated that the results will be of substantial specific importance for the shipbuilding and ship repair industry.

Note 6

Item C (1):

The parties recognise that differences exist among its competition policies or laws and regulations. The provision of Item C (1) is not intended to unify competition policies among the parties to this agreement nor to compel a party to amend its national competition laws and regulations.

Note 7

Item C (2):

While customs duties on newly-built vessels or vessel repairs are included within the scope of Item C (2), the parties do not intend thereby to characterise customs duties as obstacles to normal competitive conditions in the commercial shipbuilding industry.

Note 8

Item A (2):

Illustrative list of export subsidies

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provisions of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available [1] on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes [2] or social welfare charges paid or payable by industrial or commercial enterprises [3].

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes [2] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior stage cumulative indirect taxes [2] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste) [4]. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II of the agreement on subsidies and countervailing measures.

(i) The remission or drawback of import charges [2] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II of the agreement on subsidies and countervailing measures and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III of the agreement on subsidies and countervailing measures.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The payment by governments (or by institutions controlled by and/or acting under the authority of governments) of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the GATT 1994.

Footnotes to the illustrative list of export subsidies

[1] The term 'commercially available' means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[2] For the purpose of this agreement:

the term 'direct taxes' shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property,

the term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports,

the term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges,

'prior stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product,

'cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production,

'remission' of taxes includes the refund or rebate of taxes,

'remission or drawback' includes the full or partial exemption or deferral of import charges.

[3] The parties recognise that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The parties reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any party may draw the attention of another party to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the parties shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of parties under this agreement, including the right of consultation created in the preceding sentence. Paragraph (e) is not intended to limit a party from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another party.

[4] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

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ANNEX II — SPECIAL PROVISIONS RELATING TO MEASURES OF SUPPORT

Existing measures of support that are inconsistent with the agreement are to be eliminated at the time this agreement enters into force, except as provided in Sections A and B below. Support committed before the entry into force of the agreement may be paid after entry into force, provided that it complies with the provisions of the understanding set out in paragraph 3 of the final act of the negotiations concerning this agreement.

A. SUPPORT FOR RESTRUCTURING

Support may be provided in accordance with the following notification to the Council Working Party:

(i) the Republic of Korea's ongoing programme for Daewoo and KSEC described in [C/WP6 (91)58];

(ii) restructuring assistance in Belgium, Portugal and Spain information on which is set out in [C/WP6 (93)31] and the accompanying note 1 to this Annex.

B. OFFICIAL REGULATIONS AND PRACTICES

Coastwise laws of the United States of America

1. The United States of America reserves the right to retain the domestic build requirements incorporated in the public laws referred to in the accompanying note 2 to this Annex.

2. Regarding the coastwise laws of the United States which reserve the domestic market for United States shipyards, the following will apply:

(a) any domestic build, rebuild, or repair requirements found in United States laws other than those specified in accompanying note 2 to this Annex (hereafter 'the coastwise laws') that are inconsistent with the agreement are subject to elimination as of entry into force of the agreement;

(b) recognising that a permanent derogation for the coastwise laws could undermine the balance of rights and obligations of the parties under the agreement and is unacceptable to the other parties, the parties agree that responsive measures may be taken as provided below and on the special review and monitoring procedure;

(c) the United States agrees to cooperate in an annual review by the Parties Group and to ensure full transparency regarding the construction of such vessels, including the provision of information on new orders and ratified contracts (both adjusted subsequently for cancellations), expected and actual delivery dates, by tonnage and type of ship. The United States will provide such information no less than annually, and more frequently when requested or appropriate (e.g. when it appears that annual actual and expected deliveries may increase beyond the threshold described below under (e));

(d) the United States estimates the average annual deliveries for vessels subject to the agreement constructed under the provisions of the coastwise laws following adoption of the agreement will not exceed 200 000 gt;

(e) the Parties Group will carefully monitor the information provided under (c) above. It may by consensus minus one make determinations and authorise responsive measures as specified in subparagraphs (i) and (ii) below.

(i) Until three years after entry into force of the agreement:

if the Parties Group determines that actual or expected deliveries in any year after the entry into force of this agreement exceeds 200 000 gt (1) and that such deliveries will significantly undermine the balance of rights and obligations under the agreement, the Parties Group may authorise one or more affected parties to take responsive measures (e.g. impose a charge or restriction on bids or contracts) with respect to shipyards that in the year in which the threshold is exceeded benefited from the construction of coastwise vessels, aimed at effecting a loss of sales opportunities comparable to that resulting from deliveries of coastwise vessels in excess of the threshold.

For purposes of the paragraph, actual or expected deliveries in excess of the threshold, as defined above, in any one year establishes a rebuttable presumption of significantly undermining the balance of rights and obligations under this agreement;

(ii) after three years following entry into force:

if the Parties Group determines that actual or expected deliveries will significantly undermine the balance of rights and obligations under the agreement, the Parties Group may authorise one or more affected parties to take responsive measures (e.g. impose a charge or restriction on bids or contracts) with regard to shipyards benefiting from the construction of coastwise vessels, aimed at effecting a loss of sales opportunities or other commercial advantages comparable to that resulting from deliveries of coastwise vessels.

For purposes of this paragraph, there is a rebuttable presumption that the balance of rights and obligations under this agreement is significantly undermined;

(f) if the United States believes that the level, kind, or duration of the measures taken by a party or parties under subparagraph (e) result in a loss of sales opportunities for its shipbuilders greater than that caused by the delivery of coastwise vessels, it may invoke dispute panel proceedings under Annex IV of the agreement. The panel shall determine whether the measures taken under subparagraph (e) are disproportionate or excessive and make appropriate recommendations. Measures taken by the Parties must be made consistent with the panel's recommendations;

(g) as part of and in sufficient time prior to the first triennial review provided for in Article 11 of the agreement, the Parties Group shall examine whether the conditions which created the need for Part B of Annex II still prevail and whether the measures provided for under subparagraph (e) above are adequate to maintain the balance of rights and obligations under the agreement. On the basis of that review and with the aim of maintaining the balance of rights and obligations under the agreement, the Parties Group may decide to:

— modify the provisions of subparagraph (e),

— withdraw other rights under the agreement,

— authorise the withdrawal of GATT concessions, or

— take other appropriate action;

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(1) The threshold for any given year may be increased by carrying over an unused amount of a maximum of 50 000 gt from the previous year and by borrowing 50 000 gt from the next year.

(h) if, after the review called for in subparagraph (g) is completed, a party continues to believe that the responsive measures available to it are unsatisfactory, such party may withdraw from this agreement three months after submitting a notification of its determination to this effect to the Parties Group. The same procedures for termination are available to a party entitled to take the abovementioned responsive measures at any time after four years from entry into force of this agreement, if Part B of Annex II remains in effect.

Accompanying notes to Annex II

Note 1

Item A (ii):

Restructuring support

(a) The total amounts of assistance included in the restructuring plans of item A (ii) are as follows:

— Spain ESP 180 billion

— Portugal PTE 17.7 billion

— Belgium BEF 2 369 million

(b) These total amounts of assistance consist of the following:

(i) assistance for social measures exempted under Annex I B(1)(h);

(ii) assistance for restructuring costs incurred before the date of signature of the present agreement, committed by the respective national governments and approved by the Commission of the European Communities before that date, but have not been paid due to budgetary problems;

(iii) other assistance for restructuring measures committed and paid, on the basis of costs incurred before 1 January 1996;

(iv) assistance for restructuring measures paid after 1 January 1996, broken out in two categories:

(a) investment assistance; and

(b) any assistance for social measures not exempted under Annex I B(i)(h);

(c) The European Community will provide to the Parties Group, in accordance with Article 4(1)(b) of the present agreement information which splits up the amounts mentioned in point 1 above into the categories referred to in point 2 above, allowing the Parties Group to monitor the restructuring plans.

(d) The European Community can state that assistance paid after 1 January 1996 and not falling under 2(i) and (ii) above, will be subject to maximum limits and payment deadlines particular to each country as follows:

	Aid volume	Ultimate payment deadline
Spain	ESP 10 billion	31 December 1998
Portugal	PTE 5.2 billion	31 December 1998
Belgium	BEF 1 320 million	31 December 1997

(e) The European Commission has not yet received complete notifications of these restructuring plans as required by the internal legislation of the Community. The Commission will ensure that the above limits and restrictions on the aid will be fully respected when it takes its final decisions authorising these aids.

Note 2

Item B:

Coastwise laws of the United States

The United States reserves the right to retain the domestic build requirements incorporated in the legislation listed below.

(a) Laws that prohibit the transportation of merchandise between points in the United States except on United States built vessels documented under United States law and owned by citizens of the United States:

Section 27 of the Act of June 5, 1920 (41 STAT. 999), as amended by the Act of April 11, 1935 (49 STAT. 154); the Act of July 2, 1935 (49 STAT. 442); Section 1 of the Act of July 14, 1956 (70 STAT. 544); Section 27 (a) of Public Law 85-508 (72 STAT. 351); Section 1 of Public Law 86-583 (74 STAT. 321); Public Law 89-194 (79 STAT. 823); Section 1 of Public Law 86-583 (74 STAT. 321); Public Law 89-194 (79 STAT 823); Public Law 90-474 (82 STAT. 700); Section 1 of Public Law 92-163 (85 STAT. 486); Section 213 of Public Law 95-410 (92 STAT. 904); Section 4 of Public Law 96-112 (93 STAT. 848); Section 12 (49) of Public Law 97-31 (95 STAT. 157); Sections 502 and 504 of Public Law 97-389 (96 STAT. 1954, 1956); Section 6 (c) (1) of Public Law 100-239 (101 STAT. 1782); Section 1 (a) of Public Law 100-329 (102 STAT. 588); and Section 5501 (b) of Public Law 102-587 (106 STAT. 5085).

(b) Laws that prohibit the transportation of passengers between points in the United States except on United States built vessels documented under United States law and owned by the citizens of the United States:

Section 8 of the Act of June 19, 1886 (24 STAT. 81), as amended by Section 2 of the Act of February 17, 1898 (30 STAT. 248).

(c) Laws requiring that dredges must be built and registered in the United States:

Section 1 of the Act of May 28, 1906 (34 STAT. 204), as amended by Section 5501 (a) (1) of Public Law 102-587 (106 STAT. 5084).

(d) Laws requiring that towing vessels must be United States built and documented under the laws of the United States and owned by citizens of the United States to engage in towing vessels from any port or place in the United States to any other port or place in the United States:

Revised Statue No 4370 (54 STAT. 304), as amended by Section 10 of Public Law 99-307 (100 STAT. 447); and Section 2 of Public Law 100-329 (102 STAT. 589).

(e) Though fishing vessels destined for a country's fishing fleet are excluded from the scope of the Agreement, listed below for the sake of completeness are laws requiring that fishing vessels, fish tender vessels and fish processing vessels operating in United States waters, or in the waters of

the United States Exclusive Economic Zone (unless operating under a permit pursuant to a governing international fishing agreement), must be built in the United States and documented under United States law and owned by citizens of the United States:

Section 1 of Public Law 98-89 (97 STAT. 587), as amended by Section 301 (c) of Public Law 98-454 (98 STAT. 1374); Section 3 (4), (5), 6 (a) (6) of Public Law 100-239 (101 STAT. 1779, 1782); and Section 301 (a) (8) of Public Law 101-225 (103 STAT. 1921).

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ANNEX III — INJURIOUS PRICING CHARGES

A. BASIC PRINCIPLES

1. The parties recognise that injurious pricing, by which vessels covered by Article 2 of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry ('vessels') of one country are sold (1) directly or indirectly to one or more nationals or companies of another party (2) or to one or more companies owned (3) or controlled (4) by such nationals or companies (5), at less than the normal value of the vessels, is to be condemned if it causes or threatens material injury to an established industry in the territory of a party or materially retards the establishment of a domestic industry.

2. In order to remedy or prevent injurious pricing, a party may impose on the producer of any injuriously priced vessel an injurious pricing charge not greater in amount than the margin of injurious pricing in respect of such vessel.

3. No vessel of the territory of any party sold to a buyer of any other party shall be subject to injurious pricing charges by reason of the exemption of such vessel from duties or taxes borne by the like product when sold to a buyer of the party in which the vessel originates, or by reason of the refund of such duties or taxes.

4. (a) No party shall impose any injurious pricing charge on a shipbuilder that is a national or company of another party unless it determines that the effect of the injurious pricing is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

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(1) For the purposes of this Annex:
   (a) the concept of 'sale' covers the creation or transfer of an ownership interest in the vessel except for an ownership interest, as defined in this Annex, created or acquired solely for the purpose of providing security for a normal commercial loan;
   (b) an 'ownership interest' shall include any contractual or proprietary interest which allows the beneficiary or beneficiaries of proprietary interest which allows the beneficiary or beneficiaries of such interest to take advantage of the operation of the vessel in a manner substantially comparable to the way in which an owner may benefit from the operation of the vessel. In determining whether such substantial comparability exists, the investigating authorities shall consider the following factors:
      (i) the terms and circumstances of the transaction;
      (ii) commercial practice within the industry;
      (iii) whether the vessel subject to the transaction is integrated into the operations of the beneficiary or beneficiaries; and
      (iv) whether in practice there is a likelihood that the beneficiary or beneficiaries of such interests will take advantage of and the risk for the operation of the vessel for a significant part of the lifetime of the vessel;
   (c) the term 'buyer' means any person who acquires an ownership interest, including by way of lease or long-term bareboat charter, in conjunction with the original transfer from the shipbuilder, either directly or indirectly, including a national or company which owns or controls a buyer.
   (d) the terms 'buyer' and 'sale' shall be construed accordingly and it is understood that there may be more than one buyer of any one vessel.

(2) For purposes of this Annex, 'company of a party' means any kind of juridical entity, including any corporation, company, association, or other organisation, that is legally constituted under the laws and regulations of such country or a political subdivision thereof, regardless of whether or not the entity is organised for pecuniary gain, private or governmentally owned, or organised with limited or unlimited liability.

(3) The term 'owned' is defined as having more than a 50 % interest.

(4) The term 'control' is defined as actual ability to have substantial influence on corporate behaviour, which is presumed at a 25 % interest. If ownership of a company is shown, a separate control of that company is presumed not to exist unless established otherwise.

(5) Under this Annex, a sale shall not be subject to injurious pricing investigation if an ownership interest is shown to exist in a buyer of the party in which the vessel originates, unless it is established that the owner is acting under instruction from a 'buyer', as defined in this Annex, of another party or rights and liabilities of the owner of the vessel are otherwise assumed by such a 'buyer'.

(b) The parties may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a party to impose an injurious pricing charge on a shipbuilder with regard to the sale of any vessel to a buyer which is its company or national for the purpose of remedying injurious pricing which causes or threatens material injury to an industry in the territory of another party exporting the product concerned to the party of the buyer.

5. The parties agree to take action only under this Annex with regard to transactions involving the injurious pricing of vessels covered by this agreement. A party shall withhold action under this Annex if any member of the World Trade Organisation not a party to this agreement has previously initiated an anti-dumping action pursuant to Article VI of GATT 1994 and the agreement on the implementation of Article VI of GATT 1994 with regard to a particular transaction. If subsequent to the initiation of an action under this Annex, a member of the World Trade Organisation who is not a party to this agreement initiates an anti-dumping action pursuant to Article VI of GATT 1994 with regard to a particular transaction, the party that had initiated an action under this Annex shall suspend the action. If the anti-dumping investigation is concluded by the imposition of measures or a negative finding, a party shall not initiate or continue action under this Annex. If the anti-dumping investigation is not concluded within a reasonable period of time, but not less than one year, or if, in the event of an affirmative finding, action is not taken, the party to this agreement may initiate or continue its investigation, but in no case may both an injurious pricing charge under this agreement and an anti-dumping duty under the GATT 1994 be imposed with respect to a particular transaction.

B. SUPPLEMENTARY PROVISIONS REGARDING THE BASIC PRINCIPLES

Regarding Paragraph 1

1. Hidden injurious pricing by associated houses (that is, the sale by a buyer at a price below that corresponding to the price invoiced by a shipbuilder with whom the buyer is associated, and also below the price in the country of sale) constitutes a form of injurious pricing with respect to which the margin of injurious pricing may be calculated on the basis of the price at which the vessels are resold by the buyer.

2. It is recognised that, in the case of sales from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Regarding Paragraph 2

Multiple currency practices can in certain circumstances constitute a form of injurious pricing by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By 'multiple currency practices' is meant practices by governments or sanctioned by governments.

Regarding Paragraph 4(b)

Waivers under the provisions under paragraph 4(b) shall be granted only on application by the party proposing to impose an injurious pricing charge.

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SHIPBUILDING INJURIOUS PRICING CODE

THE PARTIES,

Recognising that anti-injurious pricing practices should not constitute an unjustifiable impediment to international trade and that injurious pricing charges may be applied against injurious pricing only if such injurious pricing causes or threatens material injury to an established industry or materially retards the establishment of an industry;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of injurious pricing cases;

Desiring to interpret the basic principles and to elaborate rules for their application in order to provide uniformity and certainty in their implementation; and

Recognising the need to take account of the complexity of ship purchase transactions and the manner in which the ownership of a vessel may be obscured;

Recognising the nature of commercial shipbuilding and repair, which often involves a single transaction covering one vessel and the adaptation of shipyard operations to render them capable to produce a particular ship, and thus, understanding that the investigating authorities shall consider the context of these and other characteristics of commercial shipbuilding and repair in assessing the impact of sales on a domestic industry:

HEREBY AGREE AS FOLLOWS:

Article 1

Principles

1.1. An injurious pricing charge on a vessel covered by Article 2 of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry ('vessel') shall be applied only under the circumstances provided for in this Annex and pursuant to investigations initiated [1] and conducted in accordance with its provisions. The following provisions govern the application of the basic principles in so far as action is taken under implementing legislation or regulations.

1.2. The parties agree to incorporate into this code any amendments made in the future to the agreement on the implementation of Article VI of the GATT 1994. Changes to such amendments shall be limited to those necessitated by the special characteristics of commercial shipbuilding.

Article 2

Determination of injurious pricing

2.1. For the purpose of this agreement, a vessel is to be considered as being injuriously priced. i. e. sold [2] directly or indirectly to one or more nationals or companies of another party, or to one or more

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[1] The term 'initiated' as used hereinafter means the procedural action by which a party formally commences an investigation as provided in Article 5.

[2] (a) 'Sold to a buyer of the party in which the vessel originates' means neither sold, within the meaning of this Annex directly or indirectly to nationals or companies of other countries nor to companies that are owned or controlled by such nationals or companies.

(b) Sales to buyers of the party in which the vessel originates constitute 'domestic sales' for purposes of this Annex, and their prices constitute 'domestic prices'.

companies owned or controlled by such nationals or companies, at less than its normal value, if the export ([3]) price of the vessel sold is less than the comparable price, in the ordinary course of trade, for the like vessel when sold to a buyer of the exporting country.

2.2. When there are no sales of the like vessel in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of injurious pricing shall be determined by comparison with a comparable price of the like vessel when exported to an appropriate third country provided that this price is representative. If such sales to any appropriate third country do not exist or do not permit a proper comparison, the margin of injurious pricing shall be determined by comparison with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1. Sales of the like vessel in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling, and general costs may be treated as not being in the ordinary course of trade ([4]) by reason of price and may be disregarded in determining normal value only if the authorities ([5]) determine that such sales are at prices which do not provide for the recovery of all costs within a reasonable period of time ([6]). If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1. For the purpose of paragraph 2 of this Article, costs shall normally be calculated on the basis of records kept by the shipbuilder under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the vessel under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the shipbuilder in the course of the investigation provided that such allocations have been historically utilised by the shipbuilder, in particular in relation to establishing appropriate amortisation and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations ([7]).

2.2.2. For the purpose of paragraph 2 of this Article, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like vessel by the shipbuilder under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realised by the shipbuilder in question in respect of production and sales in the domestic market of the country of origin of the same general category of vessel;

(ii) the weighted average of the actual amounts incurred and realised by other shipbuilders of the country of origin in respect of production and sales of the like vessel in that country's domestic market;

([3]) For purposes of this Annex, 'export' means the sale of a vessel to a buyer other than a buyer of the party in which the vessel originates.

([4]) The term 'ordinary course of trade' shall be given the same meaning throughout Article 2.

([5]) When in this code the term 'authorities' is used, it shall be interpreted as meaning authorities at an appropriate senior level.

([6]) For purposes of this Annex, a 'reasonable period' of time shall be five years.

([7]) The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

(iii) any other reasonable method ([8]), provided that the amount for profit so established shall not exceed the profit normally realised by other shipbuilders on sales of vessels of the same general category in the domestic market of the country of origin; and

(iv) the profit added in constructing value shall, in all instances, be based upon the average profit realised over a reasonable period of time ([9]) prior to and after the sale under investigation and shall reflect a reasonable profit at the time of such sale. In making such calculation, any distortion which would result in other than a profit which is reasonable at the time of the sale shall be eliminated.

2.2.3. In light of the long lead time between contract and delivery of vessels, a normal value shall not include actual costs which are due to extraordinary circumstances (e.g. labour disputes, fire, natural disaster), and which are significantly over the cost increase which the shipbuilder could have reasonably anticipated and taken into account at the time the material terms of sale were fixed ([10]).

2.3. In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the shipbuilder and the buyer or a third party, the export price may be constructed on the basis of the price at which the vessels are first resold to an independent buyer, or if the vessels are not resold to an independent buyer, are not resold in the condition as originally sold, on such reasonable basis as the authorities may determine.

2.4. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time ([11]). Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability ([12]). In the cases referred to in Article 2(3), allowances for costs, including duties and taxes, incurred between original sale and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1. When the price comparison under this paragraph requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale ([13]), provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used.

([8]) Recourse to 'any other reasonable method' should be had only to absent appropriate domestic sales. In such case, reference will generally be made, under (iii), to appropriate export sales of the shipbuilder in question or, absent such sales, to those of other shipbuilders of the country of origin.

([9]) A reasonable period of time in this context shall refer to the shortest possible time, which should normally not exceed six months both prior to and after the sale under investigation.

([10]) The burden of proof shall be placed on the shipbuilder.

([11]) Sales 'made at as nearly as possible the same time' normally would mean sales within three months prior to or after the sale under investigation, or, in the absence of such sales, such longer period as would be appropriate.

([12]) It is understood that some of the above factors may overlap, and the authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

([13]) Date of sale, for purposes of this provision, means the date on which the material terms of sale are established. That date is normally, for ship transactions, the date of contract. However, if the material terms of sale are significantly changed on another date, the rate of exchange on the date of the change should be applied. In such a case, the investigating authority shall make appropriate adjustments to take into account any unreasonable effect on the injurious pricing margin solely due to exchange rate fluctuations between the original date of sale and the date of this change.

2.4.2. Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of injurious pricing during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods and if an explanation is provided why such differences cannot be taken into account appropriately by the use of a 'weighted average to weighted average' or 'transaction to transaction' comparison.

2.5. In the case where vessels are not sold to a buyer of another party directly from the country of origin but are exported to that other party from an intermediate country, the price at which the vessels are sold from the country of export to the buyer of that other party shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the vessels are merely trans-shipped through the country of export, or such vessels are not produced in the country of export. or there is no comparable price for them in the country of export.

2.6. Throughout this agreement the term 'like vessel' shall be interpreted to mean a vessel of the same type, purpose and approximate size as the vessel under consideration and possessing characteristics closely resembling those of the vessel under consideration. The term 'same general category of vessel' shall be interpreted to mean a vessel of the same type and purpose, but of a significantly different size. Small differences in size and equipment will not affect the category of the vessel, but may be reflected in appropriate adjustments in calculations and comparisons made under this code.

2.7. This Article is without prejudice to the second supplementary provision to paragraph 1 of the basic principles.

Article 3

Determination of injury ([14])

3.1. A determination of injury for purposes of this Annex shall be based on positive evidence and involve an objective examination of both (a) the effect of the sale at less than normal value on prices in the domestic market for like vessels; and (b) the consequent impact of that sale on domestic producers of like vessels ([15]).

3.2. With regard to the effect of the sale at less than normal value on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the sale at less than normal value as compared with the price of like vessels of the buyer's country, or whether the effect of such sale is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3. Where sales of vessels from more than one country are simultaneously subject to injurious pricing investigations, the investigating authorities may cumulatively assess effects of such sales only

([14]) Under this code the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

([15]) For purposes of this Annex, 'domestic producers of like vessels' shall encompass those shipyards capable of producing a like vessel with their present facilities or which can be adapted in a timely manner to produce a like vessel.

if they determine that (1) the margin of injurious pricing established in relation to the purchases from each country is more than *de minimis* as defined in paragraph 8 of Article 5; and that (2) a cumulative assessment of the effects of the sales is appropriate in light of the conditions of competition between vessels sold by shipbuilders of other parties to its buyers and the conditions of competition between such vessels and the like domestic vessels.

3.4. The examination of the impact of the sale at less than normal value on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of injurious pricing; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5. It must be demonstrated that the sale at less than normal value is, through the effects of the sale at less than normal value, as set forth in paragraphs 2 and 4 of this Article, causing or has caused injury within the meaning of this agreement. The demonstration of a causal relationship between the sale at less than normal value and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the sale at less than normal value which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the sale at less than normal value. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of sales by shipbuilders of other parties to buyers of the investigating party not sold at less than normal value, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6. The effect of the sale at less than normal value shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the sale at less than normal value shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the sale at less than normal value would cause injury must be clearly foreseen and imminent ([16]). In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) sufficient freely disposable or an imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased sale at less than normal value to the market of the buyer's country, taking into account the availability of other export markets to absorb any additional exports; and

(ii) whether vessels are being exported to the domestic market at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further purchases from other countries.

([16]) One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased sales of such vessels at sale at less than normal value to buyers of the investigating party.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further sale at less than normal value are imminent and that, unless protective action is taken, material injury would occur.

3.8. With respect to cases where injury is threatened by sale at less than normal value, the application of injurious pricing measures shall be considered and decided with special care.

Article 4

Definition of domestic industry

4.1. For the purposes of this agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers ([17]) as a whole of the like vessels or to those of them whose collective capability to produce a like vessel constitutes a major proportion of the total domestic capability to produce a like vessel, except that when producers are related ([18]) to the exporters or domestic buyers or are themselves domestic buyers of the allegedly injuriously priced vessel, the term 'domestic industry' may be interpreted as referring to the rest of the producers.

4.2. Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of the GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1 above.

Article 5

Initiation and subsequent investigation

5.1. Except as provided for in paragraph 6 of this Article, an investigation to determine the existence, degree and effect of any alleged injurious pricing shall be initiated upon a written application by or on behalf of the domestic industry.

5.2. An application under paragraph 1 shall be filed not later than six months from the time that the applicant knew or should have known of the sale of the vessel ([19]) in a case falling under subparagraph (d) (i) or (d) (ii) below; nine months from that time in a case falling under subparagraph (d) (iii) below, provided that a notice of intent to apply ([20]) had been filed no later than six months from that time; but in any event no later than six months from its delivery. The application shall include evidence:

(a) of injurious pricing ([21]);

(b) of injury within the meaning of this Annex;

([17]) See footnote ([15]) of this Official Journal.

([18]) For the purposes of this paragraph, producers shall be deemed to be related to exporters or domestic buyers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control the other when the former is legally or operationally in a position to exercise restraint or direction over the latter.

([19]) There is a rebuttable presumption that a shipbuilder knew or should have known of the sale from the time of publication of the fact of the conclusion of the contract, along with very general information concerning the vessel, in the international trade press.

([20]) This notice shall include information reasonably available to the applicant to identify the transaction concerned.

([21]) Including evidence of the existence of a buyer who is a company or national of the investigating party.

(c) of a causal link between the injuriously priced sale and the alleged injury; and

(d) (i) that, if the vessel was sold through a broad multiple bid ([22]), the applicant was invited to tender a bid on the contract at issue, it actually did so, and the bid of the applicant substantially met bid specifications (i. e. delivery date and technical requirements); or

(ii) that, if the vessel was sold through any other bidding process and the applicant was invited to tender a bid on the contract at issue, it actually did so, and the bid of the applicant substantially met bid specifications; or

(iii) that, in the absence of an invitation to tender a bid other than under a broad multiple bid, the applicant was capable of building the vessel concerned and, if the applicant knew or should have known of the proposed purchase ([23]), it made demonstrable efforts to conclude a sale with the buyer consistent with the bid specifications in question.

Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like vessel by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like vessel and, to the extent possible, a description of the volume and value of domestic production of the like vessel accounted for by such producers;

(ii) a complete description of the allegedly injuriously priced vessel, the name of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and the identity of the buyer of the vessel in question who is a company or national of the investigating party;

(iii) prices at which such vessels are sold in the domestic market of the country of origin or export (or, where appropriate, information on the prices at which such vessels are sold from the country of origin or export to a third country or countries or on the constructed value of the vessel) and information on export prices or, where appropriate, on the prices at which such vessels are first resold to an independent buyer of the other country;

(iv) the effect of the allegedly injuriously priced sale on prices of the like vessel in the domestic market and the consequent impact of the sale on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in Article 3(2) and (4).

5.3. The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

([22]) For the purpose of this provision, a broad multiple bid shall be one in which the proposed buyer extends an invitation to bid to at least all the shipbuilders in the country of the buyer known to the buyer to be capable of building the vessel in question.

([23]) It shall be rebuttably presumed that the applicant knew or should have known of the proposed purchase if it is demonstrated that:
(i) the majority of the domestic industry in the country of the proposed buyer have made efforts with that buyer to conclude a sale of the vessel in question; or
(ii) general information on the proposed purchase was available from brokers, financiers, classification societies, charterers, trade associations, or other entities normally involved in shipbuilding transactions with whom the shipbuilder had regular contacts or dealings.

5.4. An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like vessel, that the application has been made by or on behalf of the domestic industry ([24]). The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective capacity to produce the like vessel constitutes more than 50 per cent of the total capacity to produce the like vessel of that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total capacity of the domestic producers capable of producing the like vessel.

5.5. The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the application for the initiation of an investigation. However, before proceeding to initiate an investigation, whether upon application or upon decision of the authority to initiate an investigation under paragraph 5.6 below, the authorities shall notify the government of the exporting country concerned.

5.6. If in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of injurious pricing, injury, a causal link, and that a member of the allegedly injured domestic industry met the criteria of paragraph 5.2 (d), to justify the initiation of an investigation.

5.7. The evidence of both injurious pricing and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation.

5.8. An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either injurious pricing or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of injurious pricing is *de minimis* or the injury is negligible. The margin of injurious pricing shall be considered to be *de minimis* if this margin is less than two per cent, expressed as a percentage of the export price.

5.9. A final decision on initiation will be taken no later than 45 days following an application and, in case of initiation without application, no later than six months from the time the investigating authority knew or should have known of the sale of the vessel. For cases involving price to price comparison, where a like vessel has been delivered, investigations must be completed no later than one year from the date of initiation. For cases in which the like vessel is under construction, investigation will end no later than one year from delivery of that like vessel. Investigations involving constructed value shall be concluded within one year after their initiation or within one year of delivery of the vessel, whichever is later.

Article 6

Evidence

6.1. All interested parties in an injurious pricing investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant ([25]) in respect of the investigation in question.

([24]) Parties are aware that in the territory of certain parties, employees of domestic producers of the like product or representatives of those employees, may make or support an application for an investigation under paragraph 1.

([25]) Such evidence may include the findings of any investigation into the matter made by the party of the exporting shipbuilder, which will be considered by the investigating authority and made part of the investigation record.

6.1.1. Exporters or foreign producers receiving questionnaires used in an injurious pricing investigation shall be given at least 30 days for reply ([26]). Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2. Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3. As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the exporter and to the authorities of the exporting country and make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information as provided for in paragraph 5 below.

6.2. Throughout the injurious pricing investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3. Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in sub-paragraph 1.2.

6.4. The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5 and that is used by the authorities in an injurious pricing investigation, and to prepare presentations on the basis of this information.

6.5. Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it ([27]).

6.5.1. The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarisation is not possible must be provided.

6.5.2. If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorise its disclosure in generalised

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([26]) As a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the day on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting country.

([27]) Parties are aware that in the territory of certain parties, disclosure pursuant to a narrowly drawn protective order may be required.

or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct ([28]).

6.6. Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7. In order to verify information provided or to obtain further details, the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation. The procedures described in Addendum I shall apply to verifications carried out in exporting countries. The authorities shall, subject to the requirement to protect confidential information, make the results of any verifications available or provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Addendum II shall be observed in the application of this paragraph.

6.9. The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10. For the purposes of this agreement, 'interested parties' shall include:

(i) an exporter or foreign producer or the buyer of a vessel subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or domestic buyers of such vessels;

(ii) the government of the exporting country; and

(iii) a producer of the like vessel in the investigating country or a trade or business association a majority of the members of which produce the like vessel in the investigating country.

This list shall not preclude the investigating party from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.11. The authorities shall provide opportunities for buyers ([29]) of the vessel under investigation to provide information which is relevant to the investigation regarding injurious pricing, injury, causality and the elements set out in Article 5.2 (d).

6.12. The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable.

6.13. The procedures set out above are not intended to prevent the authorities of a party from proceeding expeditiously with regard to initiating an investigation, reaching determinations, whether affirmative or negative, or from applying measures, in accordance with relevant provisions of this agreement.

([28]) Parties agree that requests for confidentiality should not be arbitrarily rejected.
([29]) An alleged buyer may provide information on whether he is in fact a buyer.

Article 7

Imposition and collection of injurious pricing charges

7.1. The decision whether or not to impose an injurious pricing charge in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the injurious pricing charge to be imposed shall be the full margin of injurious pricing or less, are decisions to be made by the authorities of the investigating party. It is desirable that the imposition be permissive and that the charge be less than the margin, if such lesser charge would be adequate to remove the injury to the domestic industry.

7.2. The amount of the injurious pricing charge shall not exceed the margin of injurious pricing as established under Article 2.

7.3. If the party conducting the investigation determines that an injurious pricing charge is warranted, the party may require the shipbuilder to pay that charge to it 180 days after notice to the shipbuilder of the amount due. The shipbuilder shall be given a reasonably extended period to pay where payment in 180 days would render it insolvent or would be incompatible with a judicially supervised reorganisation, in which case the party may require interest to accrue, at CIRR of the currency of the charge, on any unpaid portion.

7.4. The obligation of a shipbuilder to pay the charge shall expire (i) if the shipbuilder voids the sale on which the charge was based or complies with the alternative equivalent remedy accepted by the investigating authority; or (ii) if the countermeasures, applied pursuant to Article 8(10), have expired.

Article 8

Public notice and explanation of determinations

8.1. When the authorities are satisfied that there is sufficient evidence to justify the initiation of an injurious pricing investigation pursuant to Article 5, the party the vessel of which is subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given. A public notice of the initiation of an investigation shall contain or otherwise make available through a separate report ([30]) adequate information on the following:

(i) the name and country of the shipbuilder and the buyers and a description of the vessel involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which injurious pricing is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time limits allowed to interested parties for making their views known.

([30]) Where authorities provide information and explanations under the provisions of this article in a separate report, they shall ensure that such report is readily available to the public.

8.2. Public notice shall be given of any determination, whether affirmative or negative. Each such notice shall set forth or otherwise make available through a separate report in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the party the vessel of which is subject to such determination and to other interested parties known to have an interest therein. A public notice of conclusion shall contain or otherwise make available through a separate report all relevant information on the matters of fact and law and reasons which have led to the imposition of measures, due regard being paid to the requirement for the protection of confidential information. The notice or report shall in particular contain the information described below as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and buyers:

(i) the name of the shipbuilder, buyer, applicant, and country of export;

(ii) a description of the type, purpose and size of the vessel;

(iii) the margin of injurious pricing established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination, as set out in Article 3; and

(v) the main reasons leading to the determination.

Article 9

Judicial review

Each party whose national legislation contains provisions on injurious pricing measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations. Such tribunals or procedures shall be independent of the authorities responsible for the determination in question.

Article 10

Injurious pricing action on behalf of a third country

10.1. An application for injurious pricing action on behalf of a third country shall be made by the authorities of the third country requesting action.

10.2. Such an application shall be supported by price information to show that a vessel is being or has been injuriously priced and by detailed information to show that the alleged sale at less than normal value is causing or has caused injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the buyer's country to obtain any further information which the latter may require.

10.3. The authorities of the buyer's country in considering such an application shall consider the effects of the alleged injurious pricing on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged injurious pricing on the industry's sales to buyers of the investigating country or even on the industry's total exports.

10.4. The decision whether or not to proceed with a case shall rest with the buyer's country. If the buyer's country decides that it is prepared to take action, the initiation of the approach to the Parties Group seeking its approval ([31]) for such action shall rest with the buyer's country.

Article 11

Consultations

Each party shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another party with respect to any matter affecting the operation of this Annex.

Article 12

Addenda

The Addenda to this Code constitute an integral part thereof.

Article 13

Non-retroactivity

This Annex is not applicable to vessels contracted for prior to the date of entry into force of the agreement, except for vessels contracted for after the opening of this agreement for signature and for delivery more than five years from the date of contract. Such vessels shall be subject to this Annex unless the shipbuilder can demonstrate that the extended delivery date was for normal commercial reasons and not to avoid the applicability of this Annex.

Addendum I — Procedures for on-the-spot investigations pursuant to Article 6(7)

1. Upon initiation of an investigation, the authorities of the exporting party and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting party should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting party before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained the investigating authorities should notify the authorities of the exporting party of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

([31]) Approval may be given by consensus minus the party of the exporting shipbuilder.

6. Visists to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if the investigating authorities notify the representatives of the government of the party in question and unless the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting party is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting countries and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

Addendum II — Facts available in terms of Article 6(8)

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the way in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the request for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the company to use for its response a computer system other than that used by the firm. The authority should not maintain a request for a computerised response, if the interested party does not maintain computerised accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerised accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties and which is supplied in a timely fashion, and, where applicable, supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, this should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e. g. computer tape) the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for rejection of such evidence or information should be given in any published findings.

7. If the authorities have to base their determinations, including those with respect to normal value, on information from a secondary source, including the information supplied in the request for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official statistics of sales to domestic buyers and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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ANNEX IV — DISPUTE SETTLEMENT PURSUANT TO ARTICLE 8

The following provisions and rules of procedure are applicable in the implementation of Article 8 of this agreement.

SECTION 1 — INITIATION OF A PANEL PROCEEDING

(1) A panel proceeding is initiated by a request to establish a panel, communicated in writing through diplomatic channels to the other party to the dispute ('responding party') and to the Parties Group, through its Secretariat, which shall act as Secretariat to the panel to be formed.

(2) The request shall identify the party initiating the establishment of a panel, the responding party and the specific measures at issue, and shall provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

(3) The responding party shall, within 10 days of receipt of the request, deliver a copy to any shipbuilder entitled to become a participant.

SECTION 2 — SHIPBUILDER PARTICIPANTS AND OTHER INTERESTED PARTIES

(1) A shipbuilder eligible under Article 8(3) of this agreement shall become a participant by submission to the other party and the panel, through its Secretariat, of a written statement of intent to participate within 15 days of receipt by the shipbuilder of notification of the request to establish a panel.

(2) Another party to the agreement wishing to make its views on the dispute known to the panel (hereafter an 'interested party') shall notify the panel, through its Secretariat, within 30 days of the date on which the Parties Group was notified of the request to establish an panel.

SECTION 3 — AGENTS AND SERVICE OF DOCUMENTS

(1) Each party to the dispute, shipbuilder participant, and other interested party shall designate an agent to represent it in the panel proceedings and shall communicate the name and address of that agent to the panel, through its Secretariat, and to the other parties and participants. A party to the dispute shall do so at the time it or its side appoints a member of the panel. An interested party or shipbuilder participant shall do so at the time of notification of its interest or intent to participate.

(2) Should a panel proceeding involve the disclosure of a shipbuilder's confidential business information, the panel may require that the participating shipbuilder's representatives not be employees of or otherwise under the shipbuilder's professional direction or control and that the representatives undertake to maintain the confidentiality of that information.

(3) Any document that is submitted by a party to the dispute or a shipbuilder participant during a panel proceeding shall be delivered to the panel, through its Secretariat, and at the same time, subject to provisions the panel may adopt to protect confidentiality, to the other parties to the dispute and other shipbuilder participants. The submitting party shall inform other interested parties of such submissions and, subject to requirements of confidentiality, shall make such documents available to other interested parties.

(4) Any document submitted by an interested party shall be delivered to the panel, through its Secretariat, to the parties to the dispute, and to any shipbuilder participant and other interested parties.

(5) Service of a document may be effected by delivery through diplomatic channels to a party and to the panel or by personal service, facsimile transmission or expedited international courier or expedited mail service, such as express mail, to the person and address designated in paragraph 1 of this Section. Service shall be deemed made when the document is received.

SECTION 4 — TIME LIMITS

(1) If the last day of any time period falls on a legal holiday, which means any day on which the offices of the government of any party to the dispute are officially closed, the time period is extended until the next working day.

(2) The panel, in consultation with the parties to the dispute, may modify the time periods provided in this Annex.

SECTION 5 — LANGUAGES

(1) Subject to an agreement of the parties to the dispute and any shipbuilder participant, the panel shall decide the language or languages in which proceedings shall be conducted. At least one official language of the OECD shall be used.

(2) If more than one language is used:

(a) any document submitted in the course of a panel proceeding which is not in an official language of the OECD being used for this procedure shall be accompanied by a translation into that official language. Documents submitted in such an official language of the OECD shall be translated into one or more of the other languages of the proceeding at the direction of the panel; and

(b) no less than 10 days before the oral hearing, each party to the dispute, other interested party and participating shipbuilder shall inform the Secretariat of the language or languages it or its witnesses will use at the hearing and simultaneous translation will be provided.

(3) Awards and decisions of the panel under Section 13 shall, if issued in one official language of the OECD, be promptly translated into the other by the Secretariat of the Parties Group at Parties Group expense.

SECTION 6 — FORMATION OF THE PANEL

(1) The panel shall consist of two members and a Chairman or, at the option of any party to the dispute, four members and a Chairman ('the panellists').

(2) Each party to the dispute shall appoint one member of the panel within 30 days of receipt by the responding party of the request to initiate a panel. If there are two or more parties on a side of a dispute, or a shipbuilder participant and one or more parties, the parties (and, subject to the consent of its party, participant) on that side shall jointly choose one member of the panel. The appointing party or side shall provide the name of such member of the panel to the Secretariat. If a party or side does not appoint a member within 30 days of receipt by the responding party of the request to

establish a panel, within seven days thereafter the Secretary-General of the OECD, after consultation with the party or side, shall select a member from a list of eligible panellists maintained by the Parties Group in accordance with paragraph 5 of this Section (hereinafter referred to as 'Parties Group list').

(3) Within 30 days of their appointment, the panel members shall jointly choose a Chairman and, where applicable, two other members of the panel from the Party Group list. If the two panel members are unable to agree upon a Chairman or any other members, the Secretary-General, in consultation with the two panel members selected pursuant to Section 6(2), shall select the Chairman or such other members of the panel from the Parties Group list within seven additional days. With the agreement of the parties to the dispute, the panel members or Secretary-General may select a Chairman and other members of the panel who are not on the Parties Group list.

(4) A vacancy on the panel shall be filled by the procedures applicable to that position pursuant to paragraphs 2 and 3 of this Section.

(5) Panellists shall be persons with demonstrated expertise in law, international trade and the subject matter of this agreement generally, and unaffiliated with any government. The list of eligible panellists shall be established by the Parties Group at its first meeting, and updated at its subsequent meetings, on the basis of nominations made by the parties and actions taken under subparagraph (e) below:

(a) each party may nominate up to four individuals who are qualified to serve as panellists;

(b) each nomination shall be submitted at least 60 days prior to consideration by the Parties Group and shall be accompanied by (i) biographical information stating the nominee's qualifications; and (ii) disclosure of any past or current financial interest in or affiliation with the shipbuilding and repair industry or employment with or work performed for a party;

(c) information provided in confidence under subparagraph (b) (ii), above, will be held in confidence by the recipients;

(d) each nominee will be included on the list upon a finding of eligibility by the Parties Group;

(e) if a party's nominee is not found to be eligible or withdraws, or is withdrawn by the nominating party before or after being listed, the nominating party may submit a new nomination, which shall be promptly considered by the Parties Group.

SECTION 7 — IMPARTIALITY AND INDEPENDENCE OF THE PANEL

(1) The parties and other participants shall respect the impartiality and independence of the Chairman and members of the panel.

(2) No panellist may have a financial interest in the matter, be employed by, or take instructions from, any party to the dispute.

(3) No panellist may be a national of any party to the dispute or, in the case of the EC, a national of an EC Member State, unless the other parties agree.

(4) The panellists shall avoid any conflict, or appearance of conflict of interest. Each panellist shall, upon appointment, certify in writing the absence of any conflict of interest and shall, at that time and throughout the proceedings, disclose any circumstances likely to give rise to justifiable doubts as to the panellist's impartiality or independence, including involvement in any matter known to be in dispute between parties under the agreement.

(5) Any party to the dispute may, at any time, challenge any panellist on the basis of a justifiable doubt as to impartiality, independence, or conflict of interest. The challenge shall be decided within 15 days of receipt of notice of a challenge. The challenged panellist may withdraw or be withdrawn by the appointing authority under Section 6 without any implication of acceptance of the validity of the grounds for the challenge. If the challenged appointment is not so withdrawn, it shall be terminated if such challenge is considered well founded by a panellist other than one appointed by the challenging party.

SECTION 8 — CONFIDENTIALITY

(1) Unless the parties to the dispute and the panel agree otherwise, only the panel and, if the parties to the dispute have authorised it to engage assistants, such assistants may be present during deliberations of the panel which shall be confidential.

(2) Confidential information submitted to the panel shall not be disclosed without formal authorisation from the person or authority providing the information.

(a) Upon request of the person or authority providing confidential information, the panel may (i) make disclosure of the information subject to a non-disclosure agreement; and (ii) limit disclosure to parties to the dispute, excluding any shipbuilder participants and interested parties.

(b) Where such information is requested from the panel by a party or shipbuilder participant, but release of such information by the panel is not authorised, a non-confidential summary of the information, authorised by the authority or person providing the information, will be provided.

(c) Confidential information may not be relied upon in support of any finding adverse to a party or shipbuilder participant whose representative was not given access to that information.

(3) The panel shall inquire into any allegation that a party or participant has failed to maintain the confidentiality of the proceeding and, if the panel determines that the party has failed to maintain confidentiality, the panel may make adverse inferences against the party or participant in its decision.

(4) The Chairman shall inquire into any allegation that another panellist has failed to maintain the confidentiality of the panel proceeding and, if the Chairman determines that the panellist has failed to maintain confidentiality, the Chairman may remove the panellist, who shall be replaced in accordance with Section 6 of these Rules.

(5) The other panellists shall inquire into any allegation that the Chairman has failed to maintain the confidentiality of the proceeding and if they determine that the Chairman has failed to maintain confidentiality, they may remove the Chairman, who shall be replaced in accordance with Section 6 of these rules.

(6) Parties shall provide for effective legal measures against their nationals or other persons in their jurisdiction for improper disclosure of confidential information obtained through such persons' participation in panel proceedings.

SECTION 9 — TERMS OF REFERENCE

The parties to the dispute shall, within 60 days of receipt of the request to establish the panel, jointly submit to the panel terms of reference briefly describing the issue or issues in dispute. If the parties are unable to agree to terms of reference, the panel shall have the following terms of reference:

'To examine, in light of the relevant provisions of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry, the matter identified in the request by (name of party) to establish a panel of (date) and to make such decisions as are provided for in that agreement.'

SECTION 10 — WRITTEN SUBMISSIONS

(1) The first written submission of each party to the dispute and other participant shall include a statement of facts, argument and documentary evidence in support of its position. The requesting party's first submission shall also state any remedy it seeks.

(a) The first written submissions of the requesting Party or side including a shipbuilder participant on that side of the dispute shall be made within 30 days after the selection of the Chairman, or after the submission of the panel's terms of reference, whichever is later.

(b) The first written submissions of the responding party or side including any shipbuilder participant on that side of the dispute shall be made within 30 days after the first written submissions of the requesting party or side.

(2) The second written submission of each party to the dispute and shipbuilder participant shall be made within 20 days of the first written submission of the responding party or side. It shall be limited to rebuttal of the arguments and evidence presented by the other side and shall include any supplemental supporting evidence.

(3) Written submissions of other interested parties shall be made concurrently with those of the party or side to which its position is closest.

(4) Within 20 days after oral hearing under Section 12, the parties to the dispute and any shipbuilder participant may provide supplementary submissions to the panel, including responses to any questions or requests for additional information from the panel.

SECTION 11 — PROVISIONAL SUSPENSION OR REDUCTION OF COUNTERMEASURES

(1) A request under Article 8, paragraph 10(b)(ii) shall set forth the evidence and argument pertaining to the likelihood of success on the merits and the irreparable harm that would be suffered by the shipbuilder absent the relief requested. Such request shall be served on the investigating party in accordance with Section 3 of this Annex.

(2) Within 20 days after the date of service, the investigating party shall submit its response to the request for provisional relief.

(3) Within 20 days after submission of the response, the panel shall issue its decision on the request for provisional relief. The panel's decision shall include factual findings and conclusions in accordance with Section 14 of this Annex.

(4) Any provisional relief granted by the panel shall terminate automatically when the panel issues its decision in the underlying matter. If the panel sustains imposition of countermeasures, the period of countermeasures established pursuant to Article 8(10) of the Agreement will be deemed tolled

during any period in which countermeasures were provisionally suspended. Nothing in this Section affects the Panel's authority under Article 8(10)(b)(i) of the agreement to consider claims concerning the imposition of countermeasures.

SECTION 12 — HEARINGS

(1) A hearing shall be held within 21 days after the second submissions are due.

(2) All panellists shall attend the hearing.

(3) The Secretariat shall give the Parties 14 days' notice of the place, date, and time of the hearing.

(4) Each party or side shall have equal time to present evidence and argument at any hearing. The amount of time allocated for the hearing shall be determined by the panel in consultation with the parties or sides to the dispute. Shipbuilder participants shall, subject to the consent of its party, be entitled to present evidence and argument at the hearing within the time allocated to their side. The panel, in consultation with the parties to the dispute, may provide an opportunity for other interested party to present argument.

SECTION 13 — EVIDENCE

(1) If the dispute involves a measure of support in Annex I, or a countermeasure as provided under Article 8(9)(b) and (10)(b)(i), the following provisions apply:

(a) The requesting party or side shall present evidence sufficient to create a prima facie case in support of the allegations.

(b) The responding party shall be required to present evidence sufficient to prove that the allegations are without support in fact.

(c) At any time during a panel proceeding the panel may require the parties to produce documents, exhibits or other evidence within such time as the panel shall determine.

(d) If a party or other participant refuses to supply information requested by the panel, the panel shall use the best information available to it.

(e) The panel shall determine the admissibility, relevance, materiality and weight of the evidence offered.

(f) In taking all appropriate steps to establish the facts, the panel may, when necessary, request views of neutral experts.

(g) If witnesses are to be heard, at least 10 days before the hearing each party to the dispute and shipbuilder participant shall communicate to the panel and the other party or side the names and addresses of any witnesses on behalf of the party or participant, and the subject upon which such witnesses will give their testimony.

(h) Testimony of witnesses may also be presented in the form of written statements signed by them.

(i) After the panel has closed the hearing, no party may present any further evidence.

(2) If the dispute involves the levy by a party of an injurious pricing charge under Annex III, the following provisions apply:

(a) the levying party shall preserve the record of the injurious pricing proceeding for the purposes of review by the panel. Unless otherwise stipulated by the parties to the dispute, or by the shipbuilder and the party levying the charge, the record shall consist of:

(i) a copy of all information presented to or obtained by the authorities concerned during the course of the proceeding under Annex III, including all governmental memoranda that reflect the analysis of the law and the facts and are relied upon in the decision-making process; and

(ii) a copy of the determination and of all transcripts or records of conferences or hearings;

(b) the levying party shall submit a detailed index to the record and shall also make available the record to the other party or parties to the dispute, to any participating shipbuilder and to the panel, within 45 days of the request to establish a panel. The record shall remain available throughout the panel proceedings at a convenient site suitably equipped for the purposes of this Annex. Any party or participating shipbuilder shall be entitled to copy any portion of the record and may submit such record to the panel. The levying party shall submit any portion of the record requested by the panel. If the lack of availability does not permit efficient panel proceedings, the panel shall consider the extension of any period set out in this Annex. This subparagraph is subject to Section 8(2);

(c) in accordance with Article 8(6) of this agreement, the panel shall examine the matter on the basis of the facts made available in conformity with appropriate domestic procedures to the authorities of the investigating party. If required by considerations of fairness, the panel may send a matter back to the investigating authority for reconsideration in light of evidence not made available during the investigation, provided that the evidence was in existence at the time of the investigation but could not then, with due diligence, have been made available (1).

SECTION 14 — DECISIONS

(1) Any award or decision of the panel shall be made by a majority of the panellists.

(2) Any panel decision shall include factual findings, conclusions, and reasons therefor.

(3) The panel shall give due weight to any advisory opinion and shall take as conclusive any final and binding opinion given by the Parties Group under Article 5(2) of the agreement.

(4) Within 30 days from the closing of the hearing, the panel shall present to the parties to the dispute and other participants its preliminary decision.

(5) Each party or side and any shipbuilder participant shall be afforded 20 days in which to submit written objection to any portion of the panel's preliminary decision with which the party, side or participant disagrees.

(6) Upon receipt of any objections, the panel may solicit additional written views of any party or other participant and shall consider its preliminary decision.

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(1) This provision does not authorise sending a matter for reconsideration in light of expert studies and reports completed after the investigation, based on evidence which would have been available with due diligence for such purposes during the investigation.

(7) Within 180 days from the selection of the Chairman, the panel shall submit its final written decision.

(8) Unless the parties reach an alternative resolution to the dispute, the decision of a panel shall be made public 15 days after the panel issues the decision.

SECTION 15 — COSTS

The parties to the dispute shall bear the costs of the proceedings, as allocated by the panel.

SECTION 16 — GENERAL PROVISIONS

(1) The panel may supplement the rules governing its procedures, consistently with Article 8 of the agreement and the other terms of this Annex.

(2) There shall be no ex parte communications between the panel and any party, participant, expert or witness.

(3) A panel which as issued a decision requiring action by a party or a shipbuilder shall remain constituted until the decision has been complied with or for a reasonable period of time following the compliance deadline for purposes of disputes which may be submitted regarding compliance, including countermeasures.

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UNDERSTANDING ON EXPORT CREDITS FOR SHIPS

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UNDERSTANDING ON EXPORT CREDITS FOR SHIPS

1. For any contract relating to any new sea-going ship or any conversion of a ship (1) (2) (3) to be negotiated from the entry into force of the understanding onwards, participants in the understanding agree to abolish existing official facilities (4) and to introduce no new official facilities for export credits on terms providing:

(i) a maximum duration exceeding 12 years from delivery and repayment other than by equal instalments at regular intervals of normally six months and a maximum of 12 months;

(ii) payment by delivery of less than 20 per cent of the contract price;

(iii) an interest rate (5) of less than the commercial interest reference rate [CIRR] (6) of the currency of the credit (*).

2. The minimum interest rate will apply to the credit granted with official support by the shipbuilder to the buyer (in a supplier-credit transaction) or by a bank or any other party in the shipbuilder's country to the buyer or any other party in the buyer's country (in a buyer-credit transaction) whether the official support is given for the whole amount of the credit or only part of it.

3. The minimum interest rate will also apply to the credit granted with support by governments participating in the understanding, in the shipbuilder's country to the shipbuilder or to any other party,

(*) See also Annex I.

to enable credit to be given to the shipowner or to any other party in the shipowner's country, whether the official support is given for the whole amount of the credit or only part of it.

4. In so far as other public bodies participate in measures to promote exports, participants agree to use all possible influence to prevent the financing of exports on terms which contravene the above principles.

5. Concerning the rule that governments (or special institutions controlled by governments) should not provide official export credit guarantee or insurance programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes, participants agree that the rule should cover ships also.

6. Any participant in the understanding desiring, for genuine aid reasons, to concede more favourable terms in a particular case is not precluded from doing so, provided that:

(a) adequate notification, as specified in paragraphs A and C of Annex II and paragraphs 15(c) and (d), 17 and 18 of Annex III is given to all the parties to the understanding;

(b) the concessionality level for tied and partially untied aid — as defined in paragraphs 24(i) and 24(n) and notes 12 to 15 of Annex III — is at least 50 per cent for LLDCs and at least 35 per cent for other countries of final destination; paragraph 24(d)(3) of Annex III applies;

(c) the terms comply with the guidelines for tied and partially untied aid and the procedures are followed as contained in paragraphs 7(b), 8, 10(b) 12(b), 14, 15(e), 19, 24(d)(3), 24(i), notes 5 to 8, the Protocol, Appendix I, and Appendix II of Annex III;

(d) confirmation is provided that the ship is not to be operated under an open registry for the duration of the credit and that appropriate assurance has been obtained that the ultimate owner resides in the receiving country, is not a non-operational subsidiary of a foreign interest and has undertaken not to sell the ship without his government's approval.

7. The participants acknowledge that the invocation of paragraph 14(a)(3) of Annex III will be unusual and infrequent. Where a party finds that usage of paragraph 14(a)(3) is not unusual and infrequent, it may request that the Parties Group of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry (hereafter referred to as the 'agreement') immediately examine the situation with a view to taking a decision on whether corrective action is necessary or whether the agreement should be amended in accordance with its Article 11. Pending conclusion of this examination, which should be accomplished within one year, participants shall make best efforts not to commit to any transaction under 14(a)(3) of Annex III. If after one year, no acceptable corrective measures are agreed upon, participants will again have the possibility of invoking overriding non-trade reasons.

8. A participant has the right to match credit terms and conditions notifiable under clause 6 or 9 as well as credit terms and conditions offered notifiable under clause 6 or 9 as well as credit terms and conditions offered by a non-participant. The validity of a matching commitment may not exceed the termination date of the commitment being matched. Participants shall match by offering terms that comply with the understanding, unless the initiating offer does not comply with the understanding. A participant intending to match credit terms and conditions:

(a) notified by another participant shall follow the procedures set forth in:

(i) paragraph 16 (a) of Annex III, if clause 6 or 9 of this understanding applies to the initiation offer;

(ii) paragraph 16 (c) of Annex III, when the initiating offer is a non-conforming prior commitment;

(b) offered by a non-participant, shall follow the procedures set forth in paragraph 16 (b) of Annex III.

9. Notwithstanding the operative provisions of the Protocol and of Appendix I to Annex III, if a participant intends to support terms and conditions not in conformity with clause 1 of the understanding and not violating the no-derogation engagement in paragraph 12(a) of Annex III, the participant shall give adequate notice as specified in Annex III and in Annex II of the understanding.

10. Any participant in the understanding may obtain information from any other participant on the terms of any official support for an export contract in order to ascertain whether the terms contravene the understanding. Participants undertake to supply all possible information requested with all possible speed. According to the rules and practices of the OECD, any participant may ask the Secretary-General to act on its behalf in the aforementioned matter and to circulate the information obtained to all participants in the understanding.

11. Each participant undertakes to notify the Secretary-General of its system for the provision of official support and of the means of implementation of the understanding.

12. The participants in the understanding will closely cooperate with the participants in the arrangement, with the view to ensure consistent treatment of matters of mutual concern. The chairman of the participants in the arrangement will be invited to participate in relevant discussions of the Understanding Group.

13. The understanding becomes effective upon entry into force of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry. Participants are the Parties to that agreement, participants in the understanding on export credits for ships (C(81)103(Final)) which have accepted the current revisions, and any other countries with a shipbuilding and repair capability which have accepted the understanding upon invitation to do so by the other participants.

14. The understanding shall be subject to review as often as requested by participants and, in any case, at intervals not exceeding one year. At such a review, participants may adopt amendments to the understanding which will enter into force on the date decided by the participants at the time of adoption of the amendment, unless any participant has notified the Secretary-General of an objection. A participant, not party to the agreement, may withdraw from the understanding after one year's notice of its intention to do so. Within this period, at the request of any of the participants, there shall be a meeting of the participants to review the understanding, and any other participant, not party to the agreement, on notification to its partners, may withdraw from it at the same effective date as the participant which first gave notice.

Notes and references

(1) The understanding covers any new sea-going vessel of 100 gt and above used for the transportation of goods or persons, or for the performance of a specialised service (for example, fishing vessels, fish factory ships, ice breakers and as dredgers, that present in a permanent way by their means of propulsion and direction (steering) all the characteristics of self-navigability in the high sea), tugs of 365 Kw and over and to unfinished shells of ships that are afloat and mobile. The Understanding does not cover military vessels. Floating docks and mobile offshore units are not covered by the

understanding, but should problems arise in connection with export credits for such structures, the Council working party on shipbuilding, after consideration of substantiated requests by any participating governments, may decide that they shall be covered.

(2) Ship conversion means any conversion of sea-going vessels of more than 1 000 gt on condition that conversion operations entail radical alterations to the cargo plan, the hull or the propulsion system.

(3) Hovercraft-type vessels are not included in the understanding. Participants are allowed to grant export credits for hovercraft vessels on equivalent conditions to those prevailing in the understanding. They commit equivalent conditions to those prevailing in the understanding. They commit themselves to apply this possibility moderately and not to grant such credit conditions to hovercraft vessels in cases where it is established that no competition is offered under the conditions of the understanding.
In the understanding, the term 'hovercraft' is defined as follows: an amphibious vehicle of at least 100 tons designed to be supported wholly by air expelled from the vehicle forming a plenum contained within a flexible skirt around the periphery of the vehicle and the ground or water surface beneath the vehicle, and capable of being propelled and controlled by air crews or ducted air from fans or similar devices.
It is understood that the granting of export credits at conditions equivalent to those prevailing in the understanding on export credits for ships should be limited to those hovercraft vessels used on maritime routes and non land routes, except for reaching terminal facilities standing at a maximum distance of 1 kilometre from the water.

(4) Official facilities are those which enable credits to be insured, guaranteed or financed by governments, by governmental institutions, or with any form of direct or indirect governmental participation.

(5) Interest excludes: any payment by way of premium or other charge for insuring or guaranteeing supplier credits or financial credits; any other payment by way of banking fees or commissions associated with the export credit, other than annual or semi-annual bank charges payable throughout to the repayment term; and withholding taxes imposed by the importing country.

(6) As defined in Appendix III and the note to Annex III.

(7) Clauses 1 to 4 imply that all credit conditions of clause 1 shall be applied as a set of binding requirements to any ship export credit with official support, including the suppliers' credit transaction between the exporter and the buyer.

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ANNEX I — COMMITMENTS FOR FURTHER WORK AND TRANSITIONAL ARRANGEMENT

Commitments for further work

The participants in the understanding request the participants in the arrangement on guidelines for officially supported export credits to make a proposal for a 12-year CIRR and to base the determination on the CIRR system as in force at present with as few modifications as necessary. Thereafter the participants in the understanding will seek to determine before 31 December 1994 the 12-year CIRR based on the proposal by the participants in the arrangement. The Republic of Korea should be invited to participate in the discussions of the participants in the arrangement on this issue.

Participants in the understanding on export credits for ships will cooperate with the participants of the arrangement on guidelines for officially supported export credits in order to ensure coherence between the understanding and the arrangement on guidelines for officially supported export credits.

In the context of this cooperation, the participants agree:

(a) to continue discussions on the disciplines governing the use of aid credits for ship exports with the view of strengthening the disciplines governing the use of aid credits for ship exports;

(b) to develop, on the basis of experience, an illustrative list of types of ships which are generally considered non-commercially viable;

(c) to discuss questions related to second windows in conjunction with the study on pure cover;

(d) to discuss questions related to cosmetic interest rates. The participants will make best efforts to ensure that during these discussions cosmetic interest rates will not be used;

(e) to incorporate into the understanding the relevant results of the study on premiums in OECD, with a view to eliminate trade distortions, whether caused by premiums or related conditions.

Pure cover

1. Participants in the understanding agree to undertake discussions in 1994 on issues related to 'pure cover' transactions, where the sole official support is a guarantee. A report recommending solutions to this question shall be submitted within two years after entry into force of the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry ('the agreement'), or as soon thereafter as possible. Participants will cooperate in this review by providing information on a quarterly basis on all shipbuilding contracts based on loan guarantees on which the interest rates are effectively less than CIRR.

2. Any participants may ask for consultation with another participant and request, through the Secretariat, discussions in the Parties Group if it finds the elements of the pure cover transactions are not within the scope of the agreement.

3. During the two-year period following entry into force of the agreement, transactions on commercial interest terms other than CIRR will be permitted provided that the guarantee does not confer a benefit within the general sense of that term used in the agreement.

4. Thereafter, such transactions are not permitted, unless all participants agree to extend the two-year period.

5. A participant who intends to support pure cover transactions shall give prior notification, at least 10 calendar days before issuing any commitment, to all other participants in the understanding.

The notification shall be in accordance with Annex II, and should be limited to the following items: 1 to 7(a), 8(a) and 8(b).

6. A participant shall upon request by another participant, promptly and adequately respond to questions in accordance with Appendix I to Annex III (framework for information exchange).

Guarantees

1. In order to improve transparency participants shall provide annually information through the Secretariat on:

(a) the schemes in force for providing official guarantees and insurance for export credits for ships; and

(b) the following data for the schemes described in (a):

— annual results,

— claims paid,

— income from premiums and fees,

— income from recoveries

and other appropriate information as needed.

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ANNEX II — STANDARD FORM FOR NOTIFICATION REQUIRED UNDER CLAUSES 6, 8 AND 9

For notifications under Clauses 6, 8 and 9 the following particulars shall be communicated by means of instant communication to all participants and the Secretariat in the form set out below:

1. name of authority/agency responsible under the understanding for making notifications;

2. reference number (initials of the country notifying, year);

3. we are notifying under:

   — Clause 6: aid financing (15(c); 15(d));

   — Clause 8: matching (16(a)(1)(i); 16(a)(1)(ii); 16(a)(3); 16(a)(4); 16(b)(2); 16(c)(3)(i); 16(c)(3)(ii));

   — Clause 9: derogation (15(a));

   — Clause 5 in Annex I: pure cover transaction;

   — Paragraph 15(b) of Annex III: Deviation;

4. country of buyer/borrower;

5. name, location and status (public/private) of buyer/borrower;

6. number and type of ship(s) (dwt, grt, and/or kw). Closing date of tender, if relevant, expiry date of credit line;

7. (a) contract value;

   (b) value of the credit or credit line;

   (c) value of exporter's national share;

   (d) minimum contract value of credit line.

   These values shall be stated as follows:

   — the exact amount in the denominated currency for a line of credit;

   — these values pertaining to an individual vessel or contract shall be disclosed in terms of value ratings in accordance with the following scale in special drawing rights (SDRs):

     Category I: up to 1 000 000 SDRs

     Category II: from 1 000 000 to 2 000 000 SDRs

     Category III: from 2 000 000 to 3 000 000 SDRs

     Category IV: from 3 000 000 to 5 000 000 SDRs

Category V: from 5 000 000 to 7 000 000 SDRs

Category VI: from 7 000 000 to 10 000 000 SDRs

Category VII: from 10 000 000 to 20 000 000 SDRs

Category VIII: from 20 000 000 to 40 000 000 SDRs

Category IX: from 40 000 000 to 80 000 000 SDRs

Category X: from 80 000 000 to 120 000 000 SDRs

Category XI: from 120 000 000 to 160 000 000 SDRs

Category XII: from 160 000 000 to 200 000 000 SDRs

Category XIII: from 200 000 000 to 240 000 000 SDRs

Category XIV: from 240 000 000 to 280 000 000 SDRs

Category XV: from 280 000 000 SDRs (*)

When using this scale please indicate currency of the contract;

8. credit terms which reporting organisation intends to support (or has supported):

   (a) cash payments;

   (b) repayment term (including starting point of credit, frequency of instalments and whether these instalments will be equal in amount);

   (c) interest rate;

9. any other relevant information including references to related cases and when relevant:

   (a) justification for matching (specify reference number of notification matched or other references);

   (b) the overall concessionality level of the tied and partially untied aid financing calculated in accordance with paragraph 24 (n) and the discount rate used to calculate that concessionality level;

   (c) treatment of cash payments in the calculation of the concessionality level;

   (d) development aid or pre-mixed credit or associated finance;

   (e) Restrictions on the use of credit lines.

Collection of information under clause 10

Any request for information which one participant wishes to obtain from another should be made directly to the country in question, specifying the motives for the request, with a copy to the Secretariat. The reply, which should be made with all possible speed, should also be copied to the Secretariat.

(*) Indicate actual level within multiples of 40 000 000 SDRs.

Settlement of differences between two participants

Prior notifications, and any ensuing discussion, will normally be by means of instant communication.

Any difference arising between two participants should, if possible, be dealt with bilaterally, the Secretariat being kept informed as appropriate.

The Secretary-General's intervention would be solicited in accordance with Clause 10 only if the bilateral approach did not provide a satisfactory solution.

Changes in systems for the provision of official support for ship export transactions and in the means of implementation of the understanding

In accordance with Clause 11 of the understanding, participants are required to notify the Secretary-Genaral of all changes of this kind.

Such notification must be made automatically, i.e. immediately as a change occurs, or beforehand if possible, so that the Secretariat can issue information without delay.

ANNEX III — PROVISIONS INCORPORATED FROM THE ARRANGEMENT ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS

Paragraph 7 (b): *[Maximum period of validity of commitments (*), prior commitments and certain aid commitments]*

(b) Participants shall not fix for more than one year credit terms and conditions for individual tied or partially untied aid credits that have a concessionality level below the appropriate minimum in paragraph 12(b)(i) below. Aid protocols, aid credit lines or similar agreements may not be valid for more than two years after their signature. Extension of a concessional credit line shall be notified as if it were a new transaction with a note, explaining that it is an extension and that it is renewed at terms allowed at the time of the notification of the extension.

Paragraph 8: *[Trade related concessional or aid credits (5)]*

(a) Eligibility

This sub-paragraph does not apply to concessional or aid credits whether tied or partially untied (4) with a value of less than SDR 2 million or to those where the concessionality level is 80 per cent or more, except for concessional or aid credits or grants that form part of an associated (mixed) credit package, which remain subject to the provisions of footnote 12 of Annex III. In any case, derogation from these rules will be possible if the participants agree through a common line procedure (6).

(i) Tied and partially untied concessional or aid credits, except for credits to LLDCs, shall not be extended to public or private projects that normally should be commercially viable if financed on market or understanding terms.

The key tests for such aid eligibility are:

— whether the project is financially non-viable, i.e. does the project lack capacity with appropriate pricing determined on market principles, to generate cash flow sufficient to cover the project's operating costs and to service the capital employed, or

— whether it is reasonable to conclude, based on communication with other participants, that it is unlikely that the project can be financed on market or understanding terms.

The above tests are intended to describe how a project should be evaluated to determine whether it should be financed with such aid or with export credits on market or understanding terms. Through the consultation process, a body of experience is expected to develop over time that will more precisely define, for both export credit and aid agencies, ex ante guidance as to the line between the two categories of projects.

(ii) There shall be not tied or partially untied concessional or aid credits to countries whose per capita GNP would make them ineligible for 17 or 20 year loans from the World Bank (7).

(b) Procedure for derogation:

participants may derogate from the rules in paragraph 8(a) above by following the procedures in paragraph 14.

(c) Notification procedure

(i) If a participant intends to support trade related tied or partially untied aid financing:

— with a value of SDR 2 million or more and a concessionality level of 80 per cent or more, or

— with a value of less than SDR 2 million and a concessionality level of 50 per cent or more;

the participant shall give notification in accordance with the procedures in paragraph 15 (d) to all participants and the Secretariat.

(ii) if a participant intends to support trade related untied, tied or partially untied aid credits not covered by (i) above the participant shall, without prejudice to official development assistance procedures administered by the Development Assistance Committee, give notification in accordance with the procedures set forth in paragraph 15(c), if the concessionality level (*) is less than 80 per cent. Concessional or aid credits or grants that form part of an associated (mixed) credit package shall remain subject to the provisions of note 12 of Annex III.

(iii) No notification is required for untied aid financing with a value of less than SDR 2 million and a grant element of more than 50 per cent.

(iv) Exception for small projects and technical assistance

The reporting requirements of paragraphs 12(b) and 15(c) and (d) do not apply to the following transactions:

— aid financing where the official development aid component consists solely of technical cooperation that is less than either 3 per cent of the total value of the transaction or one million US dollars, whichever is lower, and

— capital projects of less than one million US dollars that are funded entirely by development assistance grants.

Paragraph 10: *[Best endeavours]*

(a) Objectives

1. The guidelines set out in this understanding represent the most generous credit terms and conditions that participants may offer when giving official support. All participants recognise the risk that in the course of time these guidelines may come to be regarded as the normal terms and conditions. They therefore undertake to take the necessary steps to prevent this risk from materialising.

2. In particular, if in an individual branch of trade or industrial sector to which this understanding applies, credit terms and conditions less generous to buyers than those set forth above in the understanding are customary, participants shall continue to respect such customary terms and conditions and shall do everything in their power to prevent these from being eroded as a result of recourse to the credit terms and conditions set forth in this understanding.

(b) Firm undertaking

In keeping with the objectives in (a) above, the participants, recognising the advantage which can accrue if a clearly defined common attitude toward the credit terms and conditions for a particular transaction can be achieved, firmly undertake:

(1) to respect strictly the existing procedures for notification and in particular to give prior notification at the latest at the stipulated moment before commitment as well as to supply all the information in the detail called for in the form set forth in Appendix I of this Annex III;

(2) to make maximum use of the framework for information exchange (see Appendix I of this Annex III) at an early stage with a view of forming a common line towards credit terms and conditions for particular transactions;

(3) to consider favourably face-to-face consultations if a participant so requests in the case of important transactions as set out in the Protocol to this Annex III.

Paragraph 11: [Matching]

A participant has the right to match credit terms and conditions notifiable under paragraph 15, as well as credit terms and conditions offered by a non-participant. The validity of a matching commitment may not exceed the termination date of the commitment being matched. Participants shall match by offering terms that comply with this understanding unless the initiating offer does not comply with this understanding. A participant intending to match credit terms and conditions:

(a) notified by another participant shall follow the procedures set forth in paragraph 16(a) or (c) as appropriate;

(b) offered by a non-participant shall follow the procedures set forth in paragraph 16(b).

Paragraph 12: [No-derogation engagement]

Participants shall not:

(a) derogate with respect to maximum repayment terms (whatever the form of support), to minimum interest rates or to the limitation of the validity of commitments to a maximum of six months or extend the relevant repayment term through an extension of the grace period before the start of the repayment beyond the normal practice of six months after the starting point; or

(b) avail themselves of the possibilities provided under paragraph 15 of this Annex III to support tied or partially untied aid financing that:

(i) has a concessionality level of less than 35 per cent or 50 per cent if the beneficiary country is a least-developed country (LLDC) as defined by the United Nations, or

(ii) does not conform to the provisions on eligibility for aid financing in paragraph 8(a)(ii) of this Annex III (6).

Paragraph 14: [Consultations]

(a) (1) Any participant seeking clarification about possible trade motivation for a tied or partially untied aid credit may request that a full aid quality assessment (see Appendix II of this Annex III) be

supplied. Any participant may request consultations ([8]) in accordance with paragraph 14(a)(2) to (a)(4) below with other participants, including face-to-face consultations, to discuss:

— first, whether an aid offer meets the requirement of the rules in paragraph 8 (a) above,

— if necessary, whether an aid offer is justified even if the requirements of the rules in 8 (a) are not met.

(2) The consultation shall be completed and the findings on both questions in 1 above notified by the Secretariat to all participants at least 10 working days before the earlier of bid closing date or commitment date. If there is disagreement among the consulting parties, the Secretariat shall invite other participants to express their views within five working days. It shall report these views to the notifying participant, who should reconsider going forward if there appears to be no substantial support for an aid offer.

(3) A donor wishing to proceed with a project despite the lack of substantial support shall provide prior notification to other participants and shall, in a letter to the Secretary-General of the OECD, outline the results of the consultations and explain the overriding non-trade related national interest that forces this action. The participants expect that such an occurrence will be unusual and infrequent.

(4) The Secretariat shall monitor the progress and results of the consultation.

(b) There shall be consultation ([8]) for all offers of tied or partially untied concessional or aid credits for projects larger than SDR 50 million with a concessionality level of less than 80 per cent. Concessional or aid credits or grants that form part of an associated (mixed) credit package shall remain subject to the provisions of note 12 of this Annex III. In such consultation, special weight shall be given to the expected availability of financing at market or understanding terms when considering the appropriateness of such aid credits.

Paragraph 15: *[Prior(*) and prompt(*) notifications]*

(a) Derogations: procedure for prior notification and discussion

(1) If a participant intends to take the initiative to support terms and conditions not in conformity with this understanding, the participant shall notify all other participants of the terms and conditions it intends to support at least 10 calendar days before issuing any commitment. If any other participant requests a discussion during this period, the initiating participant shall wait an additional 10 calendar days before issuing any commitment on such terms. Normally this discussion will be by means of instant communication.

(2) If the initiating participant moderates or withdraws its intention to support the notified non-conforming terms and conditions, it must immediately inform all other participants accordingly.

(3) A participant intending to match notified derogating terms and conditions shall follow the procedure set forth in paragraph 16(a)(1).

(b) Deviations: procedure for prior notification without discussion

(1) A participant shall notify, at least 10 calendar days before issuing any commitment, all other participants of the terms and conditions if it intends:

(iv) to support, for any kind of ship to which the OECD understanding on export credits for ships applies, credit terms and conditions that would be more favourable than those credit terms and conditions permitted by the arrangement on guidelines for officially supported export credits.

(2) If the initiating participant moderates or withdraws its intention to give such support to the notified deviating credit conditions it must immediately inform all other participants accordingly.

(3) A participant intending to match notified deviating terms and conditions shall follow the procedure set forth in paragraph 16(a)(2).

(c) Procedures for prior notification of aid financing

The procedures set out in paragraph 15(b) shall apply where a participant intends to provide or support a transaction covered by paragraph 8(c)(ii) above; except that wherever paragraph 15(b) refers to a period of 10 calendar days, a period of 30 working days before bid closing date or commitment (*), whichever comes first shall apply and that participants intending to match shall use the procedures of paragraph 16(a)(3). Notifications according to this paragraph cannot substitute procedures for derogation in paragraph 8(b).

(d) Procedure for prompt notification (*)

As soon as a participant commits itself to support a transaction covered by paragraph 8(c)(i) above, the participant will promptly notify all other participants accordingly.

(e) Tying status

Any participant may request additional information relevant to the tying status of any credit.

Paragraph 16: *[Procedures for matching]*

(a) Matching terms and conditions notified in accordance with paragraph 15

(1) Matching of notified derogations: on and after the expiry of the first 10 calendar day period referred to in paragraph 15(a)(1) if no discussion is requested (or on and after the expiry of the second 10 calendar day period if discussion is requested) and unless the participant intending to match has received notice from the initiating participant that the latter has withdrawn its intention to support non-conforming terms and conditions, any participant will have the right to support:

(i) in a case of 'identical matching', terms and conditions that include the identical non-conforming element but that otherwise conform to the understanding; provided that the matching participant gives as early as possible notification of its intention to match, or

(ii) in a case of 'other support' prompted by the initial derogation, any other non-conforming element of the terms subject to the restrictions of paragraph 11; provided that the responding participant introducing a fresh derogation, initiates a five calendar day prior notification and five calendar day discussion procedure and awaits its completion. This period can run concurrently with that of the prior notification and discussion procedure initiated by the originally derogating participant but cannot elapse before the end of the applicable 10 or 20 calendar day period referred to under paragraph 15(a)(1).

(2) Matching of notified deviations: on and after the expiry of the 10 calendar day period referred to in paragraph 15(b)(1) and unless the matching participant has received notice from the initiating participant that the latter has withdrawn its intention to support the terms and conditions notified in accordance with paragraph 15(b)(1), any participant will have the right to support:

(i) in a case of 'identical matching', terms and conditions that include the identical element notified in accordance with paragraph 15(b)(1) but that otherwise conform to the understanding; provided that the matching participant gives notification as early as possible of its intention to match.

(ii) in a case of 'other support', any other element of the terms which does not conform to the understanding subject to the restrictions of paragraph 11; provided that the responding participant initiates a five calendar day prior notification procedure without discussion and awaits its completion. This period may run concurrently with that of the prior notification procedure started by the initiating participant, but may not elapse before the end of the 10 calendar day period referred to under paragraph 15(b)(1).

(3) Matching of a prior notification of aid financing: the procedures set out in paragraph 16(a)(2) shall apply where a participant intends to match aid financing; except that where paragraph 16(a)(2) refers to a period of 10 calendar days, a period of 30 working days before bid closing date or commitment, whichever comes first, shall apply.

(4) Matching of a prompt notification: no prior notification need be given if a participant intends to match terms and conditions that were subject to a prompt notification according to paragraph 15(d).

(5) Discount rate in matching: in matching aid financing, identical matching means matching with an identical concessionality level recalculated with the discount rate in force at the time of matching.

(b) Matching export terms and conditions offered by a non-participant

(1) Before considering meeting non-conforming terms and conditions assumed to be offered by a non-participant, a participant shall make every effort to verify that these terms are receiving official support. The participant shall inform all other participants of the nature and outcome of these efforts.

(2) A participant that intends to match non-conforming terms offered by a non-participant shall follow the prior notification and discussion procedure under paragraph 15(a)(1).

(c) Matching non-conforming prior commitments

(1) A participant intending to match a prior commitment shall make reasonable efforts to determine whether the non-conforming terms and conditions of the individual transaction or credit line in question will be used to support a particular transaction. This participant will be considered to have made such reasonable efforts if it has informed by means of instant communication the participant assumed to offer such non-conforming terms and conditions of its intention to match but in reply to the instant communication has not been informed within three working days, exclusive of the day of reception, that this prior commitment will not be used to support the transaction in question.

(2) A prior credit line may be matched by an individual transaction or by means of a credit line. In both cases, the dates of expiry of the matching offer shall not be later than that of the credit line being matched.

(3) A participant intending to match another participant's non-conforming prior commitment shall, in the case of:

(i) 'identical matching', follow the procedure set forth in paragraph 16(a)(1)(i) when matching a derogation and paragraph 16(a)(2)(i) when matching a deviation;

(ii) 'other support', follow the procedure set forth in paragraph 16(a)(1)(ii) when matching a derogating prior commitment and the procedure set forth in paragraph 16(a)(2)(ii) when matching a deviating prior commitment.

Paragraph 17: [Information on commitments]

As soon as a participant commits credit terms and conditions that it had notified in accordance with paragraph 15 or 16, it shall, in all cases, inform all other participants accordingly by including the notification reference number on the relevant creditor reporting system (CRS) 1c form.

Paragraph 18: [Information to be supplied under the notification and matching procedures]

The notifications called for by the above procedures shall be made in accordance with and contain the information set out in the 'standard form' in Annex II and be copied to the Secretariat of the OECD.

Paragraph 19: [Monitoring]

The Secretariat shall monitor the implementation of the understanding.

Paragraph 24(d)(3): [Definitions and interpretations: relay countries]

In the case of an export through a relay country, the relevant repayment term and interest rate are those corresponding to the country of final destination in cases:

(i) where the 'relay country' makes payment, if and when received from the country of final destination, to the exporting country on the basis of the latter's portion in the total export value; or

(ii) where there is security or payment by the country of final destination.

Paragraph 24(i): [Definitions and interpretations tied aid financing]

Tied aid financing ([10]) is defined as loans or grants or associated financing packages involving a concessionality level greater than 0 % that is in effect tied to procurement of goods and services from the donor country. Partially untied aid financing ([10]) is defined as loans or grants or associated financing packages involving a concessionality level greater than 0 % that is in effect tied to procurement of goods and services from the donor country and from a restricted number of countries ([11]).

(1) Such financing can take the form of either:

(i) official development assistance loans;

(ii) official development assistance grants;

(iii) other official flows (including grants and loans but excluding officially supported export credits that are in conformity with this understanding); or

(iv) any association in law or in fact ([12]) either in the hands of the donor, lender or borrower among two or more of the following:

— official development assistance loans,

— official development assistance grants;

— other official flows (including grants and loans but excluding officially supported export credits that are in conformity with this understanding),

— an export credit that is officially supported by way of direct credit, refinancing, eligibility for an interest subsidy, guarantee or insurance to which this understanding applies, other funds at or near market terms or cash payments from the buyer's own resources.

(2) Such financing is defined to be in effect tied to procurement of goods and services from one or a restricted number of countries as soon as:

(i) one of the financial components listed above is not freely and fully available to finance procurement from the recipient country, substantially all other developing countries and from participating countries, whether by a formal or informal understanding to that effect between the recipient and the donor country; or

(ii) it involves practices that the Development Assistance Committee of the OECD or the participants may determine to result in such tying ([13]).

(3) The definition of 'official development assistance' is identical to that in the 'DAC guiding principles for associated financing and tied and partially untied official development assistance'.

Paragraph 24(1): [Definitions and interpretations: starting points]

Starting point is the same as the Berne Union definition currently in use and is as follows:

(1) in the case of a contract for the sale of capital goods consisting of individual items usable in themselves (e.g. locomotives), the starting point is the mean date or actual date when the buyer takes physical possession of the goods in his own country;

(2) In the case of a contract for the sale of capital equipment for complete plant of factories where the supplier has no responsibility for commissioning, the starting point is the date when the buyer is to take physical possession of the entire equipment (excluding spare parts) supplied under the contract;

(3) In the case of construction contracts where the contractor has no responsibility for commissioning, the starting point is the date when construction has been completed;

(4) In the case of any contract where the supplier or contractor has a contractual responsibility for commissioning, the starting point is the date when he has completed installation or construction and preliminary tests to ensure that it is ready for operation. This applies whether or not it is handed over to the buyer at that time in accordance with the terms of the contract and irrespective of any continuing commitment which the supplier or contractor may have, e.g. for guaranteeing its effective functioning or for training local personnel;

(5) In the case of paragraphs 2, 3 and 4 above where the contract involves the separate execution of individual parts of a project, the date of the starting point is the date of the starting point for each separate part, or the mean date of those starting points or, where the supplier has a contract, not for the whole project but for an essential part of it, the starting point may be that appropriate to the project as a whole.

Paragraph 24(n): [Definitions and interpretations: concessionality level]

(1) Concessionality level is very similar in concept to the 'grant element' used by the Development Assistance Committee (DAC) of the OECD. In the case of grants, it is 100 %. In the case of loans, it is the difference between the nominal value of the loan and the discounted present value of the future debt service payments to be made by the borrower, expressed as a percentage of the nominal value of the loan, and is calculated in accordance with the method of calculating the grant element used by the DAC, except that:

(i) The discount rate used in calculating the concessionality level of a loan in a given currency is subject to change on an annual basis on 15 January and calculated as follows:

— for currencies where CIRR is less than 10 %: CIRR + 1/4 (10-CIRR),

— for other currencies: CIRR,

where CIRR is the average of the monthly CIRRs valid during the six-month period extending from 15 August of the previous year through 14 February of the current year. The calculated rate is rounded to the nearest 10 basis points. If there is more than one CIRR for the currency, the CIRR for the longest maturity shall be used for this calculation.

(ii) The base date for the calculation of the concessionality level is the starting point as defined in paragraph 24(1).

(2) For the purpose of calculating the overall concessionality level of an associated financing package, the concessionality levels (i) of export credits that are in conformity with this Annex III (ii) of other funds at or near market rates, (iii) of other official funds with a concessionality level of less than the minimum permitted by paragraph 12(b) above, except in cases of matching ([14]); or (iv) of cash payments that are from the buyer's own resources, are considered to be zero. The overall concessionality level of a package is determined by dividing (i) the sum of the results obtained by multiplying the nominal value of each component of the package by the respective concessionality level of each component by (ii) the aggregate nominal value of the components.

(3) The discount rate for a given aid loan is the rate that is in effect at the time of notification ([15]), except in cases of prompt notification, where the discount rate is the rate in effect at the time of commitment. A change in the discount rate during the life of a loan does not change its concessionality level.

(4) Without prejudice to (3) above, when calculating the concessionality level of individual transactions initiated under an aid credit line, the discount rate is the rate that was originally notified for the credit line.

(*) The asterisk refers to the relevant definitions or interpretations set forth in paragraph 24.

Note 2:

See Appendix III hereafter

Note 5:

The participants are agreed on the following general principle: 'OECD members' export credit and tied aid credit policies should be complementary; those for export credits should be based on open competition and the free play of market forces; those for tied aid credits should provide needed external resources to countries, sectors or projects with little or no access to market financing, ensure best value for money, minimise trade distortion and contribute to developmentally effective use of these resources'.

Note 6:

There are three means by which a participant may proceed with a non-conforming offer under paragraph 8(a):

— common lines;

— justification on aid grounds through support by a substantial body of participants — paragraphs 14(a)(1) and 14(a)(2); and

— through a letter to the Secretary-General — paragraph 14(a)(3), which the participants expect will be unusual and infrequent.

Note 7:

GNP/capita over USD 2 465 in 1990. A country will only be moved to or from this category after its World Bank category has been unchanged for two consecutive years. Notwithstanding classifications of countries ineligible or eligible to receive tied aid, tied aid policy for Bulgaria, Czech and Slovak Federal Republic, Hungary, Poland and Romania is covered by the participants' agreement, as long as such agreement is in force, to try to avoid such credits other than outright grants, food aid and humanitarian aid. The OECD Ministers endorsed this policy in June 1991.

Note 8:

At which time, they may request, among other items, the following information:

— assessment of a detailed feasibility study/project appraisal;

— whether there is a competing offer with non-confessional or aid financing;

— expectation of the project generating or saving foreign currency;

— whether there is cooperation with multilateral organisations such as the World Bank;

— presence of international competitive bidding (ICB), in particular if the donor country's supplier is the lowest evaluated bid;

— environmental implication;

— private sector participation;

— timing of the notifications (e.g. six months prior to bid closing or commitment date) of concessional or aid credits.

Note 10:

It is understood that the terms 'tied aid financing' and 'partially untied aid financing' exclude aid programmes of multilateral or regional institutions.

Note 12:

Associated financing transactions may take various forms — such as 'mixed credit', 'mixed financing', 'joint financing', 'parallel financing' or single integrated transactions. Their main characteristic is that the concessional component is linked in law or in fact to the non-concessional component, that either the non-concessional or the concessional component or the whole financing package is in effect tied or partially untied and that the availability of concessional funds is conditional upon accepting the linked non-concessional component.

Association or linkage 'in fact' is determined by such factors as the existence of informal understandings between the recipient and the donor authority, the intention by the donor through the use of ODA to facilitate the acceptability of a financing package, the effective tying of the whole financing package to procurement in the donor country, the tying status of ODA and the modality of tender and/or of the contract of each financing transaction or any other practice, identified by the DAC or the participants in which a de facto liaison exists between two or more financing components.

None of the following practices shall prevent the determination that an association or linkage 'in fact' exists: contract-splitting through the separate notification of component parts of one contract; splitting of contracts financed in several stages; non-notification of interdependent parts of a contract; non-notification arising from the partial untying of a financing package.

Note 13:

In cases of uncertainty as to whether a certain financing practice falls within the scope of the above definition, the donor country shall furnish evidence in support of any claim to the effect that such a practice is untied.

Note 14:

In identical matching, the concessionality level of any OOF in the initiating participant's offer shall be included in the calculation of the initial offer's concessionality level if the matching offer contains an OOF that is included in its concessionality level, even if the OOF in the initial offer has a concessionality level below the minimum permissible concessionality level.

Note15:

If a change of currency is made before the contract is concluded, a revision of the notification is required. The discount rate used to calculate the concessionality level will be the one applicable at the time of the revision. However, if the alternative currency is indicated in the original notification and all necessary information is provided, a revision is not necessary.

PROTOCOL TO ANNEX III

Whereas at the OECD ministerial meeting of 17 to 18 May 1983, the ministers enjoined the competent bodies of the Organisation for Economic Cooperation and Development to take prompt action to improve existing arrangements so as to strengthen transparency and discipline in the area of aid and trade-related concessional finance by all appropriate means;

Whereas the participants to the consensus recognise the advantage which can occur if a clearly defined common attitude toward the credit terms for a particular transaction can be achieved and if maximum use is made of the existing arrangements for exchanging information at an early stage;

Whereas the framework for information exchange (Appendix I) lays down rules for exchanging information among members of the OECD Group on Export Credits and Credit Guarantees;

Whereas this framework outlines procedures to be followed in the event that all members taking part in an exchange of information agree to accept that the credit terms for a particular transaction should be the subject of a binding obligation;

Whereas at a meeting of the OECD Consensus Group in April 1984 all participants firmly undertook to consider favourably face-to-face consultations if a participant so requests in the case of important transactions;

Whereas this undertaking was motivated by the unsatisfactory functioning of existing procedures for exchanging information in a number of important transactions;

Whereas the implementation of the provisions of the consensus can be jeopardised if procedures for exchanging information do not function efficiently;

Whereas any weakening in consensus discipline risks provoking wasteful export credit and/or tied aid credit competition and increasing subsidies;

Whereas the search for a common attitude does not prejudice the possibility for participants to retain their rights and liberty as to whether to insure or finance credits for a particular transaction, in the framework of their international obligations,

THE PARTICIPANTS HAVE DECIDED AS FOLLOWS:

Within the framework of existing procedures in the field of officially supported export credits and tied aid credits, and with a view to improving transparency, the participants:

(1) Confirm that they will strive to provide the fullest possible details on the credit terms and conditions which they may be considering offering for any transaction which is the subject of an exchange of information;

(2) Acknowledge that the interests of all participants are best served if agreement can be reached at an early stage on a common attitude on the export credit conditions for a particular transaction and if the provisions of that agreement are maintained;

(3) Reaffirm, therefore, the need to promote common attitudes; particularly on important transactions;

(4) Recognise that in certain instances, notably when existing exchange of information procedures are perceived to be functioning in an unsatisfactory manner, face-to-face consultations could facilitate the adoption of a common line;

(5) Undertake, in such circumstances, to respond favourably to any such request for early face-to-face consultations and to attend any meeting arranged in order to reach a common attitude on credit terms in conjunction with other interested participants. In this respect, particular attention will be paid to the observance and common interpretation of the guidelines;

(6) Confirm moreover the importance they attach to a strict observation of the formal notification procedures provided for in this Annex III.

APPENDIX I TO ANNEX III

[Framework for information exchange (FIE)]

1. Scope

The framework for information exchange (FIE) concerns credit terms and conditions for any export credit or credit guarantee transactions that are covered by clause 1 of this understanding, as well as any aid transaction that is covered by the notification procedures of paragraph 15 of Annex III.

2. Information exchange

(a) A participant:

— may address to another participant an enquiry on the attitude it takes in respect of a third country, of an institution in a third country or of a particular method of doing business;

— who has received an application for official support, may address an enquiry to another participant giving the most favourable credit terms that the enquiring participant would be willing to support; or

— who has received allegations that another participant has offered official support that derogates from the understanding, may address an enquiry to another participant, stating the details of any such allegation.

If an enquiry is to more than one participant, it shall contain a list of addressees. A copy of all enquiries shall be sent to the Secretariat.

(b) The participant to whom an enquiry is addressed shall respond within seven calendar days with as much information as is available at that time. The reply shall include, if possible, the best indication that the participant can give of the decision likely to be taken. If necessary, the full reply shall follow as soon as possible. Copies shall be sent to the other addressees of the enquiry and to the Secretariat.

(c) If an answer to an enquiry subsequently becomes invalid because an application has been made, changed or withdrawn, because other terms are being considered, or for any other reason, a follow-up reply shall be made at once and copied to all other addressees of the enquiry and to the Secretariat.

(d) All communications shall be made between the designated contact points in each country by means of instant communication (e.g. electronic mail, telex, telefax) and shall be confidential.

3. Common line proposals

(a) The information exchange or face-to-face consultations (see the Protocol to Annex III) may lead to a common line. A proposal for a common line shall be sent to all participants, all DAC contact points and the Secretariat. The proposal shall be dated and shall be in the following format:

1. reference number, as for understanding notifications, but followed by 'common line';
2. name of the importing country and buyer;
3. name or description of the project as precise as possible to clearly identify the project;
4. terms and conditions foreseen by the instigating country;
5. common line proposal;
6. nationality and name of known competing bidders;
7. commercial and financial bid closing date and tender number to the extent it is known; and
8. other relevant information, including reasons for proposing the common line, availability of studies of the project or special circumstances.

(b) A common line proposal may contain terms and conditions that are more or less favourable than terms and conditions allowed under the understanding.

4. Common line procedure

(a) The participants should react on a common line proposal as quickly as possible but in any case within 20 calendar days. A reaction can be a request for additional information, acceptance, rejection, a proposal for modification of the common line or an alternative proposal for a common line. A participant who replies that it has no position because it has not been approached by an exporter or by the authorities in the recipient country in case of aid credit for the project is deemed to have accepted the common line proposal. When such a participant is approached after the common line has gone into effect, it may apply the procedures of paragraph 5, below, if it wishes to extend softer terms than those stipulated in the common line.

(b) The Secretariat shall, after a period of 20 calendar days, inform all participants of the status of the common line proposal. If no participant has rejected the common line proposal, but not all participants have accepted it, the proposal shall be retained for a second period of eight calendar days.

(c) If the instigating participant and a participant who has proposed a modification or alternative cannot agree on a common line within the second period, this period can be extended by their mutual consent. The Secretariat shall inform all participants of such an extension.

(d) After the second period, any participant who has not explicitly rejected the common line proposed shall be deemed to have accepted the common line. Nevertheless, any participant, including the instigating participant, may make his acceptance of the common line conditional on the explicit acceptance of one or more participants.

(e) The Secretariat shall inform all participants that the common line has either gone into effect or has been rejected. The common line will take effect three calendar days after this announcement. The Secretariat shall on the on-line system make available a permanently updated record of all common lines that are accepted or undecided.

5. Validity of a common line

(a) 1. The rules of an agreed common line supersede the rules of the understanding only for the project specified in the common line.

2. The participants who have agreed to the common line should inform the Secretariat when the common line is no longer of interest.

3. The Secretariat shall initiate review of the common line after each period of two years from the date on which the common line has come into force by reminding the participants. The common line shall remain in force if any participant so indicates within 14 calendar days.

(b) The intention to submit a bid that is more favourable than agreed in the common line must be notified to all participants and to the Secretariat at least 60 calendar days before any commitment. The notification must include an explanation of the reason for the commitment as well as a justification of how the commitment does not result in a purchasing decision (possibly including the outcome of an ICB procedure) which is influenced by the availability of aid. If any participant interested in this specific transaction so requests, the Secretariat shall organise a face-to-face consultation. Participants shall refrain from making any commitments until 28 calendar days after the face-to-face consultation unless an alternative common line is established or 60 calendar days after notification. Any participant can reserve the right of matching a finance offer which is more favourable than agreed in the common line in accordance with paragraph 16 of Annex III.

APPENDIX II TO ANNEX III

[Checklist of developmental quality of aid-financed projects]

To ensure developmental quality of projects in developing countries financed totally or in part by official development assistance (ODA), a number of criteria have been developed in recent years by the Development Assistance Committee of the OECD (DAC). They are essentially contained in the:

(a) DAC principles for project appraisal, 1988;

(b) DAC guiding principles for associated financing and tied and partially untied official development assistance, 1987;

(c) Good procurement practices for official development assistance, 1986.

I. Consistency of the project with the recipient country's overall investment priorities (project selection)

1. Is the project part of investment and public expenditure programmes already approved by the central financial and planning authorities of the recipient country?

(Specify policy document mentioning the project, e.g., public investment programme of the recipient country).

2. Is the project being co-financed with an international development finance institution?

3. Does evidence exist that the project had been considered and rejected by an international development finance institution or another DAC member on grounds of low developmental priority?

4. In case of a private sector project, has it been approved by the government of the recipient country?

5. Is the project covered by an intergovernmental agreement providing for a broader range of aid activities by the donor in the recipient country?

II. Project preparation and appraisal

6. Has the project been prepared, designed and appraised against a set of standards and criteria broadly consistent with the DAC principles for project appraisal (PPA)? Relevant principles concern project appraisal under:

(a) Economic aspects (paragraphs 30 to 38 PPA);

(b) Technical aspects (paragraph 22 PPA);

(c) Financial aspects (paragraphs 23 to 29 PPA). In case of a revenue producing project, particularly if it is producing for a competitive market, has the concessionary element of the aid financing been passed on to the end-user of the funds? (paragraph 25 PPA);

(d) Institutional assessment (paragraphs 40 to 44 PPA);

(e) Social and distributional analysis (paragraphs 47 to 57 PPA);

(f) Environmental assessment (paragraphs 55 to 57 PPA).

III. Procurement procedures

7. What procurement mode will be used among the following? (for definitions, see principles listed in 'Good procurement practices for ODA').

(a) International competitive bidding (procurement principle II and its Annex 2: Minimum conditions for effective international competitive bidding);

(b) National competitive bidding (procurement principle IV);

(c) Informal competition or direct negotiations (procurement principles V A or B).

8. Is it envisaged to check price and quality of supplies (paragraph 63 PPA)?

APPENDIX III TO ANNEX III

[Determination of commercial interest reference rates]

1. The participants have accepted the following aims for evaluating specific commercial interest reference rates (CIRRs):

(i) The CIRR should be representative of final commercial lending rates of interest in the domestic market of the currency concerned;

(ii) The CIRR should closely correspond to a rate for a first class domestic borrower;

(iii) The CIRR should be based, where appropriate, on the funding cost of fixed interest-rate finance over a period of not less than five years;

(iv) The CIRR should not lead to a distortion of domestic competitive conditions;

(v) The CIRR should closely correspond to a rate available to first-class foreign borrowers.

2. In view of these aims, the participants have decided that CIRRs shall be set at a fixed margin above their respective base rates.

(a) For each currency, the base rates may be either:

(i) Three-year government bond yields for repayment terms up to and including five years, five-year government bond yields for over five up to and including 8.5 years, and seven-year government bond yields for over 8.5 years, or

(ii) five-year government bond yields for all maturities except where the participants have agreed otherwise.

(b) The fixed margin is 100 basis points, except where the participants have agreed otherwise.

Note 2 to Annex III

CIRRs shall equal a base rate plus 100 basis points. For each currency the base rates may be either:

(i) Three-year government bond yields for repayment terms up to and including five years, five-year government bond yields for over five up to and including 8.5 years, and seven-year government bond yields for over 8.5 years, or

(ii) five-year government bond yields for all maturities.

Each participant shall initially select one of the two base rate systems for its currency. Other participants shall use this system for financing offered in that currency. A participant, with a six-month advance notice and with the concurrence of the participants may change to the other system for its currency, and other participants shall then use that system for that currency. The yen CIRR is the long term prime rate minus 20 basis points for all maturities. The ecu CIRR is the secondary market yield on medium term ecu bonds in the Luxembourg stock exchange plus 50 basis points.

A margin of 20 basis points shall be added to the CIRR for fixing the interest prior to contract. Interest may not be fixed for longer than 120 days.

COUNCIL REGULATION (EC) No 3094/95 (*) OF 22 DECEMBER 1995

on aid to shipbuilding

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 92(3)(e), 94, and 113 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),

Whereas Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (4) expires on 31 December 1995;

Whereas, within the framework of the Organisation for Economic Cooperation and Development (OECD), an agreement has been concluded between the European Community and certain third countries respecting normal competitive conditions in the commercial shipbuilding and repair industry (5);

Whereas the current rules of the directive will need to be prolonged *ad interim* if the OECD agreement does not enter into force by 1 January 1996;

Whereas that agreement should enter into force on 1 January 1996, after all parties to the agreement have deposited their instruments of ratification, acceptance or approval;

Whereas the agreement provides for the elimination of all direct shipbuilding aids except social aids and authorised aids to research and development within the limit of certain ceilings;

Whereas indirect measures of support to shipbuilding in the form of credit facilities and loan guarantees for shipowners are permitted by the aforesaid agreement provided they are in conformity with the OECD understanding on export credits for ships;

Whereas the OECD agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry and the Community legislation deriving therefrom are a matter of signal importance;

Whereas the Commission's powers under Articles 85, 86, 92 and 93 of the Treaty enable it to act in the event of anticompetitive measures or practices and whereas actions initiated by the Commission in connection with such measures and practices by shipyards would form an integral part of the annual report to be submitted to the Member States;

Whereas the abovementioned agreement can be reviewed three years after it enters into force,

HAS ADOPTED THIS REGULATION:

(*) OJ L 332, 30.12.95, p. 1.
(1) OJ C 304, 15.11.1995, p. 21.
(2) OJ C 339, 18.12.1995.
(3) Opinion delivered on 23 November 1995 (not yet published in the Official Journal).
(4) OJ L 380, 31.12.1990, p. 27. Directive as last amended by Directive 94/73/EC (OJ L 351, 31.12.1994, p. 10).
(5) OJ C 375, 30.12.1994, p. 3.

CHAPTER I — GENERAL

Article 1

For the purposes of this regulation:

(a) 'shipbuilding' shall mean the building, in the Community, of self-propelled seagoing commercial vessels, namely:

— 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, excluding floating docks and mobile offshore units);

— tugs of not less than 365 kW;

— fishing vessels of not less than 100 gt for export outside the Community; and

— unfinished shells of the abovementioned vessels that are afloat and mobile.

Military vessels 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 this regulation;

(b) 'ship repair' shall mean the repair or reconditioning in the Community of self-propelled seagoing commercial vessels, as defined in (a);

(c) 'ship conversion' shall mean, subject to the provisions of Article 5, the conversion, in the Community, of self-propelled seagoing commercial vessels, as defined in (a), on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger reception infrastructure;

(d) '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;

(e) 'OECD agreement' shall mean the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry;

(f) 'aid' shall mean State aid within the meaning of Articles 92 and 93 of the Treaty. This shall include not only aid granted by the State itself but also that granted by regional or local authorities or other public bodies and any aid elements contained in financing measures taken directly or indirectly by Member States in respect of shipbuilding, conversion or repair undertakings which cannot be regarded as a genuine provision of risk capital according to standard investment practice in a market economy;

(g) 'related entity' shall mean any natural or legal person who:

(i) owns or controls a shipbuilder; or

(ii) is owned or controlled by a shipbuilder, directly or indirectly, whether through stock ownership or otherwise. Control shall be presumed to arise once a person or a shipbuilder owns or controls an interest of more than 25 % in the other.

Article 2

1. Aid granted specifically, whether directly or indirectly, for shipbuilding, conversion and repair, as defined under this regulation, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be considered compatible with the common market only if it complies with the provisions of this regulation. This applies not only to undertakings engaged in such activities but also to related entities.

2. No aid granted pursuant to this regulation may be conditional upon discriminatory practices against products originating in other Member States.

CHAPTER II — COMPATIBLE MEASURES

Article 3

Social assistance

1. Aid to cover the cost of measures for the exclusive benefit of workers who lose retirement benefits or who are made redundant or otherwise separated permanently from employment in the respective shipbuilding, conversion or repair enterprise, when such assistance is related to the discontinuance or curtailment of shipyard activities, bankruptcy, or changes in activities other than shipbuilding, conversion or repair may be considered compatible with the common market.

2. The costs eligible for the aid referred to in this Article are, in particular:

— payments to workers made redundant or retired before legal retirement age,

— 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, conversion or repairs,

— payments to workers for vocational retraining.

Article 4

Research and development aid

1. Public aid for research and development to the shipbuilding, conversion and repair industry may be considered compatible with the common market where this public assistance relates to:

(i) fundamental research;

(ii) basic industrial research, provided that the aid intensity is limited to 50 % of eligible costs;

(iii) applied research, provided that the aid intensity is limited to 35 % of eligible costs;

(iv) development, provided that the aid intensity is limited to 25 % of eligible costs.

2. The maximum permissible aid intensity for research and development carried out by small and medium-sized enterprises (6) shall be 20 points higher than the percentages specified in paragraph 1(ii), (iii) and (iv).

3. For the purposes of this Article, the following definitions shall apply to research and development aid:

(a) eligible costs shall be only those relating to:

(i) the costs of instruments, material, land and buildings to the extent that they are used for specific research and development projects;

(ii) the costs of researchers, technicians and other staff to the extent that they are engaged in the specific research and development projects;

(iii) consultancy and equivalent services including research bought, technical knowledge, patents, etc.;

(iv) overhead costs (infrastructure and support services) to the extent that they are related to the research and development projects, on condition that they do not exceed 45 % of the total costs of the project for basic industrial research, 20 % for applied research and 10 % for development;

(b) 'fundamental research' shall mean research activities independently conducted by higher education or research establishments for the enlargement of general scientific and technical knowledge, not linked to industrial or commercial objectives;

(c) 'basic industrial research' shall mean original theoretical and experimental work whose objective is to achieve better understanding of the laws of science and engineering in general and which might apply to an industrial sector or to the activities of a particular undertaking;

(d) 'applied research' shall mean investigation or experimental work on the basis of the results of basic research with a view to facilitating the attainment of specific practical objectives such as the creation of new products, production processes or services. It normally ends with the creation of a first prototype and does not include efforts whose principal aim is the design, development or testing of products or services to be considered for sale;

(e) 'development' shall mean the systematic use of scientific and technical knowledge in the design, development, testing or evaluation of new products, production processes or services or in the improvement of an existing product or service to meet specific performance requirements and objectives. This stage normally includes pre-production models such as pilot and demonstration projects but does not include industrial application and commercial exploitation;

(f) aid for research and development specifically provided to the shipbuilding, conversion or repair industry shall include, but not be limited to, the following:

(i) research and development projects carried out by the shipbuilding, conversion or repair industry or by research institutes controlled or financed by that industry;

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(6) For the purposes of this regulation 'small and medium-sized enterprises' shall mean enterprises which employ fewer than 300 employees, the yearly turnover of which does not exceed ECU 20 million, and the capital of which is not more than 25 % owned by a large company.

(ii) research and development projects carried out by the shipping industry or by research institutes controlled or financed by that industry where these projects are directly related to the shipbuilding, conversion or repair industry;

(iii) research and development projects carried out by universities, public and/or independent private research institutes and other industrial sectors in collaboration with the shipbuilding, conversion or repair industry;

(iv) research and development projects carried out by universities, public and/or independent private research institutes and other industrial sectors, when, at the time the project is carried out, it can reasonably be expected that the results will be of substantial specific importance for the shipbuilding, conversion or repair industry.

4. Information on the results of research and development shall be published promptly, at least once a year.

Article 5

Indirect aid

1. Aid for shipbuilding and ship conversion, excluding repair, granted to shipowners or third parties in the form of State loans and guarantees may be considered compatible with the common market if it complies with the OECD understanding on export credits for ships (7) or with any agreement amending or replacing that understanding.

2. Aid for shipbuilding and ship conversion granted for genuine reasons as development assistance to a developing country may be deemed compatible with the common market if it complies with the relevant terms of the OECD understanding or with any agreement amending or replacing that understanding, as referred to in paragraph 1.

3. Aid granted by a Member State to its shipowners or to third parties in that State for the building or conversion of ships may not distort or threaten to distort competition between shipyards in that Member State and shipyards in other Member States in the placing of orders.

4. For the purpose of this Article, 'ship conversion' shall mean the conversion, in the Community, of self-propelled seagoing commercial vessels, as defined in Article 1(a), of not less than 1 000 g t on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger reception infrastructure.

Article 6

Spain, Portugal, Belgium

Reconstruction aid granted in Spain, Portugal and Belgium in the form of investment assistance and any assistance for social measures not covered under Article 3 and paid after 1 January 1996 may be considered compatible with the common market. This aid must be subject to individual notification and prior approval by the Commission by 31 December 1996 at the latest and be subject to the following maximum limits and payments deadlines:

(7) OJ C 375, 30.12.1994, p. 38.

Amount of aid	*Payment deadline*
Spain: ESP 10 billion	31 December 1998
Portugal: PTE 5.2 billion	31 December 1998
Belgium: BEF 1 320 million	31 December 1997

Article 7

Other measures

1. In exceptional cases, and subject to Article 92 of the Treaty, other aids may be deemed compatible with the Common market. If the Commission considers that this is the case, it shall be empowered, after consulting the special committee set up under Article 113 of the Treaty, to request a derogation from the Parties Group pursuant to Article 5(5) of the OECD agreement.

2. For research and development projects related to safety and the environment, and subject to compliance with the conditions set out in Article 92 of the Treaty, a higher aid intensity than provided for in Article 4(1)(ii), (iii) and (iv) may be deemed compatible with the common market. If the Commission considers that this is the case, it shall be empowered to request the Parties Group to approve the project pursuant to Annex I B3(2) to the OECD Agreement.

3. Where aid granted pursuant to this regulation is the subject of dispute panel proceedings under Article 8 of the OECD agreement or, in the case of export credits, the subject of consultation mechanisms as laid down in the OECD understanding on export credits for ships, the Community position shall be adopted by the Commission after consultation of the special Committee set up under Article 113 of the Treaty.

CHAPTER III — MONITORING PROCEDURE

Article 8

1. Aid to shipbuilding and repair undertakings covered by this regulation shall be subject to, in addition to the provisions of Article 93 of the Treaty, the special notification rules provided for in paragraph 2.

2. The following shall be notified to the Commission in advance by the Member States and authorised by the Commission before they are put into effect:

(a) any aid scheme — new or existing — or any amendment of an existing scheme covered by this regulation;

(b) any decision to apply a generally applicable aid scheme, including generally applicable regional aid schemes, to the undertakings covered by this regulation in order to verify compatibility with Article 92 of the Treaty;

(c) any individual application of aid schemes in the case referred to in Article 5(2) or when specifically provided for by the Commission in its approval of the aid scheme concerned.

Article 9

1. To enable the Commission to monitor application of the aid rules contained in Chapter II, Member States shall supply it with:

(a) monthly reports on officially supported credit facilities granted for each shipbuilding and conversion contract by the end of the month following the month of signing of each contract, in accordance with the annexed Schedule 1;

(b) where Member States have schemes providing for official guarantees and insurance for ships, reports to be submitted by 1 April of the year following the year under review, including the results of the schemes, claims paid, income from premiums and fees, income from recoveries and any other appropriate information requested by the Commission;

(c) completion reports on each shipbuilding and conversion contract signed before the entry into force of this regulation by the end of the month following the month of completion, in accordance with the annexed Schedule 2;

(d) yearly reports, to be provided by 1 March of the year following the year subject to the report, giving details of the total amount of aid granted to each individual national shipyard during the previous calendar year, in accordance with the annexed Schedule 3;

(e) in the case of shipyards able to build merchant ships over 5 000 gt, yearly reports to be provided not later than two months after the annual general meeting has approved the shipyard's yearly report, giving publicly available information on capacity developments and on the structure of ownership, in accordance with the annexed Schedule 4.

2. On the basis of the information communicated to it in accordance with Article 8 and paragraph 1 of this Article, the Commission shall draw up an annual overall report to serve as a basis for discussion with national experts.

Article 10

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

It shall apply as from the date of entry into force of the OECD agreement (8).

Should the said agreement not enter into force on 1 January 1996, the relevant provisions of Directive 90/684/EEC shall apply until the agreement enters into force and until 1 October 1996 at the latest.

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

(8) The date of entry into force of the OECD agreement will be published in the *Official Journal of the European Communities* by the General Secretariat of the Council.

ANNEX

SCHEDULE 1

EUROPEAN COMMUNITY

REPORT ON AID TO SHIPOWNERS AND OTHER THIRD PARTIES FOR THE NEW BUILDING OR CONVERSION OF SHIPS

1. Name and nationality of enterprise receiving aid .....

   .....

2. Contract price .....

3. Credit granted

   — Form (e.g., export credit, home credit, etc.): .....

   — Volume: .....

   — Repayment period: .....

   — Frequency of payments: .....

   — Interest rate: .....

4. Guarantees granted

   — Volume: .....

   — Premium paid: .....

   — Duration: .....

   — Other terms and conditions: .....

   .....

5. Month of aid granting: .....

6. New building or conversion contract (pleace specify which)

   — Ship type and yard No: .....

   — Deadweight (DWT): .....

   — Gross tonnage (GT): .....

   — Compensated gross tonnage (CGT): .....

   — Performing yard: — Country: .....

   — Name: .....

   — Completion/delivery date .....

Contact for enquiries: ..... Date: .....

Position held: ..... Signature: .....

SCHEDULE 2

European Community

REPORT OF MERCHANG SHIP COMPLETIONS

Section 1: Contract details

1. New building/conversion		
2. Company	3. Yard	4. Yard No
5. Registered owner		
6. Holding owner		
7. Vessel's country of registration		
8. Date contract signed	9. Completion/delivery date	

Section 2: Ship details

10. Type of vessels (by OECD category)
11. Deadweight (DWT) .....
12. Gross tonnage (GT) .....
13. Compensated gross tonnage (CGT) .....

Section 3: Financial arrangements

	Currency	Ecu (Prevailing rate)	% of Contract price
14. Contract price			
15. Estimated contract loss (if any)			
16. Contract-related aid:			
A. Granted to yard: a) grants b) credit facilities c) specific fiscal concession d) other support			
B. Granted to customer or ultimate owners a) grants b) credit facilities c) fiscal concessions d) other aid			

Contact for enquiries: ..... Date: .....

Position held: ..... Signature: .....

SCHEDULE 3

European Community

REPORT OF EMPLOYEES' OR ENTERPRISE'S FINANCIL SUPPORT

Name of enterprise: .....

	Eligible costs (including for (1) details of numbers of workers involved	Aid received		Legal basis (including date of approval by Commission)
		Form	Amount	
1. Social aid: (a) Redundancy payments (b) Early-retirement payments (c) Reconversion payments (d) Vocational retraining				
2. Research and development aid: (a) Fundamental research (b) Basic industrial research (c) Applied research (d) Development				
3. General aid schemes (please specify nature of support)				

Contract for enquiries: ..... Date: .....

Position held: ..... Signature: .....

SCHEDULE 4

REPORT ON YARDS ABLE TO BUILD MERCHANT SHIPS OF OVER 5 000 GT

1. Name of the company (.....)
2. Total available capacity (.....) (CGT)
3. Data on the dock/berth

Dock or berth	Maximum size of ships (GT)
(.....)	(.....)
(.....)	(.....)
(.....)	(.....)

4. Description of any plans for future capacity expansion or reduction
5. Structure of ownership (capital structure, share of direct and indirect public ownership)
6. Financial statements (balance sheet, profit and loss statement, including, if available, separate accounts covering the shipbuilding activities of holding)
7. Transfer of public resources (including debt guarantees, bond infusions, etc.)
8. Exemptions from financial or other obligations (including tax privileges, etc.)
9. Capital contribution (including equity infusions, withdrawal of capital dividend, loans and their refunding, etc.)
10. Debt write-off
11. Transfer of losses

COUNCIL REGULATION (EC) No 1904/96 OF 27 SEPTEMBER 1996 (*)

amending Regulation (EC) No 3094/95 on aid to shipbuilding

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 92(3)(c), 94 and 113 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),

Whereas, an agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry (4) concluded between the European Community and certain third countries within the framework of the Organisation for Economic Cooperation and Development (OECD), has not yet entered into force;

Whereas, therefore Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (5) is therefore not yet applicable;

Whereas, in accordance with Article 10 of the said regulation, the relevant rules of Directive 90/684/EEC (6) continue to apply *ad interim*, pending the entry into force of the OECD agreement and until 1 October 1996 at the latest;

Whereas, as a contingency measure against the possibility that the entry into force of the OECD agreement is delayed beyond 1 October 1996, the Council needs to take the necessary steps; whereas Regulation (EC) No 3094/95 should therefore be amended,

HAS ADOPTED THIS REGULATION:

Sole Article

The third paragraph of Article 10 of Regulation (EC) No 3094/95 shall be replaced by the following:

'Pending the entry into force of the said agreement, the relevant provisions of Directive 90/684/EEC shall apply until the agreement enters into force and until 31 December 1997 at the latest.'

(*) OJ L 251, 3.10.1996, p. 5.
(1) OJ C 213, 23.7.1995, p. 14.
(2) Opinion delivered on 20 September 1996.
(3) Opinion delivered on 25 September 1996.
(4) OJ C 375, 30.12.1994, p. 3.
(5) OJ L 332, 31.12.1995, p. 1.
(6) OJ L 380, 31.12.1990, p. 27. Directive as last amended by Directive 94/73/EC (OJ L 351, 31.12.1994, p. 10.)

COUNCIL REGULATION (EC) No 2600/97 OF 19 DECEMBER 1997 (*)

amending Regulation (EC) No 3094/95 on aid to shipbuilding

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 92(3)(c), 94 and 113 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Whereas an agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry, concluded between the European Community and certain third countries within the framework of the Organisation for Economic Cooperation and Development (OECD) (2), has still not yet entered into force;

Whereas therefore Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (3) has not yet entered into force;

Whereas, in accordance with Article 10 of Regulation (EC) No 3094/95, the relevant rules of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (4) continue to apply *ad interim*, pending the entry into force of the OECD agreement and until 31 December 1997 at the latest;

Whereas, given the continuing uncertainties over entry into force of the OECD agreement, which may be further delayed beyond 31 December 1997, the Council needs to take appropriate steps pending decisions on possible new arrangements on aid to shipbuilding;

Whereas Regulation (EC) No 3094/95 should therefore be amended,

HAS ADOPTED THIS REGULATION:

Article 1

The third subparagraph of Article 10 of Regulation (EC) No 3094/95 shall be replaced by the following:

'Pending the entry into force of the said agreement, the relevant provisions of Directive 90/684/EEC shall apply until the agreement enters into force and until 31 December 1998 at the latest.'

Article 2

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

(*) OJ L 351, 23.12.1997, p. 18.
(1) Opinion delivered on 17 December 1997.
(2) OJ C 375, 30.12.1994, p. 3.
(3) OJ L 332, 31.12.1995, p. 1. Regulation as amended by Regulation (EC) No 1904/96 (OJ L 251, 3.10.1996, p. 5).
(4) OJ L 380, 31.12.1990, p. 27.

COUNCIL REGULATION (EC) No 1013/97 OF 2 JUNE 1997 (*)

on aid to certain shipyards under restructuring

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 92(3)(e), 94 and 113 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Whereas by virtue of Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (2) the provisions of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (3) are applicable to such aid until either the OECD 'agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry' enters into force or, at the latest, until 31 December 1997;

Whereas the shipbuilding industry is important for the mitigation of structural problems in a number of regions of the Community;

Whereas the direct application of the common maximum ceiling does not allow for the comprehensive restructuring measures necessary in a number of shipyards in these regions and a special transitional arrangement has therefore been introduced;

Whereas it was acknowledged in Directive 92/68/EEC (4) that the shipbuilding industry in the territories of the former German Democratic Republic required urgent and comprehensive restructuring in order to become competitive, a target which has not been fully achieved for two shipyards in the envisaged restructuring period due to unforeseeable circumstances beyond the control of these shipyards;

Whereas in the case of the said two shipyards a further transitional arrangement is needed, in order to enable completion of their restructuring, which will allow them to comply subsequently with the aid rules applicable to the Community as a whole;

Whereas the shipbuilding capacity in the territories of the former German Democratic Republic was reduced to 327 000 compensated gross tonnes (cgt) by 31 December 1995 and whereas the German Government made a commitment to ensure that this capacity limitation is fully respected until at least the end of the year 2000 and to extend this limitation until the end of 2005 unless the Comimission authorises an earlier termination of the capacity limitations;

Whereas a further reduction of shipbuilding capacity in Germany will result from the closure, with respect to new building, of the Bremer Vulkan Werft in Bremen-Vegesack before the end of 1997;

Whereas, in spite of the efforts made by the Greek Government to privatise all its public yards by March 1993, the Hellenic shipyard was only sold in September 1995 to a cooperative of its workers, the State having kept a majority holding of 51 % for defence interests;

(*) OJ L 148, 6.6.1997, p. 1.
(1) OJ C 150, 19.5.1997.
(2) OJ L 332, 30.12.1995, p. 1. Regulation as amended by Regulation (EC) No 1904/96 (OJ L 251, 3.10.1996, p. 5).
(3) OJ L 380, 31.12.1990, p. 27. Regulation as last amended by Directive 94/73/EC (OJ L 351, 31.12.1994, p. 10).
(4) OJ L 219, 4.8.1992, p. 54.

Whereas the financial viability and the restructuring of the Hellenic shipyard necessitates the provision of aid which allows the company to write-off the debt accumulated before its delayed privatisation;

Whereas a further restructuring of the publicly owned yards in Spain is necessary so that each of these yards, being established as individual profit centres at full cost basis, will achieve financial viability by 31 December 1998;

Whereas under this restructuring plan there will be a capacity reduction in these yards from 240 000 compensated gross registered tonnes (cgrt) to 210 000 (cgrt); whereas this reduction will be supplemented by the non-reopening to shipbuilding of the public yard at Astano (135 000 cgrt capacity), by additional capacity reductions elsewhere in Spain amounting to a further 17 500 cgrt and by not carrying out ship conversions in the shipyard at Astander as long as it remains in public ownership;

Whereas no further aid for restructuring purposes (including loss compensations, loss guarantees and rescue aid) will be made available to the shipyards covered by this regulation,

HAS ADOPTED THIS REGULATION:

Article 1

1. Notwithstanding the provisions of Regulation (EC) No 3094/95, for the yards under restructuring specified in paragraphs 2, 3 and 4 of this Article the Commission may declare additional operating aid compatible with the common market for the specific purposes and up to the amounts specified.

2. In the territory of the former German Democratic Republic, operating aid for the period from 1 March 1996 until 31 December 1998 in favour of MTW-Schiffswerft and Volkswerft Stralsund may be considered compatible with the common market up to a total amount of DEM 333 million and DEM 395 million respectively. The said amounts comprise the aid to facilitate the further operation of the yards, social aid, contract-related aid under the 'Wettbewerbshilfe' scheme and the aid equivalent of guarantees. For these yards the provisions of Chapter II of Directive 90/684/EEC shall not be applicable during the restructuring period with the exception of Article 4(6) and (7) of the said directive, and no other operating aid may be paid for works on contracts or losses in the relevant period. For contracts signed during the restructuring period but carried out after it, the Community rules on contract-related aid valid on the date of contract signature shall apply, including those related to the date of delivery of the vessels.

In the event of a reduction of the maximum allowable intensity for contract-related aid, the contract-related aid for the yards subject to this paragraph shall be reduced proportionally for new contracts signed by these yards under which delivery of the vessel is stipulated during the restructuring period.

3. Drachma aid in the form of a waiver-of debts of 'Hellenic shipyards', up to the amount of GRD 54 525 million, corresponding to debts relating to civil work by the yard, as existing on 31 December 1991 and with accrued interest rates and penalties until 31 January 1996 may be regarded as compatible with the common market. All other provisions of Directive 90/684/EEC shall apply to this yard.

4. Aid for the restructuring of the publicly-owned yards in Spain may be considered compatible with the common market up to an amount of ESP 135 028 million in the following forms:

— interest payments of up to ESP 62 028 million in 1988 to 1994 on loans taken on to cover unpaid previously approved aid,

— tax credits in the period 1995 to 1999 of up to ESP 58 000 million,

— capital injection in 1997 of up to ESP 15 000 million.

All other provisions of Directive 90/684/EEC shall apply to these yards.

The Spanish Government agrees to carry out, according to a timetable approved by the Commission and in any case before 31 December 1997, a genuine and irreversible reduction of capacity of 30 000 cgrt.

Article 2

For the restructuring programmes in Spain and Germany benefiting from aid as provided for in Article 1, the notification referred to in Article 11(2) of Directive 90/684/EEC shall be supplemented by a programme for the monitoring of the actual use of the operating and investment aid, compliance with the restructuring plan and enforcement of capacity limitations which is acceptable to the Commission.

The programme of monitoring shall include on site monitoring by the Commission assisted if necessary by independent experts.

The Member States concerned shall supply the Commission until the end of June 1999 with quarterly reports on progress towards completing the restructuring programmes benefiting from aid as provided for in Article 1 and information on the specific shipyards benefiting from aid as provided in Article 1. The information on the specific shipyards shall include the following elements:

— use of aid,

— investments,

— productivity performance,

— capacity reductions and limitations,

— employment reductions,

— financial viability.

If, on the basis of the information received, the Commission considers that the conditions attached to any authorisation of aid pursuant to this regulation have not been complied with, it may require suspension of the aid payments and/or recovery of aid.

The Commission shall provide to the Council twice-yearly reports on progress on the restructuring programmes, which may also be discussed at a multilateral meeting with national experts.

Article 3

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

It shall apply until 31 December 1998.

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

COUNCIL REGULATION (EC) No 1540/98 OF 29 JUNE 1998 (*)

establishing new rules on aid to shipbuilding

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 92(3)(e), 94 and 113 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),

Whereas the agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry concluded between the European Community and certain third countries within the framework of the Organisation for Economic Cooperation and Development (OECD) (hereinafter referred to as 'the OECD agreement') (4) has still not entered into force because the United States of America has failed to ratify it; whereas, therefore, Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (5) has not yet entered into force;

Whereas, in accordance with Article 10 of Regulation (EC) No 3094/95, the relevant rules of Council Directive 90/684/EEC on aid to shipbuilding (6) will continue to apply, in the absence of entry into force of the OECD agreement, until 31 December 1998 at the latest;

Whereas a satisfactory balance between supply and demand in world shipbuilding has still not been fully established, so that prices remain depressed; whereas the competitive pressures on Community shipbuilders are expected to grow further as overall ship demand after the year 2000 is predicted to fall and available world shipbuilding capacity is expected to continue to rise;

Whereas, although Community yards have made progress in improving competitiveness, the rate at which they are improving productivity needs to be increased in order to close the gap with their international competitors, particularly in Japan and Korea;

Whereas a competitive shipbuilding industry is important to the Community and contributes to its economic and social development by providing a substantial market for a range of industries and by maintaining employment in a number of regions, many of which are already suffering a high rate of unemployment;

Whereas a complete abolition of aid to the sector is not yet possible in view of the difficult market situation and the need to encourage yards to make the necessary changes to improve competitiveness; whereas, a tight and selective aid policy should be continued in order to support these efforts and to

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(*) OJ L 202, 18.7.1998, p. 1.
(1) OJ C 114, 15.4.1998, p. 14.
(2) OJ C 138, 4.5.1998.
(3) OJ C 129, 27.4.1998, p. 19.
(4) OJ C 375, 30.12.1994, p. 3.
(5) OJ L 332, 31.12.1995, p. 1. Regulation as last amended by Regulation (EC) No 2600/97 (OJ L 351, 23.12.1997, p. 18).
(6) OJ L 380, 31.12.1990, p. 27.

ensure fair and uniform conditions for intra-Community competition; whereas such a policy constitutes the most appropriate approach in terms of ensuring the maintenance of a sufficient level of activity in European shipyards and, thereby, the survival of an efficient and competitive European shipbuilding industry;

Whereas the Community's aid policy for the shipbuilding sector has remained essentially unchanged since 1987; whereas that policy has generally achieved its objectives but requires adaptations so that it is better able to address the future challenges facing the industry;

Whereas, in particular, operating aid is not the most cost-effective way of encouraging the European shipbuilding industry to improve its competitiveness; whereas, accordingly, operating aid should be phased out and the focus shifted more towards other forms of support to promote the necessary improvements in competitiveness, such as investment aids for innovation;

Whereas operating aid will therefore end on 31 December 2000;

Whereas operating aid in the form of development assistance to developing countries should continue, subject to stricter conditions;

Whereas a clearer distinction is needed between investment aid and restructuring aid; whereas restructuring aid should be granted only exceptionally and subject to strict rules, such as applying the principle of 'one time/last time', requiring genuine capacity reductions as a counterpart for the aid and tighter monitoring procedures; whereas investment aid should be allowed only to improve the productivity of existing installations in existing yards situated in areas eligible for regional investment aid, subject to certain limitations on aid intensities in order to minimise possible distortions to competition;

Whereas investment aid for innovation should be allowed, provided that it is for genuinely innovative projects that will improve competitiveness; whereas aid for research and development and aid for environmental protection should also be permitted so that the shipbuilding industry is not deprived of these aid possibilities that are available to all other industrial sectors; whereas closure aid should continue to be allowed to facilitate structural adjustment;

Whereas, although it is proposed to continue to treat ship conversion in the same way as shipbuilding to a certain extent, aid to the ship repair sector should continue not to be permitted except for restructuring, closure, investments under regional aid schemes, innovation, research and development, and environmental protection;

Whereas close and transparent monitoring is necessary if the aid policy is to be effective;

Whereas, the Commission is to present to the Council a regular report on the market situation and appraise whether European yards are affected by anti-competitive practices; whereas, if it is established that anti-competitive practices of any kind are causing injury to industry, the Commission is, where appropriate, to propose to the Council measures to address the problem;

Whereas the first such report is to be presented to the Council no later than 31 December 1999;

Whereas this regulation is without prejudice to any amendments necessary to comply with international commitments of the Community concerning state aid to the shipbuilding industry,

HAS ADOPTED THIS REGULATION:

CHAPTER I — DEFINITIONS AND AID

Article 1

Definitions

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

(a) '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 this regulation;

(b) 'shipbuilding' shall mean the building, in the Community, of self-propelled seagoing commercial vessels;

(c) 'ship repair' shall mean the repair or reconditioning in the Community of self-propelled seagoing commercial vessels;

(d) 'ship conversion' shall mean the conversion, in the Community, of self-propelled seagoing commercial vessels of not less than 1000 gt, on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger accommodation;

(e) 'aid' shall mean State aid within the meaning of Articles 92 and 93 of the Treaty. This shall include not only aid granted by the State itself but also that granted by regional or local authorities or other public bodies and any aid elements contained in financing measures taken directly or indirectly by Member States in respect of shipbuilding, repair or conversion undertakings which cannot be regarded as a genuine provision of risk capital according to standard investment practice in a market economy;

(f) 'contract value before aid' shall mean the price laid down in the contract plus any aid granted directly to the yard;

(g) '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.

Article 2

Aid

1. Aid granted, whether directly or indirectly, for shipbuilding, ship repair and ship conversion, financed by Member States or their regional or local authorities or through State resources in any form whatsoever, may be considered compatible with the common market only if it complies with the provisions of this regulation. This provision applies not only to aid granted to undertakings engaged in such activities but also to related entities.

2. For the purposes of this regulation, aid granted indirectly includes all forms of aid to shipowners or to third parties which are available as aid for the building or conversion of ships such as credit facilities, guarantees and tax concessions. Concerning tax concessions, these provisions shall be without prejudice to the Community guidelines on State aid to maritime transport [7], and in particular point 3.1 thereof, and any amendments thereto.

3. No aid granted pursuant to this regulation may be conditional upon discriminatory practices against products originating in other Member States. In particular, aid granted by a Member State to its shipowners or to third parties in that State for ship building or ship conversion may not distort, or threaten to distort, competition between shipyards in the Member State and shipyards in other Member States in the placing of orders.

CHAPTER II — OPERATING AID

Article 3

Contract-related operating aid

1. Until 31 December 2000, production aid in support of contracts for shipbuilding and ship conversion, but not ship repair, may be considered compatible with the common market provided that the total amount of all forms of aid granted in support of any individual contract (including the grant equivalent of any aid granted to the shipowner or third parties) does not exceed, in grant equivalent, a common maximum aid ceiling expressed as a percentage of the contract value before aid. For shipbuilding contracts with a contract value before aid of more than ECU 10 million, the ceiling shall be 9 %; in all other cases the ceiling shall be 4.5 %.

[7] OJ C 205, 5.7.1997, p. 5.

2. The aid ceiling applicable to a contract shall be that in force at the date of signature of the final contract.

However, the preceding subparagraph shall not apply in respect of any ship delivered more than three years from the date of signing of the final contract. In such cases, the ceiling applicable to that contract shall be that in force three years before the date of delivery of the ship. The Commission may, however, grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company.

3. The grant of aid in individual cases in application of an approved aid scheme shall not require prior notification to, or authorisation from, the Commission.

However, where there is competition between different Member States for a particular contract, the Commission shall require prior notification of the relevant aid proposals at the request of any Member State. In such cases, the Commission shall adopt a position within 30 days of notification; such proposals may not be implemented before the Commission has given its authorisation. By its decision in such cases, the Commission shall ensure that the planned aid does not affect trading conditions to an extent contrary to the common interest.

4. Aid 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 and shall not be counted within the ceiling if it complies with the terms of OECD Council Resolution of 3 August 1981 (OECD understanding on export credits for ships) or with any agreement amending or replacing that understanding.

5. Aid related to shipbuilding and ship conversion granted as development assistance to a developing country shall not be subject to the ceiling. It may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party 6 in its agreement concerning the interpretation of Articles 6 to 8 of the OECD understanding on export credits for ships or with any later addendum or corrigendum to the said understanding.

The Commission must be given prior notification of any such individual aid proposal. It shall verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the understanding referred to in the first subparagraph and that the offer of development assistance is open to bids from different yards.

CHAPTER III — CLOSURE AND RESTRUCTURING AID

Article 4

Closure aid

1.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.

2.The costs eligible for the aid referred to in paragraph 1 are:

— payments to workers made redundant or retired before legal retirement age,

— 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, ship repair or ship conversion,

— payments to workers for vocational retraining,

— expenditure incurred for the redevelopment of the yard(s), its buildings, installations and infrastructure for use other than that specified in points (b), (c) and (d) of Article 1.

3. In addition, in the case of undertakings which totally cease shipbuilding, ship repair or ship conversion, the following measures may also be deemed compatible with the common market:

— aid of an amount not exceeding the higher of the following two values, as determined by an independent consultants report: the residual book value of the installations, ignoring that portion of any revaluation since 1 January 1991 that exceeds the national inflation rate, or the discounted value of the contribution to fixed costs obtainable from the installations over a three-year period (less any advantages the aided undertaking derives from their closure);

— 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.

4. 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.

5. In order to establish the irreversible nature of aided closures, the Member State concerned shall ensure that the closed shipbuilding, ship repair and ship conversion facilities remain closed for a period of not less than ten years.

Article 5

Restructuring aid

1. Aid for the rescue and restructuring of undertakings in difficulties, including capital injections, debt write-offs, subsidised loans, loss compensation and guarantees, may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (8).

Furthermore, in cases of restructuring, the following additional specific conditions must also be respected:

— the undertaking has not been granted any such aid pursuant to Regulation (EC) No 1013/97 (9),

(8) OJ C 368, 23.12.1994, p. 12.
(9) OJ L 148, 6.6.1997, p. 1.

— the aid is a one-off operation, with clear and unequivocal undertakings from the Member State concerned that no further aid will be granted to the undertaking or its legal successors in the future,

— there is a genuine and irreversible reduction in the shipbuilding, ship repair or ship conversion capacity of the undertaking concerned commensurate with the level of aid involved (in that regard the level of actual production in the preceding five years will be the determining factor in the level of capacity reduction required),

— the closed capacity must have been regularly used for shipbuilding, ship repair or ship conversion up to the date of notification of the particular aid in accordance with Article 10,

— the closed capacity must remain closed to shipbuilding, ship repair or ship conversion for not less than 10 years from the Commission's approval of the aid,

— if the closed capacity is re-used for alternative purposes, these must be independent of the shipyard in question and the activities must not be related principally to shipbuilding, ship repair or ship conversion,

— the Member State concerned must agree to cooperate fully with monitoring arrangements established by the Commission, including on-site inspections, where appropriate by independent experts.

2. In assessing the regularity of production and the capacity reduction involved, the Commission shall base its decision not only on the theoretical capacity of the yard(s) of the undertaking but also on the level of actual production over the preceding five years. No account will be taken of capacity reductions in other undertakings in the same Member State unless capacity reductions in the beneficiary undertaking are impossible without undermining the viability of the restructuring plan.

3. The Commission shall seek the views of Member States on all such cases where the aid is in excess of ECU 10 million before adopting a position on them.

4. In the case of restructuring operations lasting several years and involving large amounts of aid, the Commission may require that aid be disbursed in instalments subject to prior notification and approval by the Commission.

CHAPTER IV — OTHER MEASURES

Article 6

Investment aid for innovation

Aid granted for innovation in existing shipbuilding, ship repair and ship conversion yards may be deemed compatible with the common market up to a maximum aid intensity of 10 % gross, provided that it relates to the industrial application of innovative products and processes that are genuinely and substantially new, i.e. are not currently used commercially by other operators in the sector within the Community, and which carry a risk of technological or industrial failure, subject to the following conditions:

— the aid is limited to supporting expenditure on investments and engineering activities directly and exclusively related to the innovative part of the project,

— the amount and intensity of the aid is limited to the minimum necessary taking account of the degree of risk associated with the project.

Article 7

Regional investment aid

Aid 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, may be deemed compatible with the common market provided that:

— in regions meeting the criteria for the option contained in Article 92(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 does not exceed 22.5 %,

— in regions meeting the criteria for the option contained in Article 92(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 does not exceed 12.5 % or the applicable regional aid ceiling, whichever is the lower,

— the aid is limited to support eligible expenditure as defined in the applicable Community guidelines on regional aid.

Article 8

Research and development

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 ([10]), or any successor arrangements.

Article 9

Environmental protection

Aid granted to defray expenditure by shipbuilding, ship repair or ship conversion undertakings for environmental protection may be considered compatible with the common market if it is in compliance with the rules laid down in the Community guidelines on State aid for environmental protection ([11]), or any successor arrangements.

CHAPTER V — MONITORING PROCEDURES AND ENTRY INTO FORCE

Article 10

Notification

1. Aid to shipbuilding, ship repair and ship conversion undertakings covered by this regulation shall be subject to, in addition to the provisions of Article 93 of the Treaty, the special notification rules provided for in paragraph 2.

([10]) OJ C 45, 17.2.1996, p. 5.
([11]) OJ C 72, 10.3.1994, p. 3.

2. The following shall be notified to the Commission in advance by the Member States and authorised by the Commission before they are put into effect:

(a) any aid scheme — new or existing — or any amendment of an existing scheme covered by this regulation;

(b) any decision to apply a generally applicable aid scheme, including generally applicable regional aid schemes, to the undertakings covered by this regulation in order to verify compatibility with Article 92 of the Treaty, in particular in cases referred to in Articles 6, 7, 8 and 9 unless the aid is below the *de minimis* threshold of ECU 100 000 over any three-year period;

(c) any individual application of aid schemes in the following cases:

(i) those referred to in the second subparagraph of Article 3(3) and in Article 3(5), Article 4, and Article 5; or

(ii) when specifically provided for by the Commission in its approval of the aid scheme concerned.

Article 11

Monitoring of application of aid rules

1. To enable the Commission to monitor application of the aid rules contained in Chapters II to IV, Member States shall supply it with:

(a) monthly reports on each shipbuilding and ship conversion contract by the end of the third month following the month of signing of each contract, in accordance with the annexed Schedule 1;

(b) completion reports on each shipbuilding and ship conversion contract, including those signed before the entry into force of this regulation, by the end of the month following the month of completion, in accordance with the annexed Schedule 1;

(c) where requested by the Commission, yearly reports, to be provided by 1 March of the year following the year subject to the report, giving details of the total amount of aid granted to each individual national shipyard during the previous calendar year, in accordance with the annexed Schedule 2;

(d) in the case of shipyards able to build merchant ships over 5000 gt, yearly reports to be provided not later than two months after the annual general meeting has approved the shipyard's yearly report, giving publicly available information on capacity developments and on the structure of ownership, in accordance with the annexed Schedule 3; such reports shall be submitted biannually after the first annual report has been submitted unless the Commission decides to request yearly reports to continue;

(e) in the case of shipyards which have received restructuring aid in accordance with Article 5, quarterly reports on the attainment of the restructuring objectives, including the following elements: disbursement and use of the aid, investments, productivity performance, employment reductions, viability;

(f) in the case of shipyards benefiting from contracts supported by aid in the form of development assistance, such information as the Commission may require to enable it to ensure that the conditions of Article 3(5) are respected.

2. In the case of shipyards engaged in both commercial and military shipbuilding, ship repair or ship conversion, the reports referred to in (d) of paragraph 1 shall be accompanied by an attestation by the statutory auditor certifying the apportionment of the overheads to these two fields. In addition, separate information shall be submitted on the turnover in the commercial and military fields.

3. On the basis of the information communicated to it in accordance with Article 10 and paragraph 1 of this Article, the Commission shall draw up an annual overall report to serve as a basis for discussion with national experts and the Council. The report shall also be sent to the European Parliament for information. Separate half-yearly reports will be drawn up on cases involving restructuring aids.

4. If a Member State does not fully comply with its reporting obligations as laid down in paragraph 1, the Commission may, after consultation and after having given due notice, require that that Member State suspend outstanding payments of aid already approved until such time as all due reports have been received by the Commission.

If the reporting by a Member State under paragraph 1 is punctual but incomplete and at the time of reporting that Member State specifies those yards which have not fulfilled their reporting obligations, the Commission shall limit its possible requirement for suspension of outstanding aid payments to such yards only.

Article 12

Commission report

The Commission shall present to the Council a regular report on the market situation and appraise whether European yards are affected by anti-competitive practices. If it is established that industry is being caused injury by anti-competitive practices of any kind, the Commission shall, where appropriate, propose to the Council measures to address the problem.

The first report shall be presented to the Council no later than 31 December 1999.

Article 13

Entry into force

This regulation shall enter into force on 1 January 1999.

It shall apply until 31 December 2003.

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

ANNEX

SCHEDULE 1

REPORT OF MERCHANT SHIP ORDERS/COMPLETIONS

(Delete as appropriate)

Section 1: Contract details

1. New building/conversion		
2. Company	3. Yard	4. Yard No
5. Registered owner (name and nationality)		
6. Holding owner (name and nationality)		
7. Vessel's country of registration		
8. Date contract signed	9. Completion/delivery date	

Section 2: Ship details

10. Type of vessels (by OECD category)	
11. Deadweight (DWT)	
12. Gross tonnage (gt)	13. Compensated gross tonnage (cgt)
.....	.....

Section 3: Financial arrangements

	Currency	Ecu (Prevailing rate)	% of Contract price
14. Contract price			
15. Estimated contract loss (if any)			
16. Contract-related aid:			
A. Granted to yard:			
(a) grants			
(b) credit facilities			
(c) specific fiscal concession			
(d) other support			
B. Granted to customer or ultimate owners			
(a) grants			
(b) credit facilities			
(c) guarantees			
(d) fiscal concessions			
(e) other support			
17. Date aid granted			

Contact for enquiries: .....

..... Date: .....

Position: ..... Signature: .....

SCHEDULE 2

REPORT OF COMPANY FINANCIAL SUPPORT

Name of company .....

Section 1: Public aid

Operating aid	1. Contract value 2 Cost/loss	Direct aid received	Indirect aid support	Legal basis (including date of approval by Commission)
1. Contract support: (a) related to contract concluded before 1 January of the year concerned (b) related to contracts concluded after 1 January of the year concerned, of which: — related to development assistance to developing countries — related to contracts subject to Article 3(3)				
	Costs (1)		Aid received	Legal basis (including date of approval by Commission)
2. Investments 3. Social aids 4. Other cash closure costs 5. Asset disposal costs/receipts 6. Rescue and restructuring costs 7. Research and development costs 8. Environmental protection 9. Other costs				

(1) Including for 3, details of numbers of workers involved.

Contact for enquiries: .....

..... Date: .....

Position: ..... Signature: .....

Section 2: Turnover and profit / (loss) to be completed by all companies in receipt of direct production aid

	Reporting year	Previous year
10. Turnover 11. Of which related to merchant shipbuilding and ship conversion: (a) related to contracts concluded before 1 January of the year concerned (b) related to contracts concluded after 1 January of the year concerned, of which — related to development assistance to developing countries 12. Losses (if any) 13. Of which related to merchant shipbuilding and ship conversion: (a) related to loss on contracts (b) related to movement in provisions (c) related to restructuring expenditures		

Section 3: Cash flow (to be filled in for all companies which have registrered losses under 12 and have received funding from any public sources)

	Reporting year	Previous year
Expenditures 14. Trading losses before depreciation 15. Investment expenditure 16. Other expenditures 17. Other changes in working capital		
Source of funds 18. Equity receipts: (a) from public shareholders (b) from private shareholders 19. Loans and overdrafts: (a) from public sources (a') of which contract support (b) from private sources (b') of which with State guaranteee		

SCHEDULE 3

REPORT ON YARDS ABLE TO BUILD MERCHANT SHIPS OF OVER 5 000 GRT

1. Name of the company (.....)
2. Total available capacity (.....) (cgt)
3. Data on the dock/berth

Dock or berth	Maximum size of ships (grt)
(.....)	(.....)
(.....)	(.....)
(.....)	(.....)

4. Description of any plans for future capacity expansion or reduction
5. Production (expressed in cgt) for the year and production levels in the preceding four years
6. Structure of ownership (capital structure, share of direct and indirect public ownership)
7. Financial statements (balance sheet, profit and loss statement, including, if available, separate accounts covering the shipbuilding activities of holding)
8. Transfer of public resources (including debt guarantees, bond infusions, etc.)
9. Exemptions from financial or other obligations (including tax privileges, etc.)
10. Capital contribution (including equity infusions, withdrawal of capital, dividend, loans and their refunding, etc.)
11. Debt write-off
12. Transfer of losses

IV — Steel

COMMISSION DECISION No 2496/96/ECSC OF 18 DECEMBER 1996 (*)

establishing Community rules for State aid to the steel industry

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular the first and second paragraphs of Article 95 thereof,

With the unanimous assent of the Council and having consulted the Consultative Committee,

Whereas:

I

Any aid in any form whatsoever and whether specific or non-specific which Member States might grant to their steel industries is prohibited pursuant to Article 4(c) of the Treaty.

The rules authorising the grant of aid to the steel industry in certain cases, currently found in Commission Decision No 3855/91/ECSC (1), cover aid, whether specific or non-specific, financed by Member States in any form whatsoever.

Their aim was firstly not to deprive the steel industry of aid for research and developement and for environmental protection. The rules also authorise social aid to encourage the partial closure of plants or finance the definitive cessation of all ECSC activities by the least competitive enterprises. There is an exemption regarding regional investment aid in certain Member States which has now been limited to Greece. All other aid is prohibited.

The strict regime thus established has ensured fair competition in this industry in recent years. It is consistent with the objective pursued through the completion of the internal market. It should therefore continue to be applied, albeit with a number of technical modifications.

Decision No 3855/91/ECSC will expire on 31 December 1996.

The Community thus finds itself faced with a situation not specifically provided for in the Treaty and yet requiring action. In these circumstances, recourse must be had to the first paragraph of Article 95 of the Treaty so as to enable the Community to pursue the objectives set out in Articles 2, 3 and 4 thereof.

(*) OJ L 338, 28.12.1996, p. 42.
(1) OJ L 362, 31.12.1991, p. 57.

In order to cover the period remaining until the expiry of the Treaty, this Decision should apply until 22 July 2002.

In order to ensure that the steel industry and other industries have equal access to aid for research and development and to aid for environmental protection, the compability of the aid with the common market should be assessed in the light of the existing Community framework for State aid for research and development [2] and the Community guidelines on State aid for environmental protection [3]. The latter provides for a reduction of maximum aid intensities to adapt to new mandatory standards compared to the provisions of Decision No 3855/91/ECSC and allows for higher aid for investments that lead to a protection of the environment significantly exceeding the minimum standards. Furthermore, it opens some limited possibilities for operating aid, in particular for relief from environmental taxes in cases where it is necessary to prevent firms from being placed at a disadvantage compared with their competitors in countries that do not have such measures.

Where an undertaking ceases all ECSC activity, aid for closure may be paid without restriction as to the nature of its steel production. Since the rules concerning closure aid in Decision No 3855/91/ECSC were limited to cases in which the company closing its steel plants was not part of a group including other ECSC firms, the practical relevance of these provisions was rather limited. Therefore, in order to promote further capacity reductions in the steel sector, this decision should also allow closure aid for companies that belong to a group with other steel firms, provided that it is effectively separated and that the group does not increase its remaining capacity throughout a period of five years.

To avoid discrimination due to the variety of forms which State aid may take, transfers of State resources to public or private steel firms, in the form of acquisitions of shareholdings or provisions of capital or similar financing, must be subject to the same procedures as aid so that the Commission can determine whether such operations involve an aid element. This will be the case where the financial transfer is not a genuine provision of risk capital according to usual investment practice in a market economy. The compatibility of any such aid element with the Treaty must be assessed by the Commission in the light of the criteria laid down in this decision. For this purpose, all such financial transfers must be notified to the Commission and may not be implemented if, before the end of the standstill period laid down in Article 6(6) the Commission determines that they contain aid elements and initiates the procedure provided for in Article 6(5).

This decision should be applied in accordance with international commitments of the Community concerning State aid to the steel industry.

In order to maintain transparency with regard to aid, the Commission should draw up an annual report on the implementation of this decision,

HAS ADOPTED THIS DECISION:

Article 1

Principles

1. Aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

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[2] OJ C 45, 17.2.1996, p. 5.
[3] OJ C 72, 10.3.1994, p. 3.

2. The term 'aid' also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing (such as bonds convertible into shares, or loans on non commercial conditions or the interst on or repayment of which is at least partly dependent on the undertaking's financial performance, including loan guarantees and real estate transfers) which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.

3. Aid falling within the terms of this decision may be granted only after the procedures laid down in Article 6 have been followed and shall not be payable after 22 July 2002.

Article 2

Aid for research and development

Aid granted to defray expenditure by steel undertakings on research and development projects may be deemed 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, as set out in *Official Journal of the European Communities* C 45 of 17 Feburary 1996 [4].

Article 3

Aid for environmental protection

Aid for environmental protection may be deemed compatible with the common market if it is in compliance with the rules laid down in the Community guidelines on State aid for environmental protection, as set out in *Official Journal of the European Communities* C 72 of 10 March 1994, in conformity with the criteria for their application to the ECSC steel industry outlined in the Annex to this decision.

Article 4

Aid for closures

1. Aid towards the costs of payments to workers of ECSC steel undertakings made redundant or accepting early retirement may be deemed compatible with the common market provided that:

(a) the payments actually arise from the partial or total closure of steel plants that have been in regular production up to the time of notification of the aid and whose closure has not already been taken into account for the purposes of applying Commission Decisions No 257/80/ECSC [5], No 2320/81/ECSC [6], No 3484/85/ECSC [7], No 218/89/ECSC [8], No 322/89/ECSC [9], No

[4] The provisions of point 5.10.3 of the framework, applicable to a research project which is in accordance with the objectives of a specific project or programme undertaken as part of the current Community RTD framework programme, also apply to aid to a research project which is undertaken as part of an ECSC steel RTD project or programme.
[5] OJ L 29, 6.2.1980, p. 5.
[6] OJ L 228, 13.8.1981, p. 14.
[7] OJ L 340, 18.12.1985, p. 1.
[8] OJ L 86, 31.3.1989, p. 76.
[9] OJ L 38, 10.2.1989, p. 8.

3855/91/ECSC ([10]), No 94/257/ECSC ([11]), No 94/258/ECSC ([12]), No 94/259/ECSC ([13]), No 94/260/ECSC ([14]), 94/261/ECSC ([15]), No 94/1075/ECSC ([16]), 96/315/ECSC ([17]), on aid to the steel industry or the Act of Accession of Spain and Portugal;

(b) the payments do not exceed those customary, under the rules in force in the Member States on 1 January 1996; and

(c) the aid does not exceed 50 % of that portion of such payments which is not defrayed directly pursuant to Article 56(1)(c) or Article 56(2)(b) of the Treaty by the Member State and/or by the Community according to the detailed rules laid down in the bilateral conventions but is payable by the undertaking concerned.

2. Aid to steel undertakings which permanently cease production of ECSC iron and steel products may be deemed compatible with the common market, provided that:

(a) the undertakings became a legal entity before 1 January 1996;

(b) they have been regularly producing ECSC iron and steel products up to the date of notification of the particular aid in accordance with Article 6;

(c) they have not reorganised their production or plant structure since 1 January 1996;

(d) they are not directly or indirectly controlled, within the meaning of Decision No 24/54 of the High Authority ([18]), and do not themselves directly or indirectly control an undertaking that is itself a steel undertaking or controls other steel undertakings;

(e) they close and destroy the installations used for the production of ECSC iron and steel products within six months after the cessation of production or six months after the approval of the aid by the Commission, whichever is the later; and

(f) the closure of their plants has not already been taken into account for the purposes of applying the decisions referred to in paragraph 1(a) or the Act of Accession of Spain and Portugal or granting a favourable opinion pursuant to Article 54 of the Treaty.

The amount of this aid may not exceed the higher of the following two values, as determined by an independent consultant's report:

(a) the discounted value of the contribution to fixed costs obtainable from the plants over a three year period, less any advantages the aided firm derives from their closure; or

(b) the residual book value of the plants, ignoring that portion of any revaluations since 1 January 1996 which exceeds the national inflation rate.

3. Aid to steel undertakings which fulfil the conditions referred to in (a), (b), (c), (e) and (f) of the first subparagraph of paragraph 2 but which are directly or indirectly controlled by or themselves directly

([10]) OJ L 362, 31.12.1991, p. 57.
([11]) OJ L 112, 3.5.1994, p. 52.
([12]) OJ L 112, 3.5.1994, p. 58.
([13]) OJ L 112, 3.5.1994, p. 64.
([14]) OJ L 112, 3.5.1994, p. 71.
([15]) OJ L 112, 3.5.1994, p. 77.
([16]) OJ L 386, 31.12.1994, p. 18.
([17]) OJ L 121, 21.5.1996, p. 16.
([18]) OJ of the ECSC No 9, 11.5.1954, p. 345/54.

or indirectly control an undertaking that is itself a steel undertaking may be deemed compatible with the common market provided that:

(a) the undertaking to be closed is effectively and legally separated from the corporate structure at least six months before the payment of the aid; and

(b) the accounts of the undertaking to be closed have been independently certified to be a true and accurate account of the assets and liabilities attributable to that undertaking by an auditor accepted by the Commission;

(c) there is a genuine and verifiable reduction in production capacity such as to produce an appreciable benefit over time for the industry as a whole in terms of a reduction in the production capacity of ECSC iron and steel products in which the closure took place throughout a period of five years following the date of the aided closure or the date of the last payment of aid approved under this Article, if later, leading to a significant overall improvement in the relationship of supply to demand in the market; and

(d) the partial closure in question has not already been taken into account for the purposes of applying the Commission's decision of 19 October 1994 ([19]).

The amount of this aid may not exceed the average of the following two values, as determined by an independent consultant's report:

(a) the discounted value of the contribution to fixed costs obtainable from the plants over a three-year period, less any advantages the aided firm derives from their closure; and

(b) the residual book value of the plants, ignoring that portion of any revaluations since 1 January 1996 which exceeds the national inflation rate.

4. All aid approved pursuant to paragraphs 2 and 3 shall be subject to scrutiny by an independent auditor accepted by the Commission in order to ensure that the limits specified in the second subparagraph of paragraph 2 and the second subparagraph of paragraph 3 are not exceeded and that any excess aid is repaid.

Article 5

Special provisions

Aid granted to steel undertakings for investment under general regional aid schemes may until 31 December 2000 be deemed compatible with the common market, provided that the aided undertaking is located in Greece, the total aid does not exceed ECU 50 million and the aided investment does not lead to an increase in production capacity.

Article 6

Procedure

1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Article 2 to 5. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EC Treaty.

([19]) OJ C 390, 31.12.1994, p. 20.

The notification of plans to grant aid under Article 4 in which the Member State paying the aid is not identical to that in whose territory the closure would take place shall be submitted to the Commission jointly by both Member States.

The notification of aid plans must be lodged with the Commission at the latest by 31 December 2001.

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 31 December 2001 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquistion of shareholdings, provisions of capital, loan guarantees, indemnities or similar financing.

The Commission shall determine whether the financial transfers involve aid elements within the meaning of Article 1(2) and, if so, shall examine whether they are compatible with the common market under the provisions of Articles 2 to 5.

3. The Commission shall seek the views of the Member States on plans for closure aid and on other major aid proposals notified to it before adopting a position on them. It shall inform the Member States of the decisions it has adopted on aid proposals, specifying the form and volume of the aid.

4. The planned measures falling within paragraphs 1 or 2 may be put into effect only with the approval of and subject to any conditions laid down by the Commission.

The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision under the first paragraph of Article 88 of the Treaty requiring the Member State to suspend the disbursement of any financial means until approval is given by the Commission. Article 88 of the Treaty shall continue to apply in the event of a Member State's failing to comply with that decision.

The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision under the first paragraph of Article 88 of the Treaty requiring the Member State to recover provisionally any financial means disbursed in breach of the first subparagraph of this paragraph and Article 4(c) of the Treaty. Repayment shall be made in accordance with the procedures and provisions of domestic law of the Member State concerned, together with interest at the rate used as reference rate in the assessment of regional aid schemes running from the date of disbursement. Article 88 of the Treaty shall continue to apply in the event of a Member State failing to comply with that decision.

5. If the Commission considers that a certain financial measure may represent State aid within the meaning of Article 1 or doubts whether a certain aid is compatible with the provisions of this decision, it shall inform the Member State concerned and give notice to the interested parties and other Member States to submit their comments. If, after having received the comments and after having given the Member State concerned the opportunity to respond, the Commission finds that the measure in question is an aid incompatible with the provisions of this decision, it shall take a decision not later than three months after receiving the information needed to assess the proposed measure. Article 88 of the Treaty shall apply in the event of a Member State's failing to comply with that decision.

6. If the Commission fails to initiate the procedure provided for in paragraph 5 or otherwise to make its position known within two months of receiving full notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so. Where the Commission seeks the views of Member States under paragraph 3, the abovementioned period shall be three months.

Article 7

Reports of Member States

Member States shall twice a year supply the Commission with reports on the aid disbursed over the previous six months, the uses to which the aid was put and the results obtained over the same period. The reports shall include particulars of all financial operations carried out by the Member States or local or regional authorities in relation to publicly owned steel undertakings. They must be supplied within two months following the end of each six month period.

Article 8

Reports of the Commission

The Commission shall draw up annual reports on the implementation of this decision for the Council and, for information, for the European Parliament and the Consultative Committee.

Article 9

Term of validity

This decision shall enter into force on 1 January 1997. It shall apply until 22 July 2002.

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

ANNEX

CRITERIA FOR THE APPLICATION OF COMMUNITY GUIDELINES ON STATE AID TO THE STEEL INDUSTRY FOR ENVIRONMENTAL PROTECTION

For all cases of State aid for environmental protection the Commission will, as appropriate, impose strict conditions and safeguards so as to avoid general investment aid for new plants or equipment being granted under cover of environmental protection. The Commission will make use of independent expertise in examining such cases and Member States will be consulted.

Aid to help firms adapt existing installations to new mandatory standards

(a) In interpreting paragraph 3(2)(A) of the Communtiy guidelines on State aid for envionmental protection, relating to aid for investment, the Commission will allow additional aid intensity only for small and medium-sized enterprises.

(b) In relation to firms that, instead of adapting existing plant or equipment which is more than two years old, decide to replace such plant or equipment by new plant meeting the new standards, the following approach will be adopted:

(i) the cost of adapting existing plant or equipment (i.e. the basis of eligibility for aid) must be assessed not only by the investor but also, if appropriate, by independent experts;

(ii) the Commission will analyse the economic and environmental background of a decision to opt for the replacement of existing plant or equipment. In principle a decision to undertake new investment which would have been necessary in any event on economic grounds or due to the age of the existing plant or equipment will not be eligible for aid. The existing plant must have significant useful life left (at least 25 %) for the new investment to be eligible for aid.

Aid to encourage firms to contribute to significantly improved environmental protection

(a) In the case of firms which decide to improve significantly on mandatory standards, in addition to complying with the criteria in point (b) (ii) above, the investor will have to demonstrate that a clear decision was taken to opt for higher standards which necessitated additional investment, that is, that a lower-cost solution existed which would meet the new environmental standards. In any event, the higher aid level will only apply to the additional environmental protection achieved. Any advantage in regard to lower production costs resulting from these significantly higher levels of environmental protection will be deducted;

(b) in relation to firms which significantly improve on environmental protection, the criteria in point (b)(ii) above must be complied with and, in addition, any advantage in regard to lower costs of production from these significant improvements will be deducted;

(c) in conjunction with the above criteria, investments undertaken solely for environmental protection will be examined on the basis of their compliance with the criteria set out in the Community guidelines on State aid for environmental protection [1].

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[1] OJ C 72, 10.3.1994, p. 3.

Framework for certain steel sectors not covered by the ECSC Treaty (*)

1. INTRODUCTION

Although the Community iron and steel market has been improving since 1987, the long and serious crisis it experienced from the 1970s onwards, the chief features of which were a constant fall-off in demand and the collapse of prices, produced grave problems of overcapacity, low plant utilisation rates and prices which did not cover production costs. Firms were no longer viable.

The crisis affected both ECSC and non-ECSC steel activities.

When the Steel Aid Code No 2320/81/ECSC (1) expired at the end of 1985, the Commission established new Community rules for aid to the ECSC steel industry (Commission Decision No 3484/85/ECSC of 27 November 1985) (2) which prohibit aid grants other than for research and development, environmental protection and, within strict limits, for closures. No provision is made for operating aid, rescue or investment aid, although the rules cover both specific aid and aid granted under general or regional schemes.

All ECSC aid not provided for in the decision comes under the prohibition in Article 4(1) of the ECSC Treaty.

However, there are no specific Community rules on aid to non-ECSC steel sectors; aid may be granted on the basis of Articles 92 and 93 of the EC Treaty under general, specific or regional aid schemes.

In addition to the particularly sensitive nature of competition in the non-ECSC steel sectors, the Commission considers that these sectors represent a risk to its ECSC steel aid policy, inasmuch as aid awarded to subsidiaries of steel groups for non-ECSC activities could ultimately benefit ECSC activities.

Because first-stage steel processing is closely linked technically with the iron and steel industry and because of the number of steel groups involved, it has been identified as presenting the greatest potential risk in this respect.

2. ANALYSIS OF NON-ECSC STEEL ACTIVITIES

Non-ECSC iron and steel activities are made up of a number of sectors and subsectors with the following chief characteristics:

(i) the sectors are not covered by the ECSC Treaty;

(ii) in these sectors, ECSC steel undergoes preliminary processing (not covered by the ECSC Treaty) before subsequent processing into the end-product.

The following table defines the main subsectors involved in first-stage processing of steel:

(*) OJ C 320, 13.12.1988, p. 3.
(1) OJ L 228, 13.8.1981, p. 14.
(2) OJ L 340, 13.12.1985, p. 1.

Sector	Subsector	Definition	Consumption of ECSC steel	% (1)
Pipes and tubes	Seamless Large welded	Manufacturing of seamless and welded tubes from ingots, semis and sheet	Strips; sheet; ingots for tubes, semis (tube rounds and squares)	43
	Small and medium welded	Narrow strip or coils, hot or cold-rolled, including the production of precision tubes and special purpose tubes		
Wire-drawing and rod-drawing	Wire-drawing	Manufacturing of drawn-wire from wire rod	Wire rod	22
	Rod-drawing	Production of bars and full sections by drawing and thickness reduction	Wire rod; merchant steels	
Cold-rolling and cold-forming	Cold-rolling	Manufacture of cold-rolled strip	Strip; sheet	15
	Cold-forming	Cold-forming of sections by bending hot or cold-rolled strip and sheet	Strip; sheet	
Forging	Open-die forging Stamping	Manufacture of products by heavy, medium and light forging, and stamping, including the production of hoops, bands, wheels and axles	Ingots; merchant steels	13
Other	Steel foundries	Production of items by pouring liquid steel into a mould of the appropriate shape (internal and external forming); followed by cooling and solidification	Liquid steel	7
	Deep drawing and cutting	Consumption of flat products (mainly sheet) which, after cutting or deformation by deep drawing, are supplied in the appropriate shapes and sizes	Sheet; strip	

(1) Consumption percentage for the sector in relation to total ECSC first-stage processing.

Consumption of ECSC steel by non-ECSC steel works represents 40 % of total consumption, which points out the importance of this sector to the steel industry.

A breakdown of consumption by sector shows that pipe and tube manufacturers, with a 43 % share, represent by far the largest outlet, followed by wire-drawing with 22 %; the other sectors have a much smaller share.

According to the definitions given in the table, the sectors cover a very wide heterogeneous range of activities.

Because their structures vary so much, a further analysis of the subsectors is necessary.

The degree of technical integration of each sector with ECSC activities is also very variable. There is considerable integration in the tube, heavy open-die forging, wire-drawing and foundry sectors and less in the other subsectors.

2.1. Analyses by subsector

2.1.1. Seamless tubes

There are 14 producers in the Community, of which five represent 80 % of the 5.7 million tonnes of production capacity. The seamless tube market is primarily dependent on the prospecting requirements of the oil industry, which led to a sharp drop in production in recent years. Capacity utilisation rates are inadequate.

2.1.2. Large seamless pipes and tubes (diameter greater than 406.4 mm)

There are 16 Community producers, of whom six account for 90 % of the 5.3 million tonnes of production capacity. Most of them have a production line that is integrated with an upstream sheet mill.

The main users are firms constructing gas and oil pipelines, which makes them heavily dependent on the energy sector.

There are considerable links with the steel groups which produce the pre-products. As the production cycle is completely integrated, it is not possible to separate pipes and tubes from the upstream steel industry. As a result, the problems of heavy plate overcapacity are closely related to activity in the heavy welded pipe and tube sector.

2.1.3. Small and medium-sized welded tubes Ø< 406.4 mm) (or diameter less than)

Structurally, these subsectors are very different from the previous two categories: some 200 producers of various sizes, either tied to steel producers or independent, have a total capacity of 12 million tonnes.

The utilisation rate has for several years remained under 50 % although this varies considerably from one country to another.

2.1.4. Wire-drawing

A distinction is made between mild steel drawing (wire) and drawing of hard and special steels (steel wire) with high added value.

With an installed capacity in excess of 12 million tonnes and a part of the hard steel drawing sector showing profits, the situation is fairly promising; however, the utilisation rate for mild steels is very low, leading to overcapacity. The mild steel wire-drawing sector is more closely integrated with ECSC steel production.

2.1.5. Rod-drawing

There is a slight increase in the consumption of the high quality, high value-added products of this subsector. Structurally, the sector is scattered and is not dependent on exports.

2.1.6. Cold-rolling and shaping

Cold-rolling is experiencing a decline in demand due to competition from products obtained by the cold-rolling of slit sheets.

Demand for cold-forming is directly linked to demand from its largest outlets: construction and metal structures.

There are a great many firms and their links with the steel groups are minimal.

2.1.7. Open-die forging

This sector, which is mainly controlled by the major steel groups, is having to cope with the crisis caused by the decline of its two principal customers — shipbuilding and nuclear power plants.

2.1.8. Stamping

The stamping sector has a particularly fragmented structure. Firms have adjusted to market conditions, notably by increasing added value.

2.1.9. Foundries

This activity appears to be carried out chiefly by firms that are independent of the steel groups.

The sector is very fragmented, and demand has been shrinking in recent years.

Steel foundries have endeavoured to adjust capacity, but in spite of their efforts the utilisation rate is still in the region of 70 % owing to pessimistic demand forecasts, and further adjustments are necessary.

2.1.10. Deep drawing and cutting

The sector does not appear to be experiencing major difficulties. The firms concerned are for the most part independent or subcontractors in the consumer sectors (motor vehicles).

3. FRAMEWORK FOR AID

The foregoing analyses of non-ECSC steel reveals that it covers an extremely varied and mixed range of activities. Therefore, the sectors and subsectors are not all equally sensitive or liable to misuse of aid. The risk must not, however, be underestimated, as any new specific EC aid to a steel group is subject to the prior notification requirement provided for in Article 93(3) of the EC Treaty and the Commission can ensure that the impact of the aid on competition complies with the provisions of Article 92.

Only aid granted under an existing general or regional scheme and authorised by the Commission is not subject to the prior notifications requirement and would thus be more likely to avoid the abovementioned checks. Even in these cases, the Community rules in force require prior notification of individual cases of aid exceeding a certain threshold ([3]).

([3]) In particular the Community rules on general aid schemes (Commission letter to the Member States SG(79) D/10478 of 14 September 1979) and the rules on the cumulation of aid for different purposes (Commission communication on the cumulation of aid for different purposes (OJ C 3, 5.1.1985)).

The examination of the inherent sensitivity and degree of risk was based on four main parameters:

(i) Degree of integration of each sector with ECSC activities: only where there is a significant degree of integration is there a risk that aid will be transferred from one sector to another. Only seamless tubes, large welded pipes (Ø > 406.4 mm) and heavy open-die forging, followed by wire-drawing, are extensively technically integrated with ECSC steel activities.

(ii) Financial and economic position of the sector: in theory, the ailing sectors are more likely to benefit from substantial aid. Tubes, heavy open-die forging, mild steel drawing and foundries are experiencing problems of overcapacity and are therefore in serious economic and financial difficulties.

(iii) Structure of the sector: sectors where there is a strong concentration of activities in a few major groups merit closer attention than those with a more fragmented structure where firms respond more flexibly to situations of surplus capacity. Only pipes and tubes, heavy open-die forging and mild steel wire-drawing are in the first category, while the dominant feature of the others is their fragmentation.

(iv) Degree of economic activity in relation to ECSC steel: the volume of steel consumption is one of the parameters used to assess the economic size of a sector in relation to the non-ECSC steel industry as a whole. According to that parameter, only tube firms with 43 % consumption, and wire and rod drawing with 22 %, are of any significant size.

In short, therefore, the analysis shows that among the most sensitive subsectors:

(a) seamless tubes and large welded tubes and pipes (Ø > 406.4 mm) run a major risk of benefiting from considerable aid and possibly of allowing such aid to be transferred to ECSC steel activities;

(b) small and medium-sized welded tubes, heavy open-die forging, mild steel wire-drawing and foundries run a smaller risk;

(c) the other subsectors do not at present appear to be facing any great risk.

4. RULES ON NOTIFICATION AND COMMUNICATION

4.1. In view of the foregoing, the Commission considers that the existing aid schemes should be modified as follows:

(a) Member States should notify the Commission in advance of all aid schemes concerning the subsectors of seamless tubes and large welded tubes (Ø > 406.4 mm), irrespective of the amount of the aid or the location of the regions or firms receiving the aid.

(b) Member States should supply the Commission twice a year with reports on the aid disbursed over the previous six months to the subsector, referred to in point (a) and the small and medium-sized welded tubes, heavy open-die forging, foundries and mild steel wire-drawing subsectors.

The reports must be supplied within the two months following the end of each six-month period.

The Commission reserves the right to change the lists of the subsectors referred to above in points (a) and (b), if necessary by adding new subsectors if it finds that aid granted to those subsectors adversely affects trading conditions to an extent contrary to the common interest. In particular, after

the first year, the Commission will examine the first two six-monthly reports and decide whether to extend the prior notification requirement to other non-ECSC subsectors.

4.2. Legal basis

The rules referred to in paragraph 4 are based on Article 93(1) of the EC Treaty.

Notification of the aid in question must comply with the conditions in Article 93(3) of the EC Treaty. The Commission must thus be informed in sufficient time for it to submit its comments before the proposed aid schemes are implemented.

The Commission has 30 days in which to adopt a position on aid proposals notified to it.

4.3. Entry into force

The rules referred to in paragraph 4 enter into force on 1 January 1989. They do not affect the obligation on Member States to notify individual cases under existing provisions or decisions which the Commission may adopt concerning specific general, regional or sectoral aid schemes.

V — Coal

COMMISSION DECISION NO 3632/93/ECSC (*) OF 28 DECEMBER 1993

establishing Community rules for State aid to the coal industry

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 95(1) thereof,

Having consulted the Consultative Committee, the European Parliament and with the unanimous assent of the Council,

I

Whereas Article 4(c) of the Treaty prohibits all State aid to the coal industry in any form whatsoever, whether specific or non-specific;

Whereas structural changes on the international and Community energy markets have been forcing the coal industry in the Community to make major modernization, rationalisation and restructuring efforts since the early 1960s; whereas, added to the competition from crude oil and natural gas, there has been growing pressure from coal imported from outside the Community; whereas, as a result, many undertakings in the Community are in financial difficulties and require State aid;

Whereas since 1965 the High Authority/Commission has on a number of occasions laid down rules to reconcile State aid to the coal industry with the objectives of the Treaty; whereas each new set of aid rules has been tailored to developments in the economy in general, and in particular to developments in the energy market and the coal market in the Community;

Whereas all the decisions in question laid down objectives and principles guaranteeing that State aid was in the common interest, was strictly necessary in terms of volume and duration, and in no way disturbed the functioning of the common market; whereas Member States also undertook to obtain prior authorisation from the High Authority/Commission before granting aid;

II

Whereas although Commission Decision No 2064/86/ECSC of 30 June 1986 establishing Community rules for State aid to the coal industry (1) has enabled varying degrees of further restructuring,

(*) OJ L 329, 30.12.1993, p. 12.
(1) OJ L 177, 1.7.1986, p. 1.

modernisation and rationalisation to take place in the coal industry with a view to increasing competitiveness, most coal production in the Community remains uncompetitive *vis-à-vis* imports from outside the Community, despite a considerable increase in productivity and a major reduction in employee numbers in this sector;

Whereas the scope for rationalisation in the coal industry in the Community is limited by unfavourable geological conditions; whereas, therefore, these rationalisation measures must be backed up by restructuring measures in order to improve the competitive position of the Community coal industry;

Whereas, in order to attain this objective, more financial resources are needed than the undertakings themselves can provide; whereas the Community similarly does not have at its disposal the resources needed to finance this process; whereas continuation of a Community system of aid is proving indispensable;

Whereas the measures taken may, in accordance with the ECSC Treaty provisions, form part of a concept for the diversification of energy supply and suppliers, including national energy resources, in the context of existing energy concepts;

Whereas the world market in coal is stable with abundant supplies from a wide variety of geographical sources, with the result that even in the long term and with increased demand for coal the risk of persistent interruption of supply, although it cannot be ruled out totally, is nevertheless minimal;

Whereas most of the coal imported into the Community comes from the Community's partners in the International Energy Agency (IEA) or from States with which the Community and/or the Member States have signed trade agreements and which cannot be considered high-risk suppliers;

Whereas, despite the inevitable restructuring and closures, care must be taken to minimise the social and regional impact of these changes, when continuing the Community's policy in this sector, which must take account of the precarious social situation of mining regions, in particular in the context of the principle of economic and social cohesion;

Whereas the Community is therefore confronted with a situation for which no provision is made in the Treaty but on which action must nevertheless be taken; whereas, under these circumstances, the first paragraph of Article 95 of the Treaty must be invoked in order to allow the Community to continue to pursue the objectives set out in the opening Articles of the Treaty and, to this end, to establish new Community rules for aid to the coal industry;

III

Whereas the Community must progressively bring about conditions which will of themselves ensure the most rational distribution of coal production;

Whereas, to this end, the Community must, *inter alia*, promote a policy of using natural resources rationally under conditions precluding all protection against competing industries;

Whereas the Community must promote the growth of international trade;

Whereas in order to perform its task the Community must ensure the establishment, maintenance and observance of normal competitive conditions;

Whereas in the light of the abovementioned provisions, State aid must cause no distortion of competition and must not discriminate between coal producers, purchasers or consumers in the Community;

Whereas State aid must therefore be granted under transparent conditions to allow better evaluation of its impact on the conditions of competition;

Whereas inclusion of the aid in the budget or in exactly equivalent mechanisms, simplification of such aid and proper indication of the amounts received in the undertakings' annual accounts are the best guarantees of transparency in the aid systems;

Whereas, moreover, the upward trend in the amount of aid paid in recent years is incompatible with the exceptional, transitional nature of the Community aid arrangements; whereas the principle of reducing the coal industry's production costs and capacity is therefore necessary in order to achieve degression of aid;

Whereas, however, a policy of rational distribution of production requires reductions of costs and of capacity to be concentrated primarily on those areas of production receiving the highest level of aid;

Whereas for undertakings or production units in the Community which have no hope of making progress towards greater economic viability in view of coal prices on the world markets, aid arrangements should make it possible to mitigate the social and regional consequences of closures; whereas in the light of redevelopment experience in certain Community coal-producing regions it has been recognised that, in cases of early closure of installations with no prospect of future viability, aid should be granted, as deemed necessary by the Member State, for regional industrial redevelopment, to the extent compatible with the Treaties;

Whereas steps must be taken not only to create the conditions for healthier competition but also to bring about a long-term improvement in the competitiveness of this industry throughout the Community in relation to the world market;

Whereas Community coal industry undertakings must be able to count on a precise medium- and long-term outlook to carry out structural changes;

Whereas, as a result of the steady decline in coal production in the Community in recent decades, some undertakings may be confronted with abnormal or exceptionally high costs; whereas State aid to offset all or part of such costs may be compatible with the common market provided that strict supervision of such aid by the Commission is guaranteed; whereas these inherited costs are not matched by hidden revenue from the past;

Whereas it is necessary to ensure equal access by the coal industry and other sectors to aid for research and development and to aid for environmental protection; whereas it is therefore desirable to evaluate the compatibility of such aid with the Community guidelines established to this end;

Whereas, in particular, the coal industry is characterised by ever-increasing recourse to advanced technology and therefore plays an important role in research, development and demonstration and the exploitation of the industrial potential of such technology;

IV

Whereas efforts to reduce production costs must form part of a restructuring, rationalisation and modernisation plan for the industry distinguishing between production units capable of contributing towards attainment of this objective and units which cannot attain it; whereas the latter will have to be the subject of an activity-reduction plan leading to the closure of installations when the present arrangements expire; whereas only exceptional social and regional reasons can justify any postponement of closure beyond the expiry date set;

Whereas the Commission's power of authorisation must be implemented on the basis of precise and full knowledge of each measure planned by the governments and of their relationship to the objectives of this decision; whereas, consequently, Member States should regularly provide the Commission with a consolidated report showing the full details of the direct or indirect aid which they plan to grant to the Community coal industry, specifying the reasons for, and scope of, the proposed aid and, where appropriate, its relationship with any modernisation, rationalisation and restructuring plan submitted;

Whereas it may be necessary, in view of the specific nature of certain existing aid arrangements, to allow a transitional period of three years so that such arrangements can be brought into line with the provisions of this decision;

Whereas it is essential that no payment should be made, in whole or in part, before the Commission has given explicit authorisation,

HAS ADOPTED THIS DECISION:

SECTION I — FRAMEWORK AND GENERAL OBJECTIVES

Article 1

1. All aid to the coal industry, whether specific or general, granted by Member States or through State resources in any form whatsoever may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with Articles 2 to 9.

2. The term 'aid' covers any direct or indirect measure or support by public authorities linked to production, marketing and external trade which, even if it is not a burden on public budgets, gives an economic advantage to coal undertakings by reducing the costs which they would normally have to bear.

3. The term 'aid' also covers the allocation, for the direct or indirect benefit of the coal industry, of the charges rendered compulsory as a result of State intervention, without any distinction being drawn between aid granted by the State and aid granted by public or private bodies appointed by the State to administer such aid.

4. The term 'aid' also covers aid elements contained in financing measures taken by Member States in respect of coal undertakings which are not regarded as risk capital provided to a company under standard market-economy practice.

Article 2

1. Aid granted to the coal industry may be considered compatible with the proper functioning of the common market provided it helps to achieve at least one of the following objectives:

(i) to make, in the light of coal prices on international markets, further progress towards economic viability with the aim of achieving degression of aid;

(ii) to solve the social and regional problems created by total or partial reductions in the activity of production units;

(iii) to help the coal industry adjust to environmental protection standards.

2. On expiry of a transitional period not exceeding three years starting at the entry into force of this Decision, with a view to increasing transparency, aid shall be authorised only if it is entered in Member States' national, regional or local public budgets or channelled through strictly equivalent mechanisms.

3. With effect from the first coal production year covered by this decision, all aid received by undertakings shall be shown together with their profit-and-loss accounts as a separate item of revenue, distinct from turnover.

4. For the purposes of this decision, 'production costs' means those costs, per tonne of coal equivalent, which are linked to current production.

5. All measures involving the granting of aid as referred to in Articles 3 to 7 shall also be appraised, without prejudice to the specific conditions defined for them by those Articles, so as to assess their compatibility with the objectives set out in paragraph 1 of this Article.

SECTION II — AID GRANTED BY THE MEMBER STATES

Article 3

Operating aid

1. Operating aid to cover the difference between production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market may be considered compatible with the common market only if it satisfies all the following conditions:

(i) the aid notified per tonne shall not exceed, for each undertaking or production unit, the difference between production costs and foreseeable revenue in the following coal production year;

(ii) 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. Where the aid is granted within the framework of a multiannual financing ceiling, the final correction shall be made at the end of the year following the aforesaid multiannual financing exercise;

(iii) the amount of operating aid per tonne may not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries;

(iv) without prejudice to Articles 8 and 9, Member States shall supply the Commission firstly with all details relevant to the calculation of the foreseeable production costs and revenue per tonne and secondly with all details relevant to the calculation of the correction based on actual production costs and revenue;

(v) aid must entail no distortion of competition between coal users.

2. Member States which intend to grant operating aid as referred to in paragraph 1 in the course of the 1994 to 2002 coal production years to coal undertakings shall submit to the Commission in advance a modernisation, rationalisation and restructuring plan designated to improve the economic viability of the undertakings concerned by reducing production costs.

The plan will provide for appropriate measures and sustained efforts to generate a trend towards a reduction in production costs at 1992 prices, during the period 1994 to 2002.

Implementation of this plan shall be monitored regularly and the situation reviewed by the Commission in 1997.

3. If some production units in an undertaking receive aid for the reduction of activity provided for by Article 4 while others in the same undertaking receive operating aid, the production costs of the units whose activity is reduced shall not be included in the calculation of the average production costs with a view to evaluating attainment by the undertaking of the objective set in paragraph 2 of this Article.

Article 4

Aid for the reduction of activity

Aid to cover the production costs of undertakings or production units which will be unable to attain the conditions laid down by Article 3(2) may be considered compatible with the common market provided that it satisfies the conditions laid down in Article 3(1) and is the subject of a closure plan with a deadline occurring before expiry of this decision.

Should such closure come about after the expiry of this decision, aid to cover production costs will be authorised only if it is justified on exceptional social and regional grounds and is the subject of a progressive and continuous activity-reduction plan entailing a significant reduction in capacity before the expiry of this decision.

Article 5

Aid to cover exceptional costs

1. State aid to coal undertakings to cover the costs arising from, or having arisen from the modernisation, rationalisation or restructuring of the coal industry which 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:

(i) the costs incurred only by undertakings which are carrying out or have carried out restructuring;

(ii) the costs incurred by several undertakings.

The categories of costs resulting from modernisation, rationalisation and restructuring of the coal industry are defined in the Annex to this decision.

2. State aid to finance social-welfare schemes specifically for the coal industry may be considered compatible with the common market provided that it brings the ratio between the cost per mineworker in employment and the benefits per person in receipt of benefit for coal undertakings into line with the corresponding ratio in other industries. Without prejudice to Article 9, Member States' Governments shall submit to the Commission the necessary basic data and details of the calculation of the ratios between the burdens and benefits referred to above.

Article 6

Aid for research and development

Aid to cover expenditure by coal undertakings on research and development projects may be considered compatible with the common market provided that it complies with the rules laid down in the Community framework for State aid for research and development.

Article 7

Aid for environmental protection

Aid to facilitate the adjustment to new environmental protection standards of installations in operation at least two years before the entry into force of those standards may be considered compatible with the common market, provided that it complies with rules laid down in the Community framework for State aid for such purposes.

SECTION III — NOTIFICATION, APPRAISAL AND AUTHORISATION PROCEDURES

Article 8

1. Member States which intend to grant operating aid as referred to in Article 3(2) or aid for the reduction of activity as referred to in Article 4 for the 1994 to 2002 coal production years shall submit to the Commission, by 31 March 1994 at the latest, a modernisation, rationalisation and restructuring plan for the industry in accordance with Article 3(2) and/or an activity-reduction plan in accordance with Article 4.

2. The Commission shall consider whether the plan or plans are in conformity with the general objectives set by Article 2(1) and with the specific objectives and criteria set by Articles 3 and 4.

3. Within three months of notification of the plans, the Commission shall give its opinion on whether they are in conformity with the general and specific objectives, without prejudging the ability of the measures planned to attain these objectives. If the information in the plans proves insufficient, the Commission may, within one month, request further information, in which case a new three-month period will start on the date of submission of such further information.

4. If a Member State decides to make amendments to the plan which alter its general tendency in respect of the objectives pursued by this decision, it must inform the Commission so that the latter may rule on the amendments in accordance with the procedures set out in this Article.

Article 9

1. By 30 September each year (or three months before the measures enter into force) at the latest, Member States shall send notification of all the financial support which they intend to grant to the coal industry in the following year, specifying the nature of the support with reference to the general objectives and criteria set out in Article 2 and the various forms of aid provided for in Articles 3 to 7 and its relationship to the plans submitted to the Commission in accordance with Article 8.

2. By 30 September each year at the latest, Member States shall send notification of the amount of aid actually paid in the preceding coal production year and shall declare any corrections made to the amounts originally notified.

3. When notifying aid as referred to in Articles 3 and 4 and making the annual statement of aid actually paid, Member States shall supply all the information necessary for verification of the criteria set out in the relevant Articles.

4. Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the

specific criteria established by Articles 3 to 7. If the Commission has taken no decision within three months of receipt of notification of the measures planned, the measures may be implemented 15 working days after transmission to the Commission of notice of intent to implement them. Any request made by the Commission for further information shall cause that three-month period to run afresh from the date on which the Commission receives the information.

5. In the event of refusal, any payment made in anticipation of authorisation from the Commission shall be repaid in full by the undertaking that received it and shall invariably be considered an unfair advantage in the form of an unjustified cash advance and, as such, shall be liable to charges at the market rate payable by the recipient.

6. In its assessment of the measures notified, the Commission shall check whether the measures proposed are in conformity with the plans submitted in accordance with Article 8 and with the objectives set out in Article 2. It may request Member States to explain any deviation from the plans originally submitted and to propose the necessary corrective measures.

7. The arrangements existing at 31 December 1993, under which aid was granted in conformity with the provisions of Decision 2064/86/ECSC and which are linked to agreements between producers and consumers, exempted under Article 85(3) of the EC Treaty and/or authorised under Article 65 of the ECSC Treaty, must be modified by 31 December 1996 to bring them into line with the provisions of this decision.

The preceding subparagraph in no way affects either the application of Article 2 of this decision or the Member States' notification requirement in accordance with the procedures laid down in Articles 8 and 9 of this decision. All changes made in the aforementioned arrangements must also be notified to the Commission.

SECTION IV — GENERAL AND FINANCIAL PROVISIONS

Article 10

1. The Commission shall report annually to the Council, the European Parliament and the Consultative Committee on the application of this decision.

2. The Commission shall submit to the Council, by 30 June 1997 at the latest, a report on experience and problems in applying the decision. It may propose any appropriate amendments in accordance with the procedure laid down in the first paragraph of Article 95 of the ECSC Treaty.

Article 11

After consulting the Community, the Commission shall take all the measures necessary to implement this decision.

Article 12

This decision shall enter into force on 1 January 1994 and shall expire on 23 July 2002.

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

ANNEX

DEFINITION OF THE COSTS REFERRED TO IN ARTICLE 5(1) OF DECISION NO 3632/93/ECSC

I. Costs incurred 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 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;

(e) residual costs resulting from administrative, legal or tax provisions;

(f) additional underground safety work resulting from restructuring;

(g) mining damage provided that it has been caused by pits previously in service;

(h) residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water;

(i) 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 restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation);

(l) costs in connection with maintaining access to coal reserves after mining has stopped.

II. Costs incurred 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.

COMMISSION DECISION NO 341/94/ECSC (*) OF 8 FEBRUARY 1994

implementing Decision No 3632/93/ECSC establishing Community rules for State aid to the coal industry

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC (1) of 28 December 1993 establishing Community rules for State aid to the coal industry,

Having consulted the Council,

Whereas pursuant to Decision No 3632/93/ECSC the Commission shall authorise, subject to the conditions set out therein, financial measures by Member States in aid of the coal industry;

Whereas Decision No 3632/93/ECSC provides for that purpose that Member States must notify the Commission by 30 September each year (or three months before the measures enter into force at the latest) of all the financial support which they intend to grant to the coal industry in the following year (and the reasons therefore, the scope thereof and its relation to the modernisation, rationalisation, restructuring and/or activity-reduction plan); whereas in order to ensure that the communications in question are comparable and in order to check this information, it is desirable to set up a common framework for presenting the data;

Whereas in order for the Commission to carry out its monitoring of the conditions of supply to the principal consumers in the Community, it is necessary that coal undertakings in the Community and, where appropriate, steel undertakings in the Community should submit information on the supply of coal and coke in the Community;

Whereas this decision replaces Commission Decision No 2645/86/ECSC (2), whereas that decision should therefore be repealed,

HAS ADOPTED THIS DECISION:

Article 1

1. To enable the Commission to evaluate compliance with the conditions laid down by Articles 3 and 4 of Decision No 3632/93/ECSC, the coal-producing Member States shall notify the Commission by 31 March 1994 of the production costs of each coal-producing undertaking benefiting from aid on Form A in Annex I to this decision.

2. The notifications provided for in Article 9(1) to (3) of Decision No 3632/93/ECSC shall be given in accordance with the explanatory notes in Annex 2 and, where appropriate, on the forms provided in Annexes 3 to 5 to this decision.

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(2) OJ L 49, 19.2.1994, p. 1.
(3) OJ L 329, 30.12.1993, p. 12.
(4) OJ L 242, 27.8.1986, p. 1.

Article 2

1. To enable the Commission to determine the price of coal from third countries intended for blast furnaces, as provided for by Article 3 of Decision No 3632/93/ECSC, the Community undertakings concerned shall notify the Commission of their purchases of coal, coking coal or coke from third countries intended to supply the blast furnaces of the Community's iron and steel industry.

2. The information referred to in paragraph 1 shall be sent to the Commission every quarter as indicated on Form PT, as shown in Annex 6, and shall be protected by professional secrecy.

3. For the purposes of determining the price of coal from third countries intended to supply power stations in the Community, the Commission shall use the information communicated pursuant to Decision No 77/707/ECSC ([5]).

Article 3

1. Coal undertakings within the Community shall notify the Commission of contracts or additional clauses to existing contracts relating to the delivery of coal and coke to the Community's iron and steel industry and to deliveries of coal to electricity-generating undertakings in the Community.

2. The information referred to in paragraph 1 shall be sent to the Commission not later than 30 days after the date on which the contract or additional clause was concluded, as indicated on forms M, C and E in Annex 7 and shall be protected by professional secrecy.

Article 4

At the request of one or more Member States, the Commission may authorise simplifications of the notification procedure.

Article 5

The documents obtained or compiled by the national authorities in implementing this decision shall be centralised in the national departments and kept at the disposal of the Commission.

Article 6

Decision No 2645/86/ECSC is hereby repealed.

Article 7

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

It shall apply with effect from 1 January 1994.

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

([5]) OJ L 292, 16.11.1977, p. 11.

ANNEX I

FORM A

Notification of data for 1992

Country: .....

Coalfield: .....

Undertaking: .....

Unit of production or production site: .....

	Production year 1992
1. Basic data	
(a) Underground production (1 000 tonnes of coal equivalent)	.....
Opencast production (1 000 tonnes of coal equivalent)	.....
(b) Output per underground shift (tonnes/man-year)	.....
(c) Gross average hourly wage underground	.....
(d) Average lower calorific value (GJ/tonne) (1)	.....
(e) Hours worked underground (x 10^6)	.....
(f) Average number of staff underground	.....
2. Production costs (in national currency/tce) (1)	
(a) Labour costs (per tce produced)	.....
(b) Materials costs (per tce produced)	.....
(c) Direct depreciation (per tce produced)	.....
(d) Service of operating capital (per tce produced)	.....
(e) Other costs (per tce produced)	.....
(f) Total (per tce produced) (2), (3) (2(a) to 2(e) inclusive)	.....
— Less costs included in the amount specified in Sections 2(a) to 2(e) but not connected with current production (restructuring costs, inherited liabilities or other exceptional costs), whether or not covered by aid:	
(g) Inherited liabilities and restructuring costs (per tce produced)	.....
(h) Financial measures concerning social security benefits (per tce produced)	.....
(i) Others (please specify) (per tce produced)	.....
— Less costs included in the amounts specified in Sections 2(a) to 2(e) but covered by aid equivalent to the aid provided for by Articles 6 and 7 of Decision No 3632/93/ECSC:	
(j) Aid for research and development (per tce produced)	.....
(k) Aid for environmental protection (per tce produced)	.....
(l) Total deductions (per tce produced) (2(g) to 2(k) inclusive)	.....
(m) Cost of current production (per tce produced) (2(f) minus 2(l))	.....

(1) One tce = 29.302 GJ/tonne.
(2) Breakdown as in quarterly cost returns made by associations of undertakings to the Commission.
(3) Allowing the necessary amortisation and normal return on invested capital, in line with Article 3(c) of the ECSC Treaty.

ANNEX 2

EXPLANATORY NOTES ON THE NOTIFICATION OF AID

1. The forecasts for the operating aid provided for by Article 3 and for the aid for the reduction of activity provided for by Article 4 of Decision No 3632/93/ECSC must be notified on Form B in Annex 3. The real data must subsequently be submitted on Form C in Annex 4.

2. The State aid for financing the specific social welfare schemes provided for by Article 5(2) must be notified on the forms in Annex 5.

3. Any format may be used for notification of the aid provided for by Articles 5(1), 6 and 7.

ANNEX 3

(Reference Articles 3 and 4 of Decision No 3632/93/ECSC)

FORM B

Forecasts for 19..

Country: .....

Coalfield: .....

Undertaking: .....

Production unit or production site: .....

	Reference year (N-1)	Forecast year (N) .....
1. Basic data		
(a) Underground production (1 000 tonnes of coal equivalent)	.....	.....
Opencast production (1 000 tonnes of coal equivalent)	.....	.....
(b) Output per underground shift (tonnes/man-year)	.....	.....
(c) Gross average hourly wage underground	.....	.....
(d) Average lower calorific value (GJ/tonne) (1)	.....	.....
(e) Hours worked underground (x 10^6)	.....	.....
(f) Average number of staff underground	.....	.....
2. Production costs (in national currency/tce) (1)		
(a) Labour costs (per tce produced)	.....	.....
(b) Materials costs (per tce produced)	.....	.....
(c) Direct depreciation (per tce produced)	.....	.....
(d) Service of operating capital (per tce produced)	.....	.....
(e) Other costs (per tce produced)	.....	.....
(f) Total (per tce produced) (2), (3) (2(a) to 2(e) inclusive)	.....	.....
— Less costs included in the amount specified in Sections 2(a) to 2(e) but not connected with current production (restructuring costs, inherited liabilities or other exceptional costs), whether or not they are covered by the aid provided for by Article 5 of Decision No 3632/93/ECSC:	.....	.....
(g) Inherited liabilities and restructuring costs (per tce produced)	.....	.....
(h) Financial measures concerning social security benefits (per tce produced)	.....	.....
(i) Others (please specify) (per tce produced)	.....	.....
— Less costs included in the amounts specified in Sections 2(a) to 2(e) compensated for by aid granted under Articles 6 and 7 of Decision No 3632/93/ECSC:		
(j) Aid for research and development (per tce produced)	.....	.....
(k) Aid for environmental protection (per tce produced)	.....	.....
(l) Total deductions (per tce produced) (2(g) to 2(k) inclusive)	.....	.....
(m) Cost of current production (per tce produced) (2(f) minus 2(l))	.....	.....

	Reference year (N-1)	Forecast year (N) .....
3. Revenue (in national currency/tce) (1)		
— Separate items:		
— sales to coking plants (1 000 tce)	.....	.....
— sales to power stations (1 000 tce)	.....	.....
— other sales (1 000 tce)	.....	.....
— variations in stock: + stockbuilding – stock drawdown (1 000 tce)	.....	.....
(a) Total (1 000 tce)	.....	.....
— Revenue (4) (per tce produced) from:		
— sales to coking plants	.....	.....
— sales to power stations	.....	.....
— other sales	.....	.....
(b) Net revenue (per tce sold)	.....	.....
(c) Value of stocks per tce	.....	.....
(d) Total revenue (per tce produced) (5)	.....	.....
4. Loss eligible for aid under Article 3 or 4 (*) of Decision No 3632/93/ECSC		
Loss eligible for aid (per tce of coal produced) (2(m) minus 3(d))	.....	.....
5. Aid proposed pursuant to Article 3 or 4 (*) of Decision No 3632/93/ECSC		
(a) Aid applied for (per tce produced)	.....	.....
(b) Total aid for the year	.....	.....

(1) One tce = 29.302 GJ/tonne.
(2) Breakdown as in quarterly cost returns made by associations of undertakings to the Commission.
(3) Allowing the necessary amortisation and normal return on invested capital, in line with Article 3(c) of the ECSC Treaty.
(4) Net total of all direct or indirect aid.
(5) Breakdown as in quarterly revenue returns made by associations of undertakings to the Commission.
(*) Delete as appropriate.

ANNEX 4

(Reference Articles 3 and 4 of Decision No 3632/93/ECSC)

FORM C

Real data for 19..

Country: .....

Coalfield: .....

Undertaking: .....

Production unit or production site: .....

	Forecast (Annex 3)	Real data
	.....	.....
1. Basic data		
1. Basic data		
(a) Underground production (1 000 tonnes of coal equivalent)	.....	.....
Opencast production (1 000 tonnes of coal equivalent)	.....	.....
(b) Output per underground shift (tonnes/man-year)	.....	.....
(c) Gross average hourly wage underground	.....	.....
(d) Average lower calorific value (GJ/tonne) (1)	.....	.....
(e) Hours worked underground (x 10^6)	.....	.....
(f) Average number of staff underground	.....	.....
2. Production costs (in national currency/tce) (1)		
(a) Labour costs (per tce produced)		.....
(b) Materials costs (per tce produced)		.....
(c) Direct depreciation (per tce produced)		.....
(d) Service of operating capital (per tce produced)		.....
(e) Other costs (per tce produced)		.....
(f) Total (per tce produced) (2), (3) (2(a) to 2(e) inclusive)	.....	.....
— Less costs included in the amount specified in Sections 2(a) to 2(e) but not connected with current production (restructuring costs, inherited liabilities or other exceptional costs), whether or not they are covered by the aid provided for by Article 5 of Decision No 3632/93/ECSC:		
(g) Inherited liabilities and restructuring costs (per tce produced)	.....	.....
(h) Financial measures concerning social security benefits (per tce produced)	.....	.....
(i) Others (please specify) (per tce produced)	.....	.....
— Less costs included in the amounts stated in Sections 2(a) to 2(e) compensated for by aid granted under Articles 6 and 7 of Decision No 3632/93/ECSC:		
(j) Aid for research and development (per tce produced)	.....	.....
(k) Aid for environmental protection (per tce produced)	.....	.....
(l) Total deductions (per tce produced) (2(g) to 2(k) inclusive)	.....	.....
(m) Cost of current production (per tce produced) (2(f) minus 2(l))	.....	.....

	Forecast (Annex 3)	Real data
	.....	.....
3. Revenue (in national currency/tce) (1)		
— Separate items:		
— sales to coking plants (1 000 tce)	.....	.....
— sales to power stations (1 000 tce)	.....	.....
— other sales (1 000 tce)	.....	.....
— variations in stock: + stockbuilding – stock drawdown (1 000 tce)	.....	.....
(a) Total (1 000 tce)	.....	.....
— Revenue (4) (per tce produced) from:		
— sales to coking plants	.....	.....
— sales to power stations	.....	.....
— other sales	.....	.....
(b) Revenue (per tce sold)	.....	.....
(c) Value of stocks per tce	.....	.....
(d) Total revenue (per tce produced) (5)	.....	.....
4. Loss eligible for aid under Article 3 or 4 (*) of Decision No 3632/93/ECSC		
Loss eligible for aid (per tce of coal produced) (2(l) minus 3(d))	.....	.....
5. Aid granted pursuant to Article 3 or 4 (*) of Decision No 3632/93/ECSC		
(a) Aid granted (per tce produced) to current production	.....	.....
(b) Total aid granted for 19..	.....	.....

(1) One tce = 29.302 GJ/tonne.
(2) Breakdown as in quarterly cost returns made by associations of undertakings to the Commission.
(3) Allowing the necessary amortisation and normal return on invested capital, in line with Article 3(c) of the ECSC Treaty.
(4) Net total of all direct or indirect aid.
(5) Breakdown as in quarterly revenue returns made by associations of undertakings to the Commission.
(*) Delete as appropriate.

ANNEX 5

(Reference Article 5(2) of Decision No 3632/93/ECSC)

FINANCING OF SOCIAL SECURITY BENEFITS IN THE COAL INDUSTRY

Country: Germany

Form 1A

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(DEM million)

Origin of funds	Amount	Purpose
Total		

Class of insurance: pensions (1) **FORM 1B**

Country: Germany Date: .....

	Mines scheme	General scheme
II — PENSION INSURANCE		
1. Basic data		
A. Persons covered		
1. Contributors (2)		
2. Beneficiaries		
(a) Total		
(b) Pensioners under 55 (3)		
Difference		
B. Financial data (DEM million)		
1. Charge to the industry (employers' and workers' contributions) (4)		
2. Total expenditure		
(a) Total benefits		
(b) Other expenditure		
Total (a + b)		
less:		
(a) Refunds to migrant workers		
(b) Benefit to pensioners under 55 (3)	( )	( )
(of which: other expenditure) (5)		
Net total expenditure		
2. Calculations		
A. Charge per worker employed		
$\frac{\text{Total contributions}}{\text{Number of contributors}}$ = (DEM million)		C_G =
Contributions per worker employed (DEM)		
B. Benefit per beneficiary (excluding pensioners under 55)		
$\frac{\text{Net expenditure}}{\text{Number of beneficiaries}}$ = (DEM million)		
Benefit per beneficiary (DEM)	P_M =	P_G =
'Normal' charge to the industry per worker employed =		
$C_M = \frac{P_M}{P_G} \times C_G$ = DEM		
'Normal' charge to the industry = C_M x number of contributors		(DEM million)
+ pensions to pensioners under 55		(DEM million)
Total 'normal charge'		(DEM million)
Actual charge (deducted)		(DEM million)
Difference		(DEM million)

(1) Invalidity, old age and survivors.
(2) Compulsorily insured.
(3) Excluding widows' and orphans' pensions.
(4) Excluding State subsidies.
(5) 'Other expenditure' should be broken down in respect of pensioners under 55 as follows:

Mines scheme: $\frac{\text{benefit to pensioners under 55}}{\text{total benefits}}$ x other expenditure

General scheme: $\frac{\text{benefit to pensioners under 55}}{\text{total benefits}}$ x other expenditure.

Class of insurance: sickness (1) **FORM 1C**

Country: Germany Date: .....

	Mines scheme	General scheme
III — SICKNESS INSURANCE (1)		
1. Basic data		
A. Total persons covered		
1. Persons insured		
(a) Members, excluding pensioners		
(b) Pensioners		
2. Persons covered		
(a) Members, excluding pensioners		
(b) Dependants of members, excluding those of pensioners		
Total (a + b)		
(c) Pensioners		
(d) Dependants of pensioners		
Total (c + d)		
B. Financial data (DEM million)		
1. Revenue		
(a) Contributions of members, excluding pensioners		
(b) Contributions of pensioners		
Total		
2. Expenditure		
(a) Benefits (in cash and in kind) to members, excluding pensioners		
Other expenditure for members, excluding pensioners (2)		
Total (a)		
(b) Benefits (in cash and in kind) to pensioners		
Other expenditure for pensioners (2)		
Total (b)		
Total		

(1) Sickness, maternity.

(2) 'Other expenditure' should be broken down in respect of 'members, excluding pensioners' according to the number of persons covered in the two categories:

(a) Mines scheme (members, excluding pensioners):

$$\frac{\text{number of members, excluding pensioners, + dependants}}{\text{total number of persons covered}} \times \text{other items of total expenditure} = \text{DEM million.}$$

(b) General scheme (members, excluding pensioners):

$$\frac{\text{number of members, excluding pensioners, + dependants}}{\text{total number of persons covered}} \times \text{other items of total expenditure} = \text{DEM million.}$$

(c) The formulae for pensioners should be worked out in the same way as in (a) and (b).

Class of insurance: sickness (1) *(continued)* **FORM 1C *(continued)***

Country: Germany Date: .....

2. Calculations

A. Members, excluding pensioners, and dependants

$$P_M = \frac{\text{expenditure for members, excluding pensioners (M.S.)}}{\text{number of members, excluding pensioners, + dependants (M.S.)}}$$ (DEM million) = DEM

$$C_G = \frac{\text{contributions of members, excluding pensioners (G.S.)}}{\text{number of members, excluding pensioners (G.S.)}}$$ (DEM million) = DEM

$$P_G = \frac{\text{expenditure for members, excluding pensioners (G.S.)}}{\text{number of members, excluding pensioners, + dependants (G.S.)}}$$ (DEM million) = DEM

'Normal charge' per member, excluding pensioners:

$$C_M = \frac{P_M}{P_G} \times C_G$$ = DEM

'Normal charge' to the industry (members, excluding pensioners)
= C_M x number of members, excluding pensioners = DEM million
Actual charge to the industry (members, excluding pensioners) = DEM million
Difference = DEM million

B. Pensioners and their dependants

$$P_M = \frac{\text{expenditure for pensioners (M.S.)}}{\text{number of pensioners + dependants (M.S.)}}$$ (DEM million) = DEM

$$C_G = \frac{\text{contributions of pensioners (G.S.)}}{\text{number of pensioners (G.S.)}}$$ (DEM million) = DEM

$$P_G = \frac{\text{expenditure for pensioners (G.S.)}}{\text{number of pensioners + dependants (G.S.)}}$$ (DEM million) = DEM

'Normal charge' per member, excluding pensioners: = DEM

$$C_M = \frac{P_M}{P_G} \times C_G$$

'Normal charge' to the industry (pensioners)
= C_M x number of pensioners = DEM million
Actual charge to the industry (pensioners) = DEM million
Difference = DEM million

Country: Germany

FORM 1D

Date: .....

IV. SUMMARY

(DEM million)

Class of social insurance	'Normal charge' (Article 5(2) of Decision No 3632/93/ECSC)	Actual charge	Net balance (+ or –)
Pension insurance			
Sickness insurance			
Members, excluding pensioners, + dependants			
Pensioners + dependants			
Total			

The actual charge to the mining industry overall is thus DEM... million above/below the 'normal charge' under Article 5(2) of Decision No 3632/93/ECSC;

Of this, DEM..... million (= .....%) is accounted for by the coal industry.

ANNEX 5 (continued)

Country: France

FORM 2A

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(*FRF million*)

Origin of funds	Amount	Purpose
Total		

Class of insurance: pensioners' supplementary insurance

FORM 2B

Country: France Date: .....

II. SUPPLEMENTARY INSURANCE

1. Supplementary insurance for executives (formerly CARIM)
A. Contribution rates

	Rates on portions of salary liable to contribution	
	Between social insurance ceiling and AGIRC ceiling (T2)	Between AGIRC ceiling and double that amount (T3)
Contractual contribution Supplementary contribution Equalisation contribution	% %	% %
Total		

B. Calculation of charges

(FRF million)

	Portions of salary liable to contribution (S)	Total contributions (A)	Normal contractual contributions (B)	Excess charge (A – B)
T2 contributions T3 contributions				
T2 + T3				

2. Supplementary insurance for clerical, technical and supervisory personnel

(FRF million)

	Portion of income liable to contribution (S)	Actual charges (A)	Normal charges (B)	Excess charge (A – B)

3. Supplementary insurance for workers (Carcom)

(FRF million)

	Portion of wages liable to contribution (S)	Actual charges (A)	Normal charge .....% of S (B)	Excess charge (A – B)

ANNEX 5 (continued)

Class of insurance: invalidity/old age

FORM 2C

Country: France

Date: .....

		Mines scheme	General scheme
III. INVALIDITY AND OLD AGE INSURANCE			
1. Basic data			
A. Number of persons eligible			
1. Contributors			
2. Beneficiaries			
of which: (a) under 55			
(b) over 55			
(+ disabled persons and widows)			
B. Financial data (FRF million)			
1. Charge to industry (contributions)			
2. Expenditure			
(a) Benefit (beneficiaries over 55 under mines scheme)			
of which: — pensions			
— heating			
— accomodation			
(b) Other expenditure less other revenue			
Net total expenditure (a + b)			
2. Calculations			
A. Charge per worker employed			
$\frac{\text{Total contributions}}{\text{Number of contributors}}$ = (FRF million)			
Charge per worker employed	(FRF)	C_M =	C_G =
B. Benefit per beneficiary			
$\frac{\text{Net expenditure}}{\text{Number of beneficiaries}}$ = (FRF million)			
Benefit per beneficiary	(FRF)	P_M =	P_G =
'Normal charge' on the industry per worker employed			
$C_M = \frac{P_M}{P_G} \times C_G$		=	FRF
Increase per worker employed in respect of benefits to beneficiaries under 55 falling wholly to the charge of the industry			
$\frac{\text{Total net benefit (under 55)}}{\text{Number of workers employed}}$		=	FRF
Charge per mineworker employed thus amounts to at least:			
— for benefit to pensioners over 55:			FRF
— for benefit to pensioners under 55:			FRF
$\frac{\text{Total 'normal charges' to the industry}}{C_M \times \text{number of contributors}}$	Total C_M	=	
		=	FRF million

ANNEX 5 (continued)

Class of insurance: sickness/maternity/death **FORM 2D**

Country: France Date: .....
(Workers employed only: cash benefits)

	Mines scheme	General scheme
IV. SICKNESS/MATERNITY/DEATH INSURANCE		
1. Basic data		
A. Number of persons eligible		
1. Contributors		
2. Beneficiaries		
B. Financial data (FRF million)		
1. Total charge to the industry (contributions)		
2. Expenditure		
(a) Benefits		
(b) Net total expenditure (benefits + other expenditure – other revenue)	–	
2. Calculations		
A. Charge per worker employed		
$\frac{\text{Total contributions}}{\text{Number of contributors}}$ = (FRF million)		
Charge per worker employed (FRF)		C_G =
B. Benefit per beneficiary		
$\frac{\text{Total net expenditure}}{\text{Number of beneficiaries}}$ = (FRF million)		
Benefit per beneficiary (FRF)	P_M =	P_G =
'Normal charge' to the industry per worker employed		
$C_M = \frac{P_M}{P_G} \times C_G$	=	FRF
'Normal charge' to the industry		
'Normal charge' per worker employed x number of workers employed:		
C_M x number of contributors	=	FRF million

ANNEX 5 (continued)

Class of insurance: sickness/maternity/death (continued) **FORM 2E**

Country: France Date: .....

(Workers and others covered + pensioners and others covered – benefits in kind and death grant)

	Mines scheme	General scheme
IV. SICKNESS/MATERNITY/DEATH INSURANCE		
1. Basic data		
A. Number of persons eligible		
1. Contributors		
2. Beneficiaries		
B. Financial data (FRF million)		
1. Total charge to the industry (contributions)		
2. Expenditure		
(a) Benefits		
(b) Net total expenditure (benefits + other expenditure – other revenue)		
2. Calculations		
A. Charge per worker employed		
$\frac{\text{Total contributions}}{\text{Number of contributors}}$ = (FRF million)		
Charge per worker employed (FRF)		C_G =
B. Benefit per beneficiary		
$\frac{\text{Total net expenditure}}{\text{Number of beneficiaries}}$ = (FRF million)		
Benefit per beneficiary (FRF)	P_M =	P_G =
'Normal charge' to the industry per worker employed		
$C_M = \frac{P_M}{P_G} \times C_G$	=	FRF
'Normal charge' to the industry		
'Normal charge' per worker employed x number of workers employed:		
C_M x number of contributors	=	FRF million

Country: France

FORM 2F

Date: .....

(FRF million)

V. SUMMARY	
1. Primary insurance	
A. 'Normal charge' on mines primary insurance Invalidity/old age Sickness/maternity/death (a) Workers employed only (cash benefit) (b) Workers employed and others covered (benefits in kind and death grant) (c) Pensioners and others covered	
Total	
B. Total charge (invalidity/old age; sickness/maternity) (see above) 'Normal charge' to mining industry	
Remainder	
of which ... % (1) accounted for by coal industry (Charbonnages de France)	
'Normal charge' overall in respect of primary insurance (invalidity/old age and sickness/maternity) on Charbonnages de France	

	Actual charge	'Normal charge' (Article 5(2) of Decision No 3632/93/ECSC)	Excess charge (+)/ shortfall charge (–)
2. Supplementary insurance Executives (formerly CARIM) Clerical, technical and supervisory personnel (formerly CAREM) Workers (Carcom)			
Total			
3. Conclusions (Primary insurance + supplementary insurance + charges carried forward) A. 'Normal charge' to Charbonnages de France 1. Primary insurance 2. Supplementary insurance			
Total			
B. Actual charge (employers' and workers' contributions) 1. Primary insurance 2. Supplementary insurance			
Total			
C. Excess charge (B – A)			

(1) The Charbonnages de France's share of the volume of wages in the mining industry as a whole subjected to a contribution ceiling amounted in 19.. to ..... %.

The actual charge to the Charbonnages de France is thus FRF .... million above/below the 'normal charge' under Article 5(2) of Decision No 3632/93/ECSC.

ANNEX 5 (continued)

FORM 3

Country: United Kingdom

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(GBP million)

Origin of funds	Amount	Purpose
Total		

ANNEX 5 (continued)

FORM 4A

Country: Spain

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(ESP million)

Origin of funds	Amount	Purpose
Total		

ANNEX 5 (continued)

Branch: social insurance **FORM 4B**

Country: Spain Date: .....

	Mines scheme	General scheme
II. SOCIAL INSURANCE		
1. Basic data		
A. Total persons covered (number)		
1. Contributors		
2. Beneficiaries		
Difference		
B. Financial data (million ESP)		
1. Charge to the industry (employers' and workers' contributions)		
2. Total expenditure		
Total benefits		
Other expenditure		
2. Calculations		
A. Charge per worker employed (Contributions per worker employed) (ESP)	—	C_G =
B. Benefit per beneficiary (ESP)	P_M =	P_G =
'Normal' charge to the industry per workers employed:		
$C_M = \frac{P_M}{P_G} \times C_G$ =	(ESP)	
C_M x number of contributors =	ESP	million
Actual charge to the industry (employers' and workers' contributions) =	ESP	million
Difference =	ESP	million

FORM 5A

Country: Portugal

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(PTE million)

Origin of funds	Amount	Purpose
Total		

ANNEX 5 (continued)

Branch: social insurance **FORM 5B**

Country: Portugal Date: .....

	Mines scheme	General scheme
II. SOCIAL INSURANCE		
1. Basic data		
A. Total persons covered (number)		
1. Contributors		
2. Beneficiaries		
Difference		
B. Financial data (million PTE)		
1. Charge to the industry (employers' and workers' contributions)		
2. Total expenditure		
Total benefits		
Other expenditure		
2. Calculations		
A. Charge per worker employed (contributions per worker employed) (PTE)	—	C_G =
B. Benefit per beneficiary (PTE)	P_M =	P_G =

"Normal' charge to the industry per worker employed:

$C_M = \frac{P_M}{P_G} \times C_G$ = (PTE)

C_M x number of contributors	=	PTE	million
Actual charge to the industry (employers' and workers' contributions)	=	PTE	million
Difference	=	PTE	million

FORM 6A

Country: Italy

Date: .....

Production year: .....

I. TABULATION OF FINANCIAL MEASURES CONCERNING SOCIAL SECURITY BENEFITS

(ITL million)

Origin of funds	Amount	Purpose
Total		

ANNEX 5 (continued)

Branch: social insurance **FORM 6B**

Country: Italy Date: .....

		Mines scheme	General scheme
II.	SOCIAL INSURANCE		
1.	**Basic data**		
A.	Total persons covered (number)		
	1. Contributors		
	2. Beneficiaries		
	Difference		
B.	Financial data (million ITL)		
	1. Charge to the industry (employers' and workers' contributions)		
	2. Total expenditure		
	Total benefits		
	Other expenditure		
2.	**Calculations**		
A.	Charge per worker employed (contributions per worker employed) (ITL)	—	C_G =
B.	Benefit per beneficiary (ITL)	P_M =	P_G =
	"Normal' charge to the industry per worker employed:		
	$C_M = \frac{P_M}{P_G} \times C_G$ =	(ITL)	
	C_M x number of contributors =	ITL	million
	Actual charge to the industry (employers' and workers' contribution) =	ITL	million
	Difference =	ITL	million

ANNEX 6

FORM PT

Undertaking making declaration
(Name of firm — address)

Details of purchasing contract for coal (or coke) from third countries to supply blast furnaces of the Community steel industry (1)

Form PT
Serial No:
Date:

A. GENERAL INFORMATION
Producing country:
Port or station of departure:
Date of contract (or rider):
Delivery period (duration):
Total tonnage covered by contract:
Tonnages to be delivered in: 19..: ..... 19..: ..... 19..: .....
Variations from contract:

B. COUNTRY OF DESTINATION
Port or station of arrival:

C FACTORS OF DELIVERED PRICE (per tonne, tax excluded in the Community, at the date of declaration)

(a) Category and size:
— fob price (2)
— cif price (port .....) (2)
— Freight (3)

(b) Characteristics and price adjustments for quality (4):
— Moisture
— Ash (dry)
— Volatile matter (clean)
— Sulphur (dry)
— Coking properties (5)
— Other characteristics (6)

Content or index	Point value

(c) Other variations from agreed price (7):

(1) Declaration to be sent for all contracts or riders to the Director-General for Energy.
(2) State the currency used in the contract.
(3) If necessary, deal with this point separately.
(4) State price (mine, fob or cif) to which adjustments apply.
(5) State the criteria for the production of coke.
(6) State the criteria, particularly the net calorific value (GJ/tonne) for coal for PCI purposes.
(7) Indexation, for example. State main arrangements and formulae.

ANNEX 7

FORM M

Undertaking making declaration
(Name of firm — address)

Declaration of supply contract for coal produced in the Community and intended either for blast furnace coke manufacture, or for PCI (*) purposes, for the Community steel industry(1)

Form M
Serial No (2):
Date(2):

A. PRODUCER (Community undertaking)
Country:
Undertaking
Mine or washing plant (3)
Station/port of departure:
Date of contract:
Delivery period (duration):
Tonal tonnage covered by contract:
Tonnages for 19..: ..... 19..: ..... 19..: .....
Variations from contract:

B. CONSIGNEE (Community undertaking)
Country:
Undertaking:
Coking plant or blast furnace (3):
Station/port of arrival:

C. FACTORS IN CALCULATING PRODUCER'S PRICE (4)
(per tonne, tax excluded)

(a) Category and grades:
List price
Transport costs (5)
Delivered price according to price list
Price rebate
Net invoiced price
Actual delivered price

(b) Characteristics and adjustments for quality:
— Moisture
— Ash (dry)
— Volatile matter (clean)
— Sulphur (dry)
— Coking properties (6)
— Other characteristics(7)

Content or reference index	Point value

(c) Other variations from agreed price (specify):

(d) Adjustments on standard quality:

D. PRICE FACTORS USED AS A REFERENCE TO CALCULATE REBATE
(shown under C(a) per tonne, tax excluded in the Community) (4)

(a) Country of origin of coal or coking coal
Category and size
fob price (port: .....)
cif price (port: .....)
Handing and other costs
Transport costs (5)
Price delivered at coking plant or blast furnace

(b) Basic characteristics and adjustments for quality
— Moisture
— Ash (dry)
— Volatile matter (clean)
— Sulphur (dry)
— Coking properties (6)
— Other characteristics (7)

Content or based index	Point value

(c) Adjustments on standard quality

(*) Coal injected into blast furnaces.
(1) Riders to declared contracts must also be declared to the Commission.
(2) Serial number (from 1) and date to be given by coal producing undertaking.
(3) Name and locality.
(4) State the currency for prices and costs.
(5) State the link and method of transport.
(6) State the criteria for the manufacture of coke.
(7) State the criteria, notably the net calorific value (GJ/tonne) for coal for PCI purposes.

ANNEX 7 (continued)

FORM C

Undertaking making declaration
(Name of firm — address)

Declaration of supply contract for coke produced in the Community and intended for blast furnaces of the Community steel industry (1)

Form C
Serial No (2):
Date (2):

E. PRODUCER
Country:
Undertaking:
Coking plant (3):
Station/port of departure:
Date of contract:
Total tonnage covered by contract:
Delivery period (duration):
Tonnages for: 19 : ..... 19 : ..... 19 : .....
Variations from contract:

F. CONSIGNEE
Country:
Undertaking:
Blast furnace (3):
Station/port of arrival:

G. FACTORS IN CALCULTAING PRODUCER'S PRICE (4)
(per metric tonne, tax excluded)

(a) Size:
List price
Transport costs
Delivered price according to price list
Price rebate
Net invoiced price
Actual delivered price

(b) Basic characteristics and adjustments for quality:
— Moisture
— Ash (dry)
— Sulphur (dry)
— Indices (M40, M10)
— Other characteristics (to be specified)

Content or base index	Point value

(c) Adjustments on standard quality

H. PRICE FACTORS USED AS A REFERENCE TO CALCULATE REBATE
(per tonne, tax excluded in the Community) (4)

(a) Country of origin of coal from third countries:
Place of coking
Price of coal delivered at place of coking
Average cost of coke produced (5)
Price ex coking plant of blast furnace coke
Transport costs (6)
Price delivered at blast furnace

(b) Characteristics of blast furnace coke and adjustments for quality:
— Size
— Moisture
— Ash (dry)
— Sulphur (dry)
— Indices (M40, M10)
— Other characteristics (to be specified)

Content or base index	Point value

(c) Adjustments on standard quality

---

(1) Riders to declared contracts must also be declared to the Commission.
(2) Serial number (from 501), and date of declaration to be given by coke-producing undertaking.
(3) Name and locality.
(4) State the currency for prices and costs.
(5) State calculation factors according to following equations: P (k) = P (c) x Q + K where P (k) = coke production costs, P (c) = delivered coal price, Q = amount of coal to be charged to produce one tonne of coke, K = net costs of coking.
(6) Specify the link and method of transport.

ANNEX 7 (continued)

FORM E

Undertaking making declaration
(Name of firm — Address)

Declaration of supply contract for coal produced in the Community and intended for power stations in the Community (1)

Form E
Serial No (2):
Date (2):

A. PRODUCER
Country:
Undertaking:
Production unit or washing plant (3):
Station/port of departure:
Date of contract:
Total tonnage covered by contract:
Delivery period (duration):
Tonnages for 19..: ..... 19..: ..... 19..: .....
Variations from contract:

B. CONSIGNEE
Country:
Undertaking:
Power station (3):
Station/port of arrival:

C. FACTORS IN CALCULATING PRODUCER'S PRICE
(per tonne, tax excluded) (4)

(a) Net mine price
Transport costs (5)
Price rebate
Actual delivered price to power station

(b) Basic characteristics and adjustments for quality:
— Moisture
— Ash (dry)
— Volatile matter (clean)
— Sulphur (dry)
— Lower calorific value (6)
— Other characteristics (6)

Content or reference index	Point value

(1) Riders to declared contracts must also be declared to the Commission.
(2) Serial number (from 1) and date of declaration to be given by coal-producing undertaking.
(3) Name and locality.
(4) State the currency for prices and costs.
(5) Specify the link and method of transport.
(6) List the criteria.

VI — Transport

1. Rail, road and inland waterway

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

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 and 94 thereof;

Having regard to the Council Decision of 13 May 1965 (1) on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway;

Having regard to the proposal from the Commission;

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

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

Whereas one of the objectives of the common transport policy is to eliminate disparities liable to cause substantial distortion in the conditions inherent in the concept of a public service which are imposed on transport undertakings by Member States;

Whereas it is therefore necessary to terminate the public service obligations defined in this regulation; whereas, however, it is essential in certain cases to maintain such obligations in order to ensure the provision of adequate transport services; whereas the adequacy of transport services must be assessed in the light of the state of supply and demand in the transport sector and of the needs of the Community;

Whereas these termination measures are not to apply to transport rates and conditions imposed on passenger transport undertakings in the interests of one or more particular categories of person;

Whereas, for the purpose of implementing these measures, it is necessary to define the various public service obligations covered by this regulation; whereas such obligations include the obligation to operate, the obligation to carry, and tariff obligations;

(*) OJ L 156, 28.6.1969, p. 1.
(1) OJ 88, 24.5.1965.
(2) OJ C 27, 28.3.1968.
(3) OJ C 49, 17.5.1968.

Whereas it should be left to the Member States on their own initiative to take measures to terminate or to maintain public service obligations; whereas, however, these obligations being such as to entail financial burdens for transport undertakings, the latter must be able to apply for their termination to the competent authorities of the Member States;

Whereas it is appropriate to provide that transport undertakings may apply for the termination of public service obligations only where such obligations involve them in economic disadvantages determined in accordance with common procedures defined in this regulation;

Whereas, in order that standards of operation may be raised, transport undertakings should be able, when making their applications, to propose the use of some other form of transport better suited to the traffic in question;

Whereas when deciding the maintenance of public service obligations the competent authorities of Member States must be able to attach to their decision, conditions likely to improve the yield of the operations in question; whereas when deciding to terminate a public service obligation the competent authorities must, however, in order to ensure the provision of adequate transport services, be able to provide for the introduction of an alternative service;

Whereas, in order to take account of the interests of all Member States, a Community procedure should be introduced for cases where the termination of an obligation to operate or to carry might interfere with the interests of another Member State;

Whereas it is desirable, in order that the study of applications by undertakings for the termination of public service obligations may be conducted in a proper manner, that time limits both for the submission of such applications and for the study thereof by the Member States, should be laid down;

Whereas, pursuant to Article 5 of the Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway, any decision by the competent authorities to maintain any public service obligation defined in this regulation entails an obligation to pay compensation in respect of any financial burdens which may thereby devolve on transport undertakings;

Whereas the right of a transport undertaking to compensation will arise at the time of the decision by a Member State to maintain the public service obligation in question; whereas, however, because budgets are drawn up on an annual basis such right cannot arise during the initial period of operation of this regulation before 1 January 1971; whereas this date may, in the event of the time limit for the study of applications from transport undertakings being extended, likewise be altered to a later date;

Whereas, furthermore, Article 6 of the Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway provides that Member States must make compensation in respect of financial burdens devolving upon passenger transport by reason of the application of transport rates and conditions imposed in the interest of one or more particular categories of person; whereas such compensation is to operate from 1 January 1971; whereas the operative date may, by means of action at Community level, be postponed for one year should a Member State meet with special difficulties;

Whereas compensation for financial burdens devolving upon transport undertakings by reason of the maintenance of public service obligations must be made in accordance with common procedures; whereas, in order to determine the amount of such compensation, the effects with the termination of any such obligations would have on the undertaking's activities must be taken into account;

Whereas the provisions of this regulation should be applied to any new public obligation as defined in this Regulation imposed on a transport undertaking;

Whereas, since compensation payments under this regulation are to be granted by Member States in accordance with common procedures laid down by this regulation, such payments should be exempted from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community;

Whereas the Commission must be able to obtain from Member States all relevant information concerning the operation of this regulation;

Whereas, in order to enable the Council to study the situation in each Member State with regard to the implementation of this regulation, the Commission is to submit a report in this respect to the Council before 31 December 1972;

Whereas it is desirable to ensure that appropriate means are made available by the Member States to transport undertakings in order to enable the latter to make representations concerning their interests with regard to individual decisions made by Member States pursuant to this regulation;

Whereas, since this regulation is at present to apply to rail transport operations of the six national railway undertakings of the Member States and, as regards other transport undertakings, to undertakings not mainly providing transport services of a local or regional character, the Council will have to decide within three years from the entry into force of this regulation what measures should be taken with regard to public service obligations in respect of transport operations not coverd by this regulation,

HAS ADOPTED THIS REGULATION:

SECTION I — GENERAL PROVISIONS

Article 1

1. Member States shall terminate all obligations inherent in the concept of a public service as defined in this regulation imposed on transport by rail, road and inland waterway.

2. Nevertheless, such obligations may be maintained in so far as they are essential in order to ensure the provision of adequate transport services.

3. Paragraph 1 shall not apply, as regards passenger transport, to transport rates and conditions imposed by any Member State in the interests of one or more particular categories of person.

4. Financial burdens developing on transport undertakings by reason of the maintenance of the obligations referred to in paragraph 2, or of the application of the transport rates and conditions referred to in paragraph 3, shall be subject to compensation made in accordance with common procedures laid down in this regulation.

Article 2

1. 'Public service obligations' means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions.

2. Public service obligations within the meaning of paragraph 1 consist of the obligation to operate, the obligation to carry, and tariff obligations.

3. For the purposes of this regulation the 'obligation to carry' means any obligation imposed upon a transport undertaking to take, in respect of any route or installations which it is authorised to work by licence of equivalent authorisation, all necessary measures to ensure the provision of a transport service satisfying fixed standards of continuity, regularity and capacity. It also includes any obligation to operate additional services and any obligations to maintain in good condition routes, equipment — in so far as this is surplus to the requirements of the network as a whole — and installations after services have been withdrawn.

4. For the purposes of this regulation the obligation to carry means any obligation imposed upon transport undertakings to accept and carry passengers or goods at specified rates and subject to specified conditions.

5. For the purposes of this regulation 'tariff obligations' means any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions.

The provisions of the foregoing subparagraph shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with a view to the organisation of the transport market or of part thereof.

SECTION II — COMMON PRINCIPLES FOR THE TERMINATION OR MAINTENANCE OF PUBLIC SERVICE OBLIGATIONS

Article 3

1. Where the competent authorities of the Member States decide to maintain, in whole or in part, a public service obligation, and where this can be done in more than one way, each capable of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent authorities shall select the way least costly to the Community.

2. The adequacy of transport services shall be assessed having regard to:

(a) the public interest;

(b) the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration;

(c) the transport rates and conditions which can be quoted to users.

Article 4

1. It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them.

2. In their applications, transport undertakings may propose the substitution of some other form for the forms of transport being used. Undertakings shall apply the provisions of Article 5 to calculate what savings could be made as a means of improving their financial position.

Article 5

1. Any obligation to operate or to carry shall be regarded as imposing economic disadvantages where the reduction in the financial burden which would be possible as a result of the total or partial termination of the obligation in respect of an operation or a group of operations affected by that obligation exceeds the reduction in revenue resulting from that termination.

Economic disadvantages shall be determined on the basis of a statement, actualised if necessary, of the annual economic disadvantages represented by the difference between the reductions in the annual financial burden and in annual revenue that would result from termination of the obligation.

However, where the obligation to operate or to carry covers one or more categories of the passenger or goods traffic on the whole or a substantial part of a network, the financial burden which would be eliminated by terminating the obligation shall be estimated by allocating among the various categories of traffic the total costs borne by the undertaking by reason of its transport activities.

The economic disadvantage will in such case be equal to the difference between the costs allocable to that part of the undertaking's activities affected by the public service obligation and the corresponding revenue.

Economic disadvantages shall be determined taking into account the effects of the obligation on the undertaking's activities as a whole.

2. A tariff obligation shall be regarded as entailing economic disadvantages where the difference between the revenue from the traffic to which the obligation applies and the financial burden of such traffic is less than the difference between the revenue which would be produced by that traffic and the financial burden thereof if working on a commercial basis — account being taken both of the costs of those operations which are subject to the obligation and of the state of the market.

Article 6

1. Within one year of the date of the entry into force of this regulation, transport undertakings shall lodge with the competent authorities of the Member States the applications referred to in Article 4.

Transport undertakings may lodge applications after the expiry of the aforementioned period if they find that the provisions of Article 4(1) are satisfied.

2. Decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13.

3. The competent authorities of the Member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards traffic obligations.

The right to compensation shall arise on the date of the decision by the competent authorities but in any event not before 1 January 1971.

4. However, if the competent authorities of the Member States consider it necessary by reason of the number and importance of the applications lodged by each undertaking, they may extend the period prescribed in the first subparagraph of paragraph 3 until 1 January 1972 at the latest. In such case, the right to compensation shall arise on that date.

Where they intend to avail themselves of this power, the competent authorities of the Member States shall so inform the undertakings concerned within six months following the lodging of applications.

Should any Member State meet with special difficulties, the Council may, at the request of that State and a proposal from the Commission, authorise the State concerned to extend until 1 January 1973 the time limit indicated in the first subparagraph of this paragraph.

5. If the competent authorities have not reached a decision within the time limit laid down, the obligation in respect of which the application under Article 4(1) for termination was made shall stand terminated.

6. The Council shall, on the basis of a report submitted by the Commission before 31 December 1972, study the situation in each Member State with regard to the implementation of this regulation.

Article 7

1. There may be attached to any decision to maintain an obligation, conditions designed to improve the yield of the operations affected by the obligation in question.

2. Any decision to terminate an obligation may provide for the introduction of an alternative service. In such a case termination shall not take effect until such time as the alternative service has been put into operation.

Article 8

1. The Member State concerned shall communicate to the Commission, before implementation, any measure terminating the obligation to operate or to carry which it proposes to take in respect of any route or transport service liable to affect trade or traffic between Member States. It shall inform the other Member States thereof.

2. If the Commission considers it necessary or if another Member State so requests, the Commission shall consult with the Member States concerning the proposed measure.

3. The Commission shall, within two months following receipt of the communication referred to in paragraph 1, address an opinion or a recommendation to all Member States concerned.

SECTION III — APPLICATION TO PASSENGER TRANSPORT RATES AND CONDITIONS IMPOSED IN THE INTERESTS OF ONE OR MORE PARTICULAR CATEGORIES OF PERSON

Article 9

1. The amount of compensation in respect to financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person shall be determined in accordance with the common procedures laid down in Articles 11 to 13.

2. Compensation shall be payable from 1 January 1971.

Should any Member State meet with special difficulties, the Council may, at the request of that State and on a proposal from the Commission, authorise the State concerned to alter that date to 1 January 1972.

3. Applications for compensation shall be lodged with the competent authorities of the Member States.

SECTION IV — COMMON COMPENSATION PROCEDURES

Article 10

1. The amount of the compensation provided for in Article 6 shall, in the case of an obligation to operate or to carry, be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration.

However, where the calculation of economic disadvantage was made by allocating among the various parts of its transport activities the total costs borne by the undertaking in respect of those transport activities, the amount of the compensation shall be equal to the difference between the costs allocable to that part of the undertaking's activities affected by the public service obligation and the corresponding revenue.

2. For the purposes of determining the financial burdens and revenue referred to in paragraph 1, the effects of the termination of the obligation in question on the undertaking's activities as a whole shall be taken into account.

Article 11

1. The amount of the compensation provided for in Article 6 and in Article 9(1) shall, in the case of a tariff obligation, be equal to the difference between the two amounts as follows:

(a) The first amount shall be equal to the difference between, on the one hand, the product of the anticipated number of units of measure of transport and:

either the most favourable existing rate which might be claimed by users if the obligation in question did not exist; or,

where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied;

and, on the other hand, the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

(b) The second amount shall be equal to the difference between the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis and the costs actually incurred under the obligatory rate.

2. Where, by reason of the state of the market, compensation calculated in accordance with the provisions of paragraph 1 is not sufficient to cover the total costs of the traffic affected by the tariff obligation in

question, the amount of the compensation provided for in Article 9(1) shall be equal to the difference between such costs and the revenue from such traffic. Any compensation already made under Article 10 shall be taken into consideration when making this calculation.

3. In making the calculation of revenue and costs as provided in paragraph 1, the effects which termination of the obligation in question would have on the undertaking's activities as a whole shall be taken into account.

Article 12

Costs resulting from the maintenance of obligations shall be calculated on the basis of efficient management of the undertaking and the provision of transport services of an adequate quality.

Interest relating to own capital may be deducted from the interest taken into account in the calculation of costs.

Article 13

1. Decisions taken under Articles 6 and 9 shall fix in advance the amount of compensation for a period of at least one year. At the same time they shall determine the factors which might warrant an adjustment of that amount.

2. Adjustment of the amount referred to in paragraph 1 shall be made one year after closure of the annual accounts of the undertaking in question.

3. Payment of compensation fixed in advance shall be made by instalments. The payment of any sums due by reason of the adjustment provided for in paragraph 2 shall be made immediately after the amount of the adjustment has been determined.

SECTION V — IMPOSITION OF NEW PUBLIC SERVICE OBLIGATIONS

Article 14

1. Save for cases falling within Article 1(3), after the date of entry into force of this regulation, Member States may impose public service obligations on a transport undertaking only in so far as such obligations are essential in order to ensure the provision of adequate transport services.

2. Where obligations thus imposed entail for transport undertakings economic disadvantages within the meaning of Article 5(1) and (2) or financial burdens within the meaning of Article 9, the competent authorities of the Member States shall, when deciding to impose such obligations, provide for grants of compensation in respect of the financial burdens resulting therefrom. The provisions of Articles 10 to 13 shall apply.

SECTION VI — FINAL PROVISIONS

Article 15

Decisions made by the competent authorities of Member States in accordance with the provisions of this regulation, shall state the reasons on which they are based and shall be published in the appropriate manner.

Article 16

Member States shall ensure that transport undertakings, in their capacity as transport undertakings, are given the opportunity to make representations concerning their interests, by appropriate means, with regard to decisions taken pursuant to this regulation.

Article 17

1. The Commission may request Member States to supply all relevant information concerning the operation of this regulation. Whenever it considers it necessary, the Commission shall consult with the Member States concerned.

2. Compensation paid pursuant to this regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details, classified by category of obligation, of compensation payments made in respect of financial burdens devolving upon transport undertakings by reason of the maintenance of the public service obligations set out in Article 2 or by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person.

Article 18

1. Member States shall, after consulting the Commission and in good time, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this regulation and in particular of Article 4 thereof.

2. Where a Member State so requests, or where the Commission considers it appropriate, the Commission shall consult with the Member States concerned upon the proposed terms of the measures referred to in paragraph 1.

Article 19

1. As regards railway undertakings, this regulation shall, in respect of their rail transport operations, apply to the following undertakings:

Société nationale des chemins de fer belges (SNCB)/Nationale Maatschappij der Belgische Spoorwegen (NMBS),

Deutsche Bundesbahn (DB),

Société nationale des chemins de fer français (SNCF),

Azienda autonoma delle Ferrovie dello Stato (FS),

Société nationale des chemins de fer luxembourgeois (CFL),

Naamloze Vennootschap Nederlandse Spoorwegen (NS).

2. As regards other transport undertakings, this regulation shall not apply to undertakings mainly providing transport services of a local or regional character.

3. Within three years of the entry into force of this regulation the Council shall, on the basis of the principles and objectives set out in Section II of its decision of 13 May 1965, decide on the action to be taken with regard to obligations inherent in the concept of a public service affecting transport operations which are not covered by this regulation.

Article 20

This regulation shall enter into force on 1 July 1969.

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

COUNCIL REGULATION (EEC) No 1893/91 OF 20 JUNE 1991 (*)

amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, in particular Article 75 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),

Whereas, while maintaining the principle of the termination of public service obligations, the specific public interest of transport services may warrant the application of the concept of public service in this area;

Whereas in compliance with the principle of the commercial independence of transport undertakings, the arrangements for providing transport services should be established in a contract concluded between the competent authorities of Member States and the undertaking concerned;

Whereas, for the purposes of supply of certain services or in the interests of certain social categories of passenger, the Member States should retain an option to maintain or impose certain public service obligations;

Whereas it is therefore necessary to amend Regulation (EEC) No 1191/69 (4), as last amended by Regulation (EEC) No 3572/90 (5), to adapt its scope and to lay down the general rules applicable to public service contracts,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 1191/69 is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'*Article 1*

1. This regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway.

(*) OJ L 169, 29.6.1991, p. 1.
(1) OJ C 34, 12.2.1990, p. 8.
(2) OJ C 19, 28.1.1991, p. 254.
(3) OJ C 225, 10.9.1990, p. 27.
(4) OJ L 156, 28.6.1969, p. 1.
(5) OJ L 353, 17.12.1990, p. 12.

Member States may exclude from the scope of this regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

2. For the purposes of this regulation:

"urban and suburban services" means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas,

"regional services" means transport services operated to meet the transport needs of a region.

3. The competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service as defined in this regulation imposed on transport by rail, road and inland waterway.

4. In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking. The conditions and details of operation of such contracts are laid down in Section V.

5. However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV.

Where a transport undertaking not only operates services subject to public service obligations but also engages in other activities, the public services must be operated as separate divisions meeting at least the following conditions:

(a) the operating accounts corresponding to each of these activities shall be separate and the proportion of the assets pertaining to each shall be used in accordance with the accounting rules in force;

(b) expenditure shall be balanced by operating revenue and payments from public authorities, without any possibility of transfer from, or to another sector of the undertaking's activity.

6. Furthermore, the competent authorities of a Member State may decide not to apply paragraphs 3 and 4 in the field of passenger transport to the transport rates and conditions imposed in the interests of one or more particular categories of person.'

2. Article 10(2) shall be deleted.

3. Article 11(3) shall be deleted.

4. Section V shall be replaced by the following:

'SECTION V

Public service contracts

Article 14

1. "A public service contract" shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services.

A public service contract may cover notably:

(i) transport services satisfying fixed standards of continuity, regularity, capacity and quality;

(ii) additional transport services;

(iii) transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes;

(iv) adjustments of services to actual requirements.

2. A public service contract shall cover, *inter alia*, the following points:

(a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality;

(b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties;

(c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes;

(d) the period of validity of the contract;

(e) the penalties in the event of failure to comply with the contract.

3. Those assets involved in the provision of transport services which are the subject of a public service contract may belong to the undertaking or be placed at its disposal.

4. Any undertaking which intends to discontinue or make substantial modifications to a transport service which it provides to the public on a continuous and regular basis and which is not covered by the contract system or the public service obligation shall notify the competent authorities of the Member State thereof at least three months in advance.

The competent authorities may decide to waive such notification.

This provision shall not affect other national procedures applicable as regards entitlement to terminate or modify transport services.

5. After receiving the information referred to in paragraph 4 the competent authorities may insist on the maintenance of the service concerned for up to one year from the date of notification and they shall inform the undertaking at least one month before the expiry of the notification.

They may also take the initiative of negotiating the establishment or modification of such a transport service.

6. Expenditure arising for transport undertakings from the obligations referred to in paragraph 5 shall be compensated in accordance with the common procedures laid down in Sections II, III and IV.'

5. Article 19 shall be deleted.

Article 2

This regulation shall enter into force on 1 July 1992.

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

COUNCIL REGULATION (EEC) No 1192/69 (*) OF 26 JUNE 1969

on common rules for the normalisation of the accounts of railway undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 and 94 thereof;

Having regard to the Council Decision of 13 May 1965 (1) on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway;

Having regard to the proposal from the Commission;

Having regard to the opinion of the Assembly (2);

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

Whereas one of the objectives of the common transport policy is to eliminate disparities which arise by reason of the imposition of financial burdens on, or the grant of benefits to, railway undertakings by public authorities, and which are consequently liable to cause substantial distortion in the conditions of competition;

Whereas it is appropriate for that purpose to take such action as will ensure the elimination of the effects of such financial burdens or benefits with a view to achieving equality of treatment for all modes of transport; whereas for certain classes of financial burden or benefit, such action may consist in their early termination; whereas, in respect of other classes, such action must be carried out as part of a process of normalisation of the accounts of railway undertakings, a feature of such normalisation being the payment of compensation in respect of the effects of such financial burdens or benefits;

Whereas a final settlement of the position as regards certain classes of financial burden or benefit to be covered by normalisation will have to be made in conjunction with the progressive harmonisation of the rules governing financial relations between railway undertakings and States as laid down in Article 8 of the Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway; whereas, for those classes of burden or benefit, it is therefore appropriate, pending a final settlement, to leave to each State the right to decide in each individual case whether normalisation should take place; whereas, if normalisation is decided on, it should be carried out in accordance with the common rules laid down in this regulation, in particular as regards the methods for calculating financial compensation;

Whereas, before any steps can be taken in pursuance of the normalisation of accounts to pay any compensation due as a result of that normalisation, it is necessary to determine the financial burdens borne or benefits enjoyed by railway undertakings by comparison with their position if they operated under the same conditions as other transport undertakings;

Whereas, in order to make such determination, the cases to which normalisation should be applied must be defined; whereas all existing cases in the Member States should be covered, with the exception, on

(*) OJ L 156, 28.6.1969, p. 8.
(1) OJ 88, 24.5.1965.
(2) OJ C 135, 14.12.1968.
(3) OJ C 118, 11.11.1968.

the one hand, of public service obligations, within the meaning of Council Regulation (EEC) No 1191/69 (4) 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 and, on the other hand, of disparities in the infrastructure and taxation burdens under the rules governing the three modes of transport — disparities which will in due course be eliminated under the measures proposed with regard to infrastructure charging and in conjunction with the adjustment of the general and specific taxation systems for transport;

Whereas, since each case of normalisation has its own distinctive features, it is appropriate to define the scope of each such case and to lay down the principles of calculation to be applied for the purposes of determining the financial burdens imposed on, or benefits granted to, railway undertakings;

Whereas, in order to determine the amount of such burdens of benefits, it is necessary to compare the system applicable to railway undertakings with that applicable to private transport undertakings operating other modes of transport;

Whereas the financial burdens borne by railway undertakings are usually greater than the benefits they enjoy and, furthermore, such undertakings can easily supply the accounting data necessary to determine the amount of such burdens or benefits; whereas it is therefore appropriate to allow such undertakings the initiative in the matter, it being left to the competent authorities of the Member States to examine in accordance with the provisions of this regulation, and before fixing the amount of compensation, the figures on which the undertakings have based their applications; whereas it is desirable to set a time limit within which such authorities must give a decision;

Whereas, since the payment of compensation is linked to the drawing up of the budgets both of the State or the competent authorities and of railway undertakings, it is appropriate to lay down specific provisions providing for the making of payments on the basis of estimates and the settlement of the outstanding balances;

Whereas, for the sake of clarity and in order to publicise appropriately the normalisation of accounts, it is desirable to lay down that amounts of compensation granted pursuant to the normalisation of accounts should appear in a table annexed to the annual accounts of railway undertakings;

Whereas it is desirable to ensure that appropriate means are made available by the Member States to transport undertakings in order to enable the latter to make representations concerning their interests with regard to individual decisions made by Member States in implementation of this regulation;

Whereas the Commission must be able to obtain from Member States all relevant information concerning the application of this regulation;

Whereas, since compensation paid pursuant to this regulation is to be granted by Member States in accordance with common rules laid down by this regulation, such compensation should be exempted from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community;

Whereas the implementation of the common transport policy necessitates the immediate application of the provisions of this regulation to the six national railway undertakings; whereas, by reason of the position of other railway undertakings, with respect in particular to the conditions of competition in transport, and by reason of the need to implement the aforesaid common transport policy by stages,

(4) OJ L 156, 28.6.1969, p. 8.

examination of the conditions for extending the application of this regulation to other railway undertakings can be postponed for some years;

Whereas the process of normalisation does not relieve Member States of their own responsibility for eliminating, as far as possible, existing causes of distortion; whereas, nevertheless, they must not by such action bring about a deterioration, in law or in fact, in the situation of railway staff, or impede or retard improvements in their living and working conditions;

HAS ADOPTED THIS REGULATION:

SECTION I — DEFINITIONS AND SCOPE

Article 1

1. The accounts of railway undertakings shall be normalised in accordance with the common rules set out in this regulation.

2. Any financial compensation resulting from the normalisation of accounts laid down in paragraph 1 shall be effected from 1 January 1971 and in accordance with the common procedures set out in this regulation.

Article 2

1. Normalisation of the accounts of railway undertakings shall, within the meaning of this regulation, consist in:

(a) determination of the financial burdens borne or benefits enjoyed by railway undertakings, by reason of any provision laid down by law, regulation or administrative action, by comparison with their position if they operated under the same conditions as other transport undertakings;

(b) payment of compensation in respect of the burdens or benefits disclosed by the determination under (a).

2. Financial burdens resulting from any provision laid down by law, regulation or administrative action which embodies the results of negotiations between the two sides of industry shall not be treated as financial burdens for the purposes of this regulation.

3. Normalisation of accounts within the meaning of this Regulation shall not apply to public service obligations imposed by Member States and covered by regulation (EEC) No 1191/69.

Article 3

1. This regulation shall apply to the following railway undertakings:

Société nationale des chemins de fer belges (SNCB)/Nationale Maatschappij der Belgische Spoorwegen (NMBS),

Deutsche Bundesbahn (DB),

Société nationale des chemins de fer français (SNCF),

Azienda autonoma delle Ferrovie dello Stato (FS),

Société nationale des chemins de fer luxembourgeois (CFL),

Naamloze Vennootschap Nederlandse Spoorwegen (NS).

2. The Commission shall, by 1 January 1973 at the latest, submit to the Council the measures it considers to be necessary for the purpose of extending the applications of this regulation to other undertakings effecting carriage by rail.

Article 4

1. Normalisation of accounts within the meaning of this regulation shall be applied to the following classes of financial burden or benefit:

(a) payments which railway undertakings are obliged to make but which, for the rest of the economy, including other modes of transport, are borne by the State (Class I);

(b) expenditure of a social nature incurred by railway undertakings in respect of family allowances different from that which they would bear if they had to contribute on the same terms as other transport undertakings (Class II);

(c) payments in respect of retirement and other pensions borne by railway undertakings on terms different from those applicable to other transport undertakings (Class III);

(d) the bearing by railway undertakings of the costs of crossing facilities (Class IV).

2. The following classes of financial burden or benefit in existence at the time of the entry into force of this regulation shall be terminated by 1 January 1971 at the latest:

(a) the obligation to recruit staff surplus to the requirements of the undertaking (Class V);

(b) backdated increases in wages and salaries imposed by the government of a Member State, except where such increases are made for the sole purpose of bringing the wages and salaries paid by railway undertakings into line with the wages and salaries paid elsewhere in the transport sector (Class VI);

(c) delay imposed by the competent authorities with regard to renewals and maintenance (Class VII).

3. The following classes of financial burden or benefit in existence at the time of the entry into force of this regulation shall be abolished by 1 January 1973 at the latest:

(i) financial burdens in respect of reconstruction or replacement arising out of war damage which are borne by railway undertakings but which should have been assumed by the State (Class VIII);

(ii) the capital and interest burden of loans granted under this heading shall be the subject of normalisation of accounts within the meaning of this regulation until liability ceases.

4. The following classes of financial burden or benefit in existence at the time of the entry into force of this regulation may be the subject of normalisation of accounts within the meaning of this regulation:

(a) the obligation to retain staff surplus to the requirements of the undertaking (Class IX);

(b) measures benefiting staff, in recognition of certain services rendered to their country, imposed on railway undertakings by the State on terms different from those applicable to other transport undertakings (Class X);

(c) allowances payable to staff imposed on railway undertakings and not on other transport undertakings (Class XI);

(d) expenditure of a social character incurred by railway undertakings, in respect, in particular, of medical treatment, different from that which they would bear if they had to contribute on the same basis as other transport undertakings (Class XII);

(e) financial burdens devolving upon railway undertakings in consequence of their being required by the State to keep in operation works or other establishments in circumstances inconsistent with operation on a commercial basis (Class XIII);

(f) conditions imposed in respect of the placing of public contracts for works and supplies (Class XIV).

The following class of financial burden or benefit may also be the subject of normalisation of accounts within the meaning of this regulation:

capital and interest burdens borne as a result of lack of normalisation in the past (Class XV).

A final settlement of the position as regards Classes IX to XV shall be adopted by the Council not later than the time when measures are adopted for the implementation of Article 8 of the Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway. In the mean time, Member States shall endeavour to remove the causes of those financial burdens or benefits.

SECTION II — COMMON RULES FOR NORMALISATION AND COMPENSATION

Article 5

1. Any financial burden upon, or benefit for, railway undertakings which shall or may be the subject of normalisation of accounts shall be determined in accordance with the provisions of the annexes to this regulation. The annexes shall form an integral part of this regulation.

2. Where, for any class to be normalised, the conditions applicable to railway undertakings have to be compared with those applicable elsewhere in the transport sector, the comparison shall be only with private undertakings.

Article 6

1. The gross amount of compensation shall be determined for each class of normalisation by applying the principles of calculation specified in the annex for the relevant class.

The net amount shall be obtained by taking into account only once any item which appears more than once in the calculation of the gross amounts for the various classes.

2. Where the calculation made in accordance with the provisions laid down in the annexes for each class of normalisation discloses a financial burden for the railway undertaking, the latter shall be entitled to an equivalent sum by way of compensation from the public authorities.

Where such a calculation discloses a benefit for the railway undertaking, the equivalent sum by way of compensation shall be due from the railway undertaking to the public authorities.

Article 7

1. Every year railway undertakings shall submit to the competent authorities applications for normalisation in accordance with the provisions of this regulation.

2. Such applications shall consist of:

(a) data relating to the following financial year, calculated on the basis of the provisions laid down by law, regulation or administrative action in force at the time the application is made; and

(b) the data needed for adjustment of the amounts paid provisionally in respect of the financial year for which final results are known.

3. Such application, which shall be made in good time to allow the public authorities to make the necessary provision in the budget, shall contain all relevant supporting information concerning in particular:

(a) the financial burdens or benefits for each class of normalisation;

(b) the method of calculation applied for each class under consideration;

(c) the gross and net amounts referred to in Article 6 paragraph 1 for each class under consideration. The estimates referred to in paragraph 2(a) shall be calculated on the basis of the figures for the last period for which final results are known, account being taken of any changes which may have occurred within each class of normalisation up to the time when the application was made.

Article 8

1. The competent authorities of the Member States shall examine the data upon which the application by the railway undertaking concerned is based.

2. After giving the undertaking concerned an opportunity to submit its comments, the competent authorities of the Member States may:

(i) adjust the amounts of the compensation and alter other items in the application, if the provisions of this regulation have not been complied with;

(ii) include in the application other financial burdens or benefits resulting from any of the classes listed in Article 4.

3. The competent authorities shall determine, in accordance with the provisions laid down in this regulation, the estimated amount of the compensation for the following financial year, and the final amount of the compensation for the last preceding financial year for which final results are known. Their decision shall include details of the calculation of such amounts.

4. The competent authorities shall notify the railway undertaking of their decision six months at the latest after receipt of the application.

If the competent authorites fail to give a decision within that period, the undertaking's application shall be deemed to be provisionally accepted.

Article 9

Member States shall pay the estimated amount of compensation determined pursuant to Article 8 in the course of the financial year for which the estimate was made.

In the course of that financial year, Member States shall pay or collect the balance of the compensation due by reason of the difference between the final amount of the compensation for the last preceding financial year for which final results are available and the estimated amounts already paid.

Article 10

1. The amount of the compensation paid in respect of each class of normalisation shall be shown in a table annexed to the annual accounts of the railway undertaking. That table shall show separately amounts of compensation received on an estimated basis, and amounts received or paid in settlement of the outstanding balance as provided in Article 9.

The table shall also show, in respect of each public service obligation, the amounts of compensation granted under Regulation (EEC) No 1191/69.

2. The total amount of compensation received pursuant to the normalisation of accounts and of compensation of accounts and of compensation received in respect of public service obligations shall, depending on the rules in force in the individual States, be entered either in the trading account or in the profit and loss account of the railway undertaking concerned.

Article 11

Decisions of the competent authorities of the Member States taken in pursuance of the provisions of this regulation shall state the reasons on which they are based and shall receive official publication.

Article 12

Member States shall ensure that railway undertakings, in their capacity as railway undertakings, are given the opportunity to make representations concerning their interests, by appropriate means, with regard to decisions taken pursuant to this regulation.

SECTION III — FINAL PROVISIONS

Article 13

1. The Commission may request Member States to supply all relevant information concerning the application of this regulation. Whenever it considers it necessary, the Commission shall consult with the Member States concerned.

2. Compensation paid pursuant to this regulation shall be exempted from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details of amounts actually paid as compensation in respect of each class of financial burden or benefit covered by this regulation.

Article 14

1. Member States shall, after consulting the Commission and in good time, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this regulation.

2. Where a Member State so requests, or where the Commission considers it appropriate, the Commission shall consult with the Member States concerned upon the proposed terms of the measures referred to in paragraph 1.

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

ANNEX I

Class I: payments which railway undertakings are obliged to make but which, for the rest of the economy, including other modes of transport, are borne by the State

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking must itself bear certain payments which for the rest of the economy, including other transport undertakings, are borne in whole or in part by the State. Such payments include compensation in respect of loss or injury resulting from accidents at work and special allowances for the children of employees.

B. Principle of calculation

Compensation shall be equal to the amount which the State would have borne had an undertaking in any other sector of the economy, including other modes of transport, been concerned.

ANNEX II

Class II: expenditure of a social nature incurred by railway undertakings in respect of family allowances different from that which they would bear if they had to contribute on the same terms as other transport undertakings

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking is required to make payments, either directly or through a specialised body, in respect of family allowances.

B. Principle of calculation

The financial burden to be normalised shall be equal to the difference between:

(a) the amount of the allowances provided for under the general law paid by the railway undertaking; and

(b) that same amount adjusted, by:

— the ratio between the proportion of heads of families to total active staff in the railway undertaking and such proportion in the totality of the undertakings contributing to the body taken as a basis of comparison;

— the ratio between the average number of persons dependent on each head of family for the railway undertaking and such average number for the totality of the undertakings contributing to the body taken as a basis of comparison.

ANNEX III

Class III: payments in respect of retirement and pensions borne by railway undertakings on terms different from those applicable to other transport undertakings

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking is required to make payments in respect of retirement and other pensions for its staff and other persons entitled on terms different from those applicable to other transport undertakings.

The difference in terms causing the difference in payments arises by reason of:

(i) the fact that the railways must pay pensions as they fall due directly and in full while other transport undertakings pay to an appropriate body a contribution proportionate to the number of their active staff and to the level of salaries and wages of that staff; or

(ii) the fact that railway staff receive the benefit of certain special provisions to which other modes of transport are not subject and which result in additional financial burdens on or in benefits for railways.

B. Principles of calculation

1. With regard to payments covered by A(i), compensation shall be equal to the difference between the financial burden which the undertaking bears and that which it would bear if, with the same number of persons actively employed and receiving the same remuneration, they were subject either to the scheme under the general law (general social security scheme or compulsory supplementary schemes) or to the scheme applicable to other modes of transport. In cases where such schemes offer no basis for comparison, the retirement and pensions scheme of a representative transport undertaking shall be taken as a basis.

The financial burden borne by the railway undertaking shall be ascertained directly from its accounts.

The financial burden which the undertaking would bear if, with the same number of persons actively employed and receiving the same remuneration, it were subject to the scheme taken as a basis of comparison, shall be determined by applying the provisions laid down by law, regulation or administrative action governing such schemes.

2. With regard to payments covered by A(ii) compensation shall be equal to either;

(a) the difference between:

(i) the financial burden borne by the undertaking as ascertained directly from its accounts, and

(ii) the direct or indirect benefits which the undertaking enjoys by comparison with other modes of transport by reason of the special provisions referred to in A(ii); or

(b) the difference between:

(i) the financial burdens which the undertaking bears or would bear in order to cover the totality of the payments in respect of the retirement and pensions scheme to which it is subject, and

(ii) the financial burden which would result if the scheme taken as a basis of comparison were applied.

3. If any rules of national law, having the same purpose but drawn in different terms, produce the same results as those obtained by applying paragraphs 1 and 2, compensation may be calculated in accordance with those rules.

4. Each Member State shall inform the Commission by 31 December 1970 of the estimated amount of the compensation it intends to pay to its railway undertaking pursuant to the foregoing principles.

The Commission shall submit a report on this subject by 31 December 1971. On the basis of that report and by not later than the time when measures are adopted for the implementation of Article 8 of the Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway, the Council shall decide what action should be taken in this respect.

ANNEX IV

Class IV: the bearing by railway undertakings of the costs of crossing facilities

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking bears an abnormally large share of the construction and operating costs of facilities used both by railways and by other modes of transport.

An abnormally large share shall be deemed to be borne in the following cases:

(a) where a new road is built

other than at the request of the railway undertaking, and that undertaking bears the cost of modernisation, less any additional cost for modifications made at the request of the railway undertaking and the value of any benefit which it derives from modernisation;

(b) where an overpass or underpass is modernised or where a level crossing is replaced by an overpass or underpass

other than at the request of the railway undertaking, and that undertaking bears the cost of modernisation, less any additional cost for modifications made at the request of the railway undertaking and the value of any benefit which it derives from modernisation;

(c) where a level crossing is modernised

and the railway undertaking bears more than half the cost;

(d) where, in respect of the reconstruction, maintenance or operation of:

an overpass or underpass,

the railway undertaking bears a proportion of the costs involved greater than the proportion of the costs of constructing or modernising crossing facilities which it ought to bear on the basis of (a) or (b);

a level crossing,

the railway undertaking bears more than half the cost involved.

B. Principles of calculation

Compensation shall be determined as follows:

For cases coming under (a): the amount of the compensation shall be equal to the proportion of the cost borne by the railway undertaking not having requested the new road in question, less any additional costs incurred by reason of modifications made at the request of the railway undertaking.

For cases coming under (b): the amount of the compensation shall be equal to the proportion of the cost borne by the railway undertaking not having requested the modernisation of the structure in question,

less any additional costs for modifications made at the request of the railway undertaking and the value of any benefit which the railway undertaking derives from the works carried out; such benefit shall be assessed having regard, where a level crossing is replaced by an overpass or underpass, to any compensation which the railway undertaking has already received in respect of the level crossing.

For cases coming under (c): the amount of the compensation shall be equal to that part of the cost borne by the railway undertaking which is in excess of the half which it is required to bear.

For cases coming under (d): in the cases of overpasses or underpasses, the amount of the compensation shall be equal to that part of the cost borne by the railway undertaking which is in excess of the proportion of the cost of constructing or modernising crossing facilities which it ought to bear according to the principles of calculation laid down for cases coming under (a) and (b); in the case of level crossings, the amount of the compensation shall be equal to that part of the cost borne by the railway undertaking which is in excess of the half which it is required to bear.

ANNEX V

Class V: the obligation to recruit staff surplus to the requirements of the undertaking

Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking is required to recruit more staff than it actually requires.

ANNEX VI

Class VI: backdated increases in wages and salaries imposed by the government of a Member State, except where such increases are made for the sole purpose of bringing the wages and salaries paid by railway undertakings into line with the wages and salaries paid elsewhere in the transport sector

Scope

This class covers cases where, pursuant to some government measure, a railway undertaking is required to make backdated increases in the wages and salaries of its staff without being allowed to adjust rates so as to take those backdated increases into account, whilst similar financial burdens are not imposed on other transport undertakings.

Class VII: delay imposed by the competent authorities with regard to renewals and maintenance

Scope

This class covers cases where, pursuant to a decision by the public authorities, a railway undertaking is obliged to reduce its expenditure on renewals and maintenance to a level below that required to ensure the continuity of the undertaking's activities.

The effect of such intervention is that expenditure for the financial years in which the postponed work then has to be done is raised to an abnormally high level. This state of affairs results in a financial burden being imposed on the railway undertaking in cases where the latter is unable to increase the amounts allocated for those years to expenditure on maintenance and renewals.

Class VIII: financial burdens in respect of reconstruction or replacement arising out of war damage which are borne by railway undertakings but which should have been assumed by the State

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking is required to bear financial burdens in respect of reconstruction or replacement arising out of war damage on a different basis from that applicable to other transport undertakings.

B. Principle of calculation

The amount shall be determined by comparing as between railway and other transport undertakings the basis on which the burdens have been borne, account being taken of any indirect expenses incurred by reason of the special nature of railway activities.

The financial burdens to be taken into consideration shall be as follows:

(a) direct expenditure on reconstruction or replacement;

(b) the capital and interest burden of loans incurred in connection with reconstruction or replacement.

The amount of the compensation shall be ascertained directly from the accounts of the railway undertaking.

Where a loan has been contracted for the purpose of also meeting other expenditure, the financial burden which it entails shall be determined on the basis of that part of the loan intended for reconstruction or replacement.

ANNEX IX

Class IX: the obligation to retain staff surplus to the requirements of the undertaking

A. Scope

This class covers cases where, pursuant to some provision laid down by the public authorities, a railway undertaking is required:

(a) to keep employed surplus staff whom, under provisions concerning its staff, it would be entitled to dismiss;

(b) under certain provisions of its staff regulations not agreed to by the railway undertaking, to retain staff released by rationalisation measures who cannot reasonably be given other work in the undertaking.

B. Principles of calculation

The financial burden resulting from the retention of surplus staff will be proportionate to the number of persons affected by the measure under consideration.

For cases coming under (a): the number of persons to be dismissed shall be proposed by the undertaking. The number of persons to be retained shall be fixed by decision of the competent authorities. Compensation shall be made in respect of expenditure relating to such surplus staff for such period as that staff remains surplus to requirements.

For cases coming under (b): the number of surplus staff to be taken into consideration in the calculation shall be specified by the railway undertaking. This number shall be equal to the number of persons released by rationalisation measures, account being taken of the possibility of re-employing such staff in the course of the year in which the rationalisation measures are to take effect in posts made vacant by reason of retirement, or in newly created posts.

The amount of the resultant financial burden will be equal to the total of the wages or salary, allowances and social security payments for each person retained in employment or for each homogeneous group of such persons. In the latter case, the amount may be calculated on the basis of averages for each such group.

ANNEX X

Class X: measures benefiting staff, in recognition of certain services rendered to their country, imposed on railway undertakings by the State on terms different from those applicable to other transport undertakings

A. Scope

This class covers cases where, by reason of some provision laid down by law, regulation or administrative action, a railway undertaking is required to take special measures, such as granting allowances, advancements in seniority, additional promotions, or special holidays, for the benefit of staff having served in the armed forces or rendered special services to their country.

B. Principles of calculation

Compensation shall be equal to the amount of the special benefits which the undertaking is required to grant to the staff in question.

With regard to additional promotions, only promotions granted which are surplus to establishment shall be taken into account.

Compensation may be calculated in two different ways, depending on the number of persons concerned:

(a) the calculation may be made individually for each case; or

(b) by homogeneous groups of persons, the average increase in costs per person and the number of persons benefiting each year being determined for each group.

Class XI: allowances payable to staff imposed on railway undertakings and not on other transport undertakings

A. Scope

This class covers cases where, pursuant to some provision laid down by law, regulation or administrative action, a railway undertaking is required to grant to its staff or part thereof, whether actively employed or available for active employment, allowances the payment of which is not imposed on other transport undertakings. Such allowances include in particular additional family allowances and supplementary holiday bonuses.

B. Principle of calculation

Compensation shall be equal to the amount of the financial burden which the undertaking has to bear.

Class XII: expenditure of a social character incurred by railway undertakings, in respect, in particular, of medical treatment, different from that which they would bear if they had to contribute on the same basis as other transport undertakings

A. Scope

This category covers cases where, pursuant to some provision laid down by the public authorities, a railway undertaking is required to meet, either directly or acting through a specialised body, certain expenses, such as those in respect of medical treatment.

B. Principles of calculation

Compensation shall be equal to the difference between the financial burden actually borne by the undertaking and the burden it would bear if it were affiliated to the body taken as a basis of comparison, allowance being made for benefits granted voluntarily by the undertaking.

With regard to medical treatment, comparison shall be calculated as follows: the financial burden borne by the railway undertaking shall be ascertained directly from its accounts. The burden it would bear if with the same number of persons actively employed and receiving the same remuneration it were subject to the scheme taken as a basis of comparison shall be determined in accordance with the provisions laid down by law, regulation or administrative action governing such scheme. Expenditure relating to benefits granted voluntarily by the railway undertaking to its staff which are additional to those available under the scheme taken as a basis of comparison shall be deducted from the difference between the two amounts thus obtained.

Class XIII: financial burdens devolving upon railway undertakings in consequence of their being required by the State to keep in operation works or other establishments in circumstances inconsistent with operation on a commercial basis

A. Scope

This class covers cases where, pursuant to a decision of the public authorities, a railway undertaking is required, for reasons of social or regional policy, to keep in operation works or other establishments the existence of which is no longer justified by the requirements of the undertakings.

B. Principle of calculation

Compensation shall be equal to the cost of keeping the works in question in operation as required. The figures for determining that cost shall be those given in the accounts of the railway undertaking.

Class XIV: conditions imposed in respect of the placing of public contracts for works and supplies

A. Scope

This class covers cases where, pursuant to a provision laid down by the public authorities, a railway undertaking is required to place a proportion of its contracts for works and supplies with domestic undertakings based in certain regions of the Member State, or with specified categories of domestic contractors.

B. Principles of calculation

A comparison shall be made between the price charged by the party to whom the contract is preferentially awarded and the price quoted in the economically most favourable tender for that contract, or failing such a tender, for a similar contract.

The amount of the compensation shall be the difference between those two prices.

Class XV: capital and interest burdens borne as a result of lack of normalisation in the past

A. Scope

This category covers cases where, as the result of action by the public authorities, the budget of a railway undertaking includes provision for the capital and interest burden of loans contracted with, or advances received from, the competent authorities under decisions made in the past by such authorities on grounds incompatible with the principles of normalisation laid down in this regulation.

B. Principles of calculation

The said capital and interest burden may be incorporated by the competent authorities in their own budget or may be included in normalisation under this regulation. In the latter case normalisation shall apply to the total existing capital and interest burden shown in the budget of the railway undertaking in respect of loans contracted with, or repayable advances received from, the competent authorities.

The amount of the burden shall be ascertained from the accounts of the railway undertaking.

COUNCIL REGULATION (EEC) No 1107/70 (*) OF 4 JUNE 1970

on the granting of aid for transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 77 and 94 thereof;

Having regard to the Council Decision of 13 May 1965 (1) on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway, and in particular Article 9 thereof;

Having regard to the proposal from the Commission;

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

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

Whereas the elimination of disparities liable to distort the conditions of competition in the transport market is an essential objective of the common transport policy;

Whereas, to that end, it is appropriate to lay down certain rules on the granting of aid for transport by rail, road and inland waterway in so far as such aid relates specifically to activities within that sector;

Whereas Article 77 states that aid shall be compatible with the Treaty if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service;

Whereas Council Regulations (EEC) Nos 1192/69 and 1191/69 (4) of 26 June 1969 laid down common rules and procedures for, respectively, compensation payments arising from the normalisation of the accounts of railway undertakings, and compensation in respect of financial burdens resulting from public service obligations in transport by rail, road and inland waterway;

Whereas it is therefore necessary to specify the cases and the circumstances in which Member States may take coordination measures or impose obligations inherent in the concept of a public service which involve the granting of aid under Article 77 of the Treaty not covered by the aforesaid regulation;

Whereas, pursuant to Article 8 of the Council decision of 13 May 1965, payments by States and public authorities to railway undertakings are to be made subject to Community rules; whereas payments made by reason of the fact that the harmonisation referred to in the said Article 8 has not yet been carried out should be exempted from the provisions of this regulation delimiting the powers of Member States to take coordination measures or impose obligations inherent in the concept of a public service which involve the granting of aid under Article 77 of the Treaty;

Whereas, owing to the particular nature of these payments, it seems appropriate, pursuant to Article 94 of the Treaty, to lay down a special procedure for informing the Commission of such payments;

(*) OJ L 130, 15.6.1970, p. 1.
(1) OJ 88, 24.5.1965.
(2) OJ 103, 2.6.1967.
(3) OJ 178, 2.8.1967.
(4) OJ L 156, 28.6.1969.

Whereas it is desirable that certain provisions of this regulation should not apply to measures taken by any Member State in implementation of a system of aid upon which the Commission has, pursuant to Articles 77, 92 and 93 of the Treaty, already pronounced;

Whereas it is desirable, in order to assist the Commission in its examination of aid granted for transport, to attach to the Commission an advisory committee consisting of experts appointed by Member States;

HAS ADOPTED THIS REGULATION:

Article 1

This regulation shall apply to aid granted for transport by rail, road and inland waterway, in so far as such aid relates specifically to activities within that sector.

Article 2

Articles 92 to 94 of the Treaty shall apply to aid granted for transport by rail, road and inland waterway.

Article 3

Without prejudice to the provisions of Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings, and of 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, Member States shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aid pursuant to Article 77 of the Treaty except in the following cases or circumstances:

1. As regards coordination of transport:

(a) where aid granted to railway undertakings not covered by Regulation (EEC) No 1192/69 is intended as compensation for additional financial burdens which those undertakings bear by comparison with other transport undertakings and which falls under one of the headings of normalisation listed in that regulation;

(b) 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;

(c) where the purpose of the aid is to promote either:

research into transport systems and technologies more economic for the Community in general, or

the development of transport systems and technologies more economic for the Community in general,

such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies;

(d) until the entry into force of Community rules on access to the transport market, where aid is granted as an exceptional and temporary measure in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems, and thus to contribute towards meeting more effectively the needs of the transport market.

2. As regards reimbursement for the discharge of obligations inherent in the concept of a public service:

until the entry into force of relevant Community rules, where payments are made to rail, road or inland waterway transport undertakings as compensation for public service obligations imposed on them by the State or public authorities and covering either:

tariff obligations not falling within the definition given in Article 2(5) of Regulation (EEC) No 1191/69; or

transport undertakings or activities to which that regulation does not apply.

3. Without prejudice to the provisions of Article 75(3) of the Treaty, the Council, acting by a qualified majority on a proposal from the Commission, may amend the list given in paragraphs (1) and (2) of this article.

Article 4

Until the entry into force of Community rules adopted pursuant to Article 8 of the Council Decision of 13 May 1965 and without prejudice to the provisions of Regulation (EEC) No 1191/69 and of Regulation (EEC) No 1192/69, the provisions of Article 3 shall not apply to payments by States and public authorities to railway undertakings made by reason of any failure to achieve harmonisation, as laid down in the said Article 8, of the rules governing the financial relations between railway undertakings and States, the purpose of such harmonisation being to make those undertakings financially autonomous.

Article 5

1. When informing the Commission, in accordance with Article 93(3) of the Treaty, of any plans to grant or alter aid, Member States shall forward to the Commission all information necessary to establish that such aid complies with the provisions of this regulation.

2. The aid referred to in Article 4 shall be exempt from the procedure provided for in Article 93(3) of the Treaty. Details of such aid shall be communicated to the Commission in the form of estimates at the beginning of each year and subsequently, in the form of a report, after the end of the financial year.

Article 6

An advisory committee to the Commission is hereby set up; it shall assist the Commission in its examination of aid granted for transport by rail, road and inland waterway. The committee shall have as chairman a representative of the Commission and shall consist of representatives appointed by each Member State. Not less than 10 days' notice of meetings of the committee shall be given and such notice shall include details of the agenda. This period may be reduced for urgent cases. The functioning of the committee shall be subject to Article 83 of the Treaty.

The committee may examine, and give an opinion on, all questions concerning the operation of this regulation and of all other provisions governing the granting of aid in the transport sector.

The committee shall be kept informed of the nature and amount of aid granted to transport undertakings and, generally, of all relevant details concerning such aid, as soon as the latter is notified to the Commission in accordance with the provisions of this regulation.

Article 7

The provisions of Article 3 shall not apply to measures adopted by any Member State in implementation of a system of aid upon which the Commission has, pursuant to Articles 77, 92 and 93 of the Treaty, already pronounced.

Article 8

This regulation shall enter into force on 1 January 1971.

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

COUNCIL REGULATION (EEC) No 1473/75 (*) OF 20 MAY 1975

amending Regulation (EEC) No 1107/70

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 and 94 thereof;

Having regard to the proposal from the Commission;

Having regard to the opinion of the European Parliament;

Having regard to the opinion of the Economic and Social Committee (1);

Whereas, pursuant to Article 4 of Council Regulation (EEC) No 1107/70 (2) of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway, and until the entry into force of Community rules adopted pursuant to Article 8 of Council Decision No 65/371/EEC (3) of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway, payments may be made to railway undertakings by States and public authorities by reason of any failure to achieve harmonisation, as laid down in the said Article 8, of the rules governing the financial relations between railway undertakings and States, the purpose of such harmonisation being to make those undertakings financially independent; whereas Article 5(2) of the abovementioned regulation provides that the aid referred to in Article 4 shall be exempt from the procedure laid down in Article 93(3) of the Treaty and that details of such aid shall be communicated to the Commission in the form of estimates at the beginning of each year and subsequently, in the form of a report, after the end of the financial year;

Whereas, following the adoption, pursuant to Article 8 of Decision No 65/71/EEC, of Council Decision No 75/327/EEC of 20 May 1975 on the improvement of the situation of railway undertakings and the harmonisation of rules governing financial relations between such undertakings and States, Article 4 of Regulation (EEC) No 1107/70 is no longer applicable to national railway undertakings; whereas, on the other hand, Member States may give financial assistance to such undertakings within the framework of the business plans of the latter in accorance with Article 5(1) of Decision No 75/327/EEC, and also deficit subsidies in accordance with Article 13 of that decision;

Whereas, in view of the special nature of these financial measures, it is advisable to retain, pursuant to Article 94 of the Treaty, the special procedure for informing the Commission provided for in Article 5(2) of Regulation (EEC) No 1107/70;

Whereas, for this purpose, Article 4 of Regulation (EEC) No 1107/70 should be amended,

HAS ADOPTED THIS REGULATION:

(*) OJ L 152, 12.6.1975.
(1) OJ C 62, 15.3.1975.
(2) OJ L 130, 15.6.1970.
(3) OJ 88, 24.5.1965.

Sole Article

Article 4 of Regulation (EEC) No 1107/70 is replaced by the following:

'Article 4

1. Until the expiry of the period laid down for attaining financial balance in accordance with Article 15(1) of Council Decision No 75/327/EEC (4) of 20 May 1975 on the improvement of the situation of railway undertakings and the harmonisation of rules governing financial relations between such undertakings and States, and without prejudice to Regulations (EEC) Nos 1191/69 and 1192/69 Article 3 shall apply neither to financial assistance given to railway undertakings within the framework of their business plans in accordance with Article 5(1) of that decision nor to the deficit subsidies granted to them in accordance with Article 13 of that decision.

2. In the absence of Community regulations on the harmonisation of the rules governing the financial relations between States and railway undertakings other than those referred to in Article 1 of Decision No 75/327/EEC and without prejudice to Regulations (EEC) Nos 1191/69 and 1192/69, Article 3 shall not apply to payments by States and public authorities to these undertakings made by reason of any failure to achieve harmonisation.'

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

(4) OJ L 152, 12.6.1975.

COUNCIL REGULATION (EEC) No 3578/92 (*) OF 7 DECEMBER 1992

amending Regulation (EEC) No 1107/70 on the granting of aid for transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 75 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),

Whereas Regulation (EEC) No 1107/70 (4) provides that Member States may promote the development of combined transport by granting aid relating to investment in infrastructure and in the fixed and movable facilities necessary for trans-shipment or to the running costs of an intra-Community combined transport service in transit across the territory of non-member countries;

Whereas the evolution of combined transport shows that for the Community as a whole the starting-up phase of this technology has not been completed yet, and whereas the aid arrangements should therefore be maintained for a further period;

Whereas the possibility of granting such aid for the running costs of combined transport services crossing the territory of a non-member country is warranted only in the specific cases of Austria, Switzerland and the States of the former Yugoslavia;

Whereas the need to achieve economic and social cohesion rapidly in the Community entails putting the emphasis on investment in rail and road facilities specific to combined transport, in particular where they present an alternative to infrastructure work that cannot be completed in the short term;

Whereas, in addition, providing aid for road facilities specific to combined transport would be an effective way of encouraging small and medium-sized undertakings to avail themselves of combined transport services;

Whereas aid for equipment specific to combined transport would foster the development of new bimodal and trans-shipment technology;

Whereas during a limited start-up phase the possibility of granting aid should therefore be extended to investment in transport facilities specifically designed for combined transport, provided that they are used exclusively for that purpose;

(*) OJ L 364, 12.12.1992, p. 11.
(1) OJ C 282, 30.10.1992, p. 10.
(2) Opinion delivered on 20 November 1992.
(3) Opinion delivered on 24 November 1992.
(4) OJ L 130, 15.6.1970, p. 1. Last amended by Regulation (EEC) No 1100/89 (OJ L 116, 28.4.1989, p. 24).

Whereas the present aid arrangements should be maintained in force until 31 December 1995 and the Council should decide, under the conditions laid down in the Treaty, on the arrangements to be applied subsequently or, if necessary, on the conditions for terminating such aid;

Whereas Regulation (EEC) No 1107/70 should therefore be amended,

HAS ADOPTED THIS REGULATION:

Article 1

Item 1(e) of Article 3 of Regulation (EEC) No 1107/70 is hereby replaced by the following:

'(e) until 31 December 1995, where the aid is granted as a temporary measure and is designed to facilitate the development of combined transport, such aid must relate to:

(i) investment in infrastructure,

or

(ii) investment in fixed and movable facilities necessary for trans-shipment,

or

(iii) investment in transport equipment specifically designed for combined transport and used exclusively in combined transport,

or

(iv) costs of running combined transport services in transit across Austria, Switzerland or the States of the former Yugoslavia.

The Commission shall submit a progress report on the above measures to the Council every two years giving details, *inter alia,* of the destination of the aid, its amount and its impact on combined transport. Member States shall supply the Commission with the information needed to compile the report.

By 31 December 1995 the Council, acting on a proposal from the Commission, shall decide under the conditions laid down in the Treaty, on the arrangements to be applied subsequently or, if necessary, on the conditions for terminating them.'

Article 2

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

It shall apply from 1 January 1993.

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

COUNCIL REGULATION (EC) No 2255/96 (*) OF 19 NOVEMBER 1996

amending Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 75 thereof,

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

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189c of the Treaty (3),

Whereas point 1 of Article 3 of Regulation (EEC) No 1107/70 (4) provides that the Member States may grant aid designed to facilitate the development of more economic transport systems and technologies for the Community in general, and the development of combined transport;

Whereas the costs of loading and unloading form a significant part of the total cost of transport by inland waterway; whereas it is essential to the development of inland waterway transport for major investments to be made to render loading and unloading installations and equipment for inland waterway terminals more efficient and better suited to the current logistical requirements; whereas, to this end, it is important that aid granted by the Member States or through State resources can be made available to the undertakings concerned;

Whereas harmonised conditions should be laid down for the granting of this aid for the development of inland waterway transport and whereas the impact of the aid must be assessed at regular intervals;

Whereas this aid must be granted for a sufficiently long period for the said investment to have the time to win over the market and bring new traffic to inland waterways and whereas the Council should decide on subsequent arrangements,

HAS ADOPTED THIS REGULATION:

Sole Article

The following shall be added to point 1 of Article 3 of Regulation (EEC) No 1107/70:

'(f) up to 31 December 1999, where aid is granted on a temporary basis and is designed to facilitate the development of inland waterway transport, such aid having to be either:

— investments in the infrastructure of inland waterway terminals; or

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(*) OJ L 304, 27.11.1996, p. 3.
(1) OJ C 318, 29.11.1995, p. 12.
(2) OJ C 39, 12.2.1996, p. 96.
(3) Opinion of the European Parliament of 13 February 1996 (OJ C 65, 4.3.1996, p. 33), common position of the Council of 27 June 1996 (OJ C 264, 11.9.1996) and decision of the European Parliament of 17 September 1996 (OJ C 320, 28.10.1996).
(4) OJ L 130, 15.6.1970, p. 1. Regulation as last amended by Regulation (EC) No 3578/92 (OJ L 364, 12.12.1992, p. 11).

— investments in the fixed and mobile equipment needed for loading and unloading.

The aid granted may not exceed 50 % of the total amount of investment.

The purpose of the aid shall be to develop new or additional transport tonnage on the inland waterway. The beneficiaries must comply with the detailed arrangements laid down by the Member State concerned and shall be responsible for the actual carrying out of the investment.

Every two years the Commission shall submit to the European Parliament and the Council a progress report on the implementation of the measures, stating in particular the purpose of the aid, the amount and its impact on inland waterway transport. The Member States shall provide the Commission with the information needed to draw up this report.

No later than 31 July 1999 the Council shall decide, on a proposal from the Commission and under the conditions set out in the Treaty, on subsequent arrangements or, where appropriate, on the conditions for terminating the arrangements.'

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

COUNCIL REGULATION (EC) No 543/97(*) OF 17 MARCH 1997

amending Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 75 and 94 thereof,

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

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure referred to in Article 189c of the Treaty (3),

(1) Whereas Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (4), provides the Member States with the possibility of developing combined transport by the granting of aid relating to investments in infrastructure, in fixed and mobile equipment necessary for trans-shipment and in transport equipment specifically geared to combined transport and used only in combined transport or aid concerning the running costs of an intra-Community combined transport service transiting through the territory of third countries;

(2) Whereas the growing requirement for mobility is placing ever increasing demands and pressures on people and the environment; whereas, to take account of the present highly uneven spread of costs and pressures between the different modes of transport, the possibility must be created of support for environment-friendly forms of transport;

(3) Whereas the current overall transport policy has not yet succeeded in creating the conditions for healthy competition between the various modes of transport; whereas no financial equilibrium has yet been achieved within the railway companies;

(4) Whereas the development of combined transport reveals that the launching phase of this technique has not yet been completed in all regions of the Community; whereas the aid arrangements have accordingly to be extended;

(5) Whereas, consequently, it is appropriate to maintain current aid arrangements in force until 31 December 1997; whereas the Council should take a decision, under the conditions provided for in the Treaty, on the arrangements to be applied thereafter or, if necessary, on the conditions under which these aids should cease;

(6) Whereas the possibility of granting aid for the running costs of combined transport services transiting through the territory of third countries has to be maintained only for Switzerland and the States of former Yugoslavia;

(*) OJ L 84, 26.3.1997, p. 6.
(1) OJ C 253, 29.9.1995, p. 22.
(2) OJ C 39, 12.2.1996, p. 102.
(3) Opinion of the European Parliament of 29 February 1996 (OJ C 78, 18.3.1996, p. 25), Council common position of 25 October 1996 (OJ C 372, 9.12.1996, p. 1) and decision of the European Parliament of 19 February 1997 (OJ C 85, 17.3.1997).
(4) OJ L 130, 15.6.1970, p. 1. Regulation as last amended by Regulation (EEC) No 3578/92 (OJ L 364, 12.12.1992, p. 11).

(7) Whereas Decision 75/327/EEC [5], to which Article 4 of Regulation (EEC) No 1107/70 refers, was repealed by Article 13 of Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [6]; whereas Article 4 should therefore be deleted;

(8) Whereas the categories of aid authorised for combined transport have been shown to operate satisfactorily and that it is possible, consequently, to simplify checks on these by exempting them from the procedure referred to in Article 93(3) of the Treaty;

(9) Whereas the laying down of rules relating to aids allocated by Member States for transport is a matter of exclusive Community competence and must take the form of a regulation;

(10) Whereas it is appropriate to amend Regulation (EEC) No 1107/70 accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 1107/70 is hereby amended as follows:

1. Article 3, item 1(e), shall be amended as follows:

— in the first and third subparagraphs, 31 December 1995 shall be replaced by 31 December 1997,

— in the fourth indent of the first subparagraph, the words 'across Austria' shall be deleted;

2. Article 4 shall be deleted;

3. Article 5(2) shall be replaced by the following:

'2. Aid referred to in Article 3, item 1(e) shall be exempt from the procedure provided for in Article 93(3) of the Treaty; it shall be communicated to the Commission on an estimated basis at the beginning of each year, and, subsequently, in the form of a report, after the end of the financial year.'

Article 2

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

It shall apply with effect from 1 January 1996.

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

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[5] Council Decision 75/327/EEC of 20 May 1975 on the improvement of the situation of railway undertakings and the harmonisation of the rules governing financial relations between such undertakings and the States (OJ L 152, 12.6.1975, p. 3).

[6] OJ L 237, 24.8.1991, p. 25.

COUNCIL REGULATION (EEC) No 1658/82 (*) OF 10 JUNE 1982

supplementing, by provisions on combined transport, Regulation (EEC) No 1107/70

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community;

Having regard to Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway (1), and in particular Article 3 thereof;

Having regard to the proposal from the Commission (2);

Having regard to the opinion of the European Parliament (3);

Having regard to the opinion of the Economic and Social Committee (4);

Whereas the various systems and technologies for combined transport bring benefits for the Community in general, *inter alia* by reducing congestion on certain roads, conserving energy and allowing better use to be made of railway capacity;

Whereas the investment required for the development of combined transport should accordingly be encouraged; whereas it is therefore essential that aid granted by a Member State or through State resources can be made available to the undertakings concerned;

Whereas Regulation (EEC) No 1107/70 provides that Member States may grant aid to assist the development of transport systems and technologies that are more economic for the Community but restricts such aid to the experimental phase; whereas, for the development of combined transport, allowance should also be made for an initial operating phase which is sufficiently long to enable such transport to qualify for better conditions in the haulage market;

Whereas it is therefore necessary to adjust the Community provisions relating to aid;

HAS ADOPTED THIS REGULATION:

Article 1

The following subparagraph is hereby added to Article 3(1) of Regulation (EEC) No 1107/70: '(e) Where the aid is granted as a temporary measure and designed to facilitate the development of combined transport, such aid having to relate to investment in the following fields:

— infrastructure,

— the fixed and movable facilities necessary for trans-shipment.

(*) OJ L 184, 29.6.1982.
(1) OJ L 130, 15.6.1970.
(2) OJ C 351, 31.12.1980.
(3) OJ C 260, 12.10.1981.
(4) OJ C 310, 30.11.1981.

Before 31 December 1986 the Commission shall make a progress report to the Council on the application of this provision. In the light of that report and in view of the temporary nature of the system provided for in this regulation, the Council shall decide, on a proposal from the Commission, on the system to be applied subsequently and, if necessary, on the procedures to be adopted for terminating that system.'

Article 2

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

It shall apply from 1 July 1982.

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

COUNCIL REGULATION (EEC) No 1101/89 (*) OF 27 APRIL 1989

on structural improvements in inland waterway transport

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 75 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),

Whereas the structural overcapacity manifest for some time in the fleets operating on the linked inland waterway networks of Belgium, France, Germany, Luxembourg and the Netherlands appreciably affects, in those countries, the economics of transport services, particularly of the carriage of goods by inland waterway;

Whereas forecasts show no sign of sufficient increase in demand in this sector to absorb this overcapacity in the next few years; whereas in fact the share of the total transport market taken by inland waterway transport is continuing to decline as a result of progressive changes in the basic industries supplied mainly by inland waterway;

Whereas a scrapping scheme coordinated at Community level is the only way to bring about a substantial reduction in overcapacity in the near future and thus improve the structures of inland waterway transport;

Whereas the results of the national vessel-scrapping schemes organised by certain Member States, while positive, have been insufficient, in particular, for want of international coordination of these schemes;

Whereas a common approach, allowing Member States to take joint measures to attain the same objective, is a *sine qua non* for effectively reducing overcapacity; whereas, to this end, scrapping funds should be introduced in the Member States particularly concerned by inland waterway transport and those Member States should administer the funds; whereas undertakings established in other Member States but providing transport services on the linked inland waterways of the Member States concerned must contribute to one of these funds;

Whereas overcapacity generally affects every sector of the inland waterway transport market; whereas the measures to be adopted must, therefore, be generally applicable and cover all cargo vessels and pusher craft; whereas, however, vessels which in no way contribute to the overcapacity on the abovementioned network of linked inland waterways either because of their size or because they are operated solely on closed national markets, could be exempted from these measures; whereas, by contrast, private fleets performing carriage on their own account must be included in the system because of their impact on transport markets;

(*) OJ L 116, 28.4.1989, p. 25.
(1) OJ C 297, 22.11.1988, p. 12 and OJ C 31, 7.2.1989, p. 14.
(2) OJ C 326, 19.12.1988, p. 54.
(3) OJ C 318, 12.12.1988, p. 58.

Whereas, in view of the worrying economic and social situation of the sector involving vessels with a dead-weight of less than 450 tonnes and in particular the boat owners' financial situation and limited scope for conversion, specific measures are called for, such as special adjustment coefficients for inland waterway vessels or specific improvement measures for the networks most affected; whereas, in the latter case, it is necessary to enable Member States to exclude these vessels from the scope of the regulation provided that they are made subject to a national improvement plan which does not create distortions of competition and is consistent with the Treaty provisions on aid;

Whereas, in view of the fundamental differences between the dry cargo and liquid cargo markets, it is advisable to keep separate accounts in each fund for dry cargo carriers and tanker vessels;

Whereas, in the context of an economic policy compatible with the Treaty, responsibility for structural improvements in a given sector of the economy lies primarily with operators in the sector; whereas, therefore, the cost of any system introduced must be borne by the inland waterway transport undertakings; whereas, in order to launch the system on a fully operational basis from the outset, arrangements should be made, however, for the Member States concerned to pay an advance in the form of repayable loans; whereas, in view of the difficult economic situation of the said undertakings, these loans should be interest-free;

Whereas, in accordance with Article 74 of the Treaty, the objectives of the Treaty are to be pursued as regards transport within the framework of a common policy; whereas, as Article 77 makes clear, this policy may include the granting of aid, in particular if it meets the needs of coordination of transport; whereas the Community's action in this area, including aid, must however take into account the various general objectives of Article 3 of the Treaty and in particular that of Article 3(f), concerning competition; whereas, as with all aid subject to the rules of Article 92 and following of the Treaty, it is desirable to ensure that the measures provided for in this regulation and their implementation do not distort, or threaten to distort, competition, in particular by favouring certain undertakings to an extent which is contrary to the common interest; whereas, in order to place the enterprises concerned in similar conditions of competition, the contributions to be paid to the scrapping funds and the scrapping premiums should be set at uniform rates; whereas, likewise, the scrapping programme should be started at the same time, be of the same duration and subject to the same conditions in all the Member States concerned;

Whereas steps should be taken to prevent the gains from the coordinated scrapping scheme being cancelled out by extra capacity coming into service at the same time; whereas temporary measures have to be taken to curb investment without, however, totally blocking access to the inland waterway market or imposing a quota on the national fleets;

Whereas, as part of the proposed system, social measures should be taken to help workers who wish to leave the inland waterway industry or to retrain for jobs in another sector;

Whereas, since the system is a Community one, decisions on its operation must be taken at Community level after consultation with the Member States and the organisations representing the inland waterway transport industry; whereas the requisite power for the adoption of those decisions, as well as for ensuring their implementation and the maintenance of the conditions of competition laid down in this regulation, must be conferred on the Commission;

Whereas, in order to prevent distortion of competition on the markets in question and to render the proposed system more effective, it is desirable for Switzerland to adopt similar measures for its fleet on the linked inland waterway network of the Member States concerned; whereas Switzerland has shown itself to be willing to adopt such measures,

HAS ADOPTED THIS REGULATION:

Article 1

1. Inland waterway vessels used to carry goods between two or more points by inland waterway in the Member States shall be subject to measures for structural improvements in inland waterway transport under the conditions laid down in this regulation.

2. The measures referred to in paragraph 1 shall comprise:

(i) the reduction of structural overcapacity by means of scrapping schemes coordinated at Community level;

(ii) supporting measures to avoid aggravation of existing overcapacity, or the emergence of further overcapacity.

Article 2

1. This regulation shall apply to cargo-carrying vessels and pusher craft providing transport services on their own account or for hire or reward and registered in a Member State or, if not registered, operated by an undertaking established in a Member State.

For the purposes of this regulation, 'undertaking' shall mean any natural or legal person exercising an economic activity on a non-industrial or industrial scale.

2. The following shall be exempt from this regulation:

(a) vessels operating exclusively on national waterways not linked to other waterways in the Community;

(b) vessels which, owing to their dimensions, cannot leave the national waterways on which they operate and cannot enter the other waterways of the Community ('prisoner vessels'), provided that such vessels are not likely to compete with vessels covered by this regulation;

(c) pusher craft with a motive power not exceeding 300 kilowatts,

seagoing inland waterway vessels and ship-borne barges used exclusively for international or national transport operations during voyages which include a sea crossing,

ferries,

vessels providing a non-profit-making public service.

3. Each Member State may exclude its vessels with a dead-weight of less than 450 tonnes from the scope of this regulation if the economic and social situation in the sector of those vessels so requires.

In such cases, the Member State concerned shall communicate to the Commission a national improvement plan under the aid scheme in the six months following the adoption of this regulation. If the Commission considers the improvement plan incompatible with the common market, paragraph 1 shall apply to the vessels in question.

Article 3

1. Each of the Member States whose inland waterways are linked to those of another Member State and the tonnage of whose fleet is above 100 000 tonnes, hereinafter referred to as 'the Member States

concerned', shall set up, under its national legislation and with its own administrative resources, a scrapping fund, hereinafter referred to as 'the fund'.

2. The competent authorities in the Member State concerned shall administer the fund. Each Member State shall involve its national organisations representing inland waterway carriers in this administration.

3. Each fund shall consist of two separate accounts, one for dry cargo carriers and pusher craft, the other for tanker vessels.

Article 4

1. For each vessel covered by this regulation the owner shall pay into one of the funds set up under Article 3 a contribution fixed in accordance with Article 6.

2. For vessels registered in one of the Member States concerned, the contribution shall be paid into the fund of the Member State where the vessel is registered. For non-registered vessels operated by an undertaking established in one of these States, the contribution shall be paid into the fund of the Member State in which the undertaking is established.

3. The contribution for vessels registered in another Member State or for non-registered vessels operated by an undertaking established in another Member State shall be paid into one of the funds set up in the Member States concerned, at the choice of the vessel owner.

This choice shall be made once only and shall apply to all vessels belonging to the same owner or operated by the same undertaking.

Article 5

1. Any owner scrapping a vessel referred to in Article 2(1) shall receive a scrapping premium from the fund to which his vessel belongs in so far as the financial means are available, subject to the conditions set out in Article 6. This premium shall be granted only in respect of vessels which the owner proves form part of his active fleet.

Scrapping means the total breaking up of the hull of the vessel.

The active fleet shall include vessels in good working order which hold:

- either a certificate of water-worthiness issued by the competent national authority or in agreement with the latter, or

- an authorisation to engage in national transport issued by the authority of one of the Member States concerned,

and which have made at least one voyage during the year preceding application for the scrapping premium;

- or which have made at least 10 voyages during the year preceding application for the scrapping premium.

No premium shall be granted in respect of vessels which, as a result of a wreck or other damage suffered, are no longer repairable and are scrapped.

2. There shall be mutual financial support between the funds with regard to the separate accounts mentioned in Article 3(3). This shall come into play when the interest-free loans mentioned in Article 7 are repaid, in order to ensure that the time limit for repayment of these loans is the same for all the funds.

Article 6

1. The Commission shall lay down separately for dry cargo carriers, for tankers and for pusher craft:

(i) the rate of the annual contributions to the fund for each vessel;

(ii) the rate of the scrapping premiums;

(iii) the period covered by the scrapping schemes, during which scrapping premiums will be paid, and the conditions under which the premiums may be obtained;

(iv) the adjustment coefficients for each type and category of inland waterway vessel. These coefficients shall take account of the particular socioeconomic situation regarding vessels with a dead-weight of less than 450 tonnes.

2. The contributions and scrapping premiums shall be expressed in ecus; the rates applying shall be the same for each fund.

3. Contributions and premiums shall be calculated on the basis of either the dead-weight tonnage for cargo-carrying vessels or the motive power of the vessel for pusher craft.

4. Contribution rates shall be fixed at a level allowing the funds sufficient financial resources to make an effective contribution to reducing the structural imbalance between supply and demand in the inland waterway transport sector, taking into account the difficult economic position of this sector.

Contributions shall be paid annually at the start of the year in return for a certificate of payment. The period for which they are paid shall not exceed 10 years.

From 1 March of the year concerned this certificate must be on board the vessel or, in the case of unmanned vessels, on board the pusher craft. For the first year of operation of the system, the date from which the certificate must be on board shall be set by the Commission.

5. The Commission shall lay down the period during which scrapping premiums may be obtained and the conditions for granting these premiums on the basis of the objectives to be attained, the vessel types or categories and the financial resources of the funds.

6. The Commission shall lay down detailed rules for the mutual financial support referred to in Article 5(2).

7. After consulting the Member States and the organisations representing inland waterway carriers at Community level, the Commission shall set a target date for achieving a substantial reduction in overcapacity and shall take the decisions referred to in paragraphs 1 to 6.

The decisions reached by the Commission shall also take account of the results of observation of the transport markets in the Community and of any foreseeable changes therein, as well as of the need to avoid any distortion of competition to an extent which is contrary to the common interest.

Article 7

1. Without prejudice to the provisions of the Treaty on aid and to the rules adopted in implementation thereof, the Member States concerned shall make advance payments, in the form of loans, to the fund set up in their territory so that a coordinated scrapping scheme can start operating immediately. The sums granted in this way shall be repaid, free of interest, by the fund, according to a predetermined schedule.

The funds may also be prefinanced by loans guaranteed by the State, contracted on the capital market, provided that interest on the loan is borne by the State concerned.

2. Obligations borne by a national fund existing when this regulation comes into force shall be assumed by the fund of the Member State concerned.

Owners of vessels who are not subject to this regulation and who have rights resulting from existing national scrapping schemes may assert those rights *vis-à-vis* the funds referred to in Article 3(1) for a period of six months from the end of the scrapping period referred to in Article 6(5).

Article 8

1. (a) For a period of five years from the entry into force of this regulation, vessels covered by this regulation which are newly constructed, imported from a third country or which leave the national waterways mentioned in Article 2(2)(a) and (b) may be brought into service on inland waterways as referred to in Article 3 only where:

   (i) the owner of the vessel to be brought into service scraps a tonnage of carrying capacity equivalent to the new vessel without receiving a scrapping premium; or

   (ii) where the owner scraps no vessel, he pays into the fund covering his new vessel or into the fund chosen by him in accordance with Article 4 a special contribution equal to the scrapping premium fixed for a tonnage equal to that of the new vessel; or

   (iii) where the owner scraps a tonnage smaller than that of the new vessel to be brought into service, he pays into the fund in question a special contribution equivalent to the scrapping premium corresponding at the time to the difference between the tonnage of the new vessel and the tonnage scrapped.

   In the case of pusher craft, the concept of 'tonnage' shall be replaced by that of 'motive power'.

   Vessels of third countries which have adopted, on the basis of an international instrument, measures similar to those in this regulation shall be regarded as vessels of the Member States.

   (b) In the case of the vessels referred to in (a) which are put into service on the inland waterways referred to in Article 3 between the entry into force of this regulation and the setting up of the corresponding national fund, the special contribution to be paid by the owner in accordance with (a) shall be paid into a special account to be designated by the national authorities of the Member State concerned. The contribution shall be transferred to the fund as soon as it has been set up

   (c) Three years after this regulation comes into force, the Commission may, if transport markets trends so require, and after consulting the Member States and the organisations representing inland waterway transport at Community level, adjust the ratio between the new tonnage and the old tonnage as referred to in (a).

2. The conditions laid down in paragraph 1 shall also apply to increases in capacity resulting from the lengthening of a vessel or the replacement of pusher-craft engines.

3. (a) The conditions set out in paragraphs 1 and 2 shall not apply to vessels in respect of which the owner proves that:

(i) construction was under way on the date of entry into force of this regulation, and that

(ii) work already carried out represents at least 20 % of the steel weight or 50 tonnes, and that

(iii) delivery and commissioning is to take place within the six months following entry into force of this regulation.

(b) The conditions set out in paragraphs 1 and 2 shall not apply to vessels which, at the time of entry into force of this regulation, were exempt from this regulation pursuant to Article 2(2)(a) and which by reason of a newly-opened navigable link are able to use the other inland waterways of the Community.

(c) The Commission may, after consulting the Member States and the organisations representing inland waterway transport at Community level, exempt specialised vessels from the scope of paragraph 1.

4. A vessel referred to in paragraphs 1 and 2 may not be put into service until the owner has fulfilled the requirements set out in paragraph 1. Where this prohibition is infringed, the national authorities may take steps to prevent the vessel concerned from participating in the trade.

5. On the basis of a Commission proposal accompanied by a well-founded report, the Council may take a decision to extend the period referred to in paragraph 1 by a maximum of five years.

The Council shall act on this proposal in accordance with the conditions laid down in the Treaty.

Article 9

The Member States concerned may take measures:

(i) to make it easier for inland waterway carriers leaving the industry to obtain an early retirement pension or to transfer to another economic activity;

(ii) to grant early retirement pensions to workers leaving the inland waterways as a result of scrapping schemes and to organise vocational training courses or retraining courses.

Article 10

1. Member States shall adopt the measures necessary to implement this regulation before 1 January 1990 and shall notify the Commission thereof.

These measures shall provide, *inter alia*, for permanent and effective verification of compliance with the obligations imposed on undertakings by this regulation and the national provisions adopted in implementation thereof, and for appropriate penalties in the event of infringement.

2. Throughout the duration of the scrapping scheme, Member States shall communicate to the Commission every six months all relevant information on progress with the current scheme and, in particular, on the financial position of the fund, the number of applications to scrap vessels and the tonnage actually scrapped.

3. Before 1 May 1989 the Commission shall adopt the decisions which it is required to take under Article 6.

4. Two years after this regulation enters into force, the Commission shall draw up a report evaluating the effect of the measures referred to in paragraph 1 and submit it to the European Parliament and the Council.

Article 11

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

It shall apply with effect from 1 May 1989.

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

COMMISSION REGULATION (EEC) No 1102/89 (*) OF 27 APRIL 1989

laying down certain measures for implementing Council Regulation (EEC) No 1101/89 on structural improvements in inland waterway transport

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (1), and in particular Article 10(3) thereof,

Having regard to the views expressed by the Member States and the organisations representing inland waterway carriers at Community level in the consultations held by the Commission on 29 March and 3 February 1989 respectively,

Whereas, under Article 6 of Regulation (EEC) No 1101/89, the Commission must adopt a number of decisions concerning the operation of the system for structural improvements in inland waterway transport laid down in that regulation;

Whereas, in the course of the abovementioned consultations, the Member States and the organisations representing inland waterway carriers at Community level took the view that the capacity of the fleets concerned should be cut by 10 % in the case of dry cargo vessels and pusher craft and by 15 % in the case of tanker vessels;

Whereas, in view of the need to encourage scrapping by setting attractive premiums and considering the limited resources available to the trade associations for repaying the sums prefinanced by the Member States concerned pursuant to Article 7 of Regulation (EEC) No 1101/89, a total budget of ECU 130.5 million seems appropriate;

Whereas the Commission must determine the date on which the scrapping scheme, coordinated at Community level, is to begin; whereas that date must coincide with the date on which the Member States affected by structural overcapacity have adopted the necessary measures for implementing Council Regulation (EEC) No 1101/89;

Whereas the Commission must lay down the rate for the annual contributions to the scrapping funds payable by carriers in respect of each vessel they operate for the carriage of goods on the linked inland waterway networks of the Member States; whereas these rates must be such as to enable the scrapping funds to repay the sums prefinanced by the Member States concerned within 10 years at the most, and must be set at a level acceptable to inland waterway undertakings in a difficult economic position;

Whereas the Commission must also lay down the rates for the scrapping premiums, the period during which, and the conditions subject to which, they may be obtained; whereas, to this end, in view of the overcapacity to be shed and of a limited overall budget which would be insufficient to meet all the applications for scrapping premiums lodged with the national scrapping funds, it would seem appropriate, to enable as much overcapacity as possible to be scrapped, to follow a procedure whereby priority consideration is given to applications for rates at the lower end of the 70 to 100 % bracket with respect to the maximum values laid down;

(*) OJ L 116, 28.4.1989, p. 30.
(1) *Ibidem.* See page 25.

Whereas, because of the particular socioeconomic situation affecting small vessels, appropriate measures should be adopted and, in particular, adjustment coefficients should be set so as to take account of the lower commercial value of these vessels; whereas it would therefore be advisable to set lower scrapping premiums and, accordingly, lower annual contribution rates for such vessels;

Whereas, in order to operate the mutual financial support arrangements between the various national scrapping funds, it would seem advisable for the Commission, with the help of the representatives of the national funds, to balance the accounts of those funds at the beginning of each year so as to ensure that the repayment period for the sums prefinanced by the Member States concerned is the same for all funds;

Whereas the various types of waterway vessel differ in value and in their effect on fleet capacity; whereas special coefficients should therefore be laid down in order to determine the equivalent tonnage where a carrier brings a new vessel into service and presents for scrapping a vessel of a different type,

HAS ADOPTED THIS REGULATION:

GENERAL PROVISIONS

Article 1

1. This regulation fixes, *inter alia*, the annual contributions, the scrapping premiums and the conditions under which they may be obtained in respect of the vessels referred to in Article 2 of Council Regulation (EEC) No 1101/89 in view of the need to reduce fleet capacity by 10 % in respect of dry cargo vessels and pusher craft and by 15 % in respect of tanker vessels.

2. A total budget of ECU 130.5 million is considered necessary, ECU 81.2 million thereof for dry cargo vessels, ECU 44.3 million for tanker vessels and ECU 5 million for pusher craft.

Article 2

The system of scrapping measures coordinated at Community level, as laid down in Regulation (EEC) No 1101/89, shall become operational on 1 January 1990.

ANNUAL CONTRIBUTIONS

Article 3

1. Owners of the vessels referred to in Article 2 of Regulation (EEC) No 1101/89 including vessels in respect of which a scrapping premium has been applied for, shall, from 1 January 1990, be required to pay the annual contributions to the relevant scrapping fund. The rates for these contributions shall be as follows for the various types and categories of inland waterway vessels:

Dry cargo vessels

Self-propelled barges: ECU 1.00 per tonne

Push barges: ECU 0.70 per tonne

Lighters: ECU 0.36 per tonne

Tanker vessels

Self-propelled barges: ECU 3.00 per tonne

Push barges: ECU 1.26 per tonne

Lighters: ECU 0.54 per tonne

Pusher craft:

ECU 0.40 per kW

2. For vessels with a dead-weight capacity of less than 450 tonnes, the annual contribution set out in paragraph 1 shall be reduced by 30 %. For vessels with a dead-weight capacity of between 650 and 450 tonnes, the annual contribution shall be reduced by 0.15 % for every tonne by which the dead-weight capacity of the vessel in question is less than 650 tonnes.

3. The Commission may alter the rates set out in paragraph 1 in order to ensure that the sums prefinanced by the Member States concerned pursuant to Article 7(1) of Regulation (EEC) No 1101/89 are repaid within 10 years.

Article 4

1. The certificate of payment of the annual contribution in respect of 1990 must, from 1 May, be on board the vessel or, in the case of unmanned waterway vessels, on board the pusher craft.

2. Annual contributions, expressed in ecus, shall be converted into the currencies of the relevant funds at the rate applicable on 1 January of the year in question.

SCRAPPING PREMIUMS

Article 5

1. The scrapping premiums for the different types and categories of vessels shall be within a bracket ranging from 70 to 100 % of the following rates:

Dry cargo vessels

Self-propelled barges: ECU 120 per tonne

Push barges: ECU 60 per tonne

Lighter: ECU 43 per tonne

Tanker vessels

Self-propelled barges: ECU 216 per tonne

Push barges: ECU 91 per tonne

Lighters: ECU 39 per tonne

Pusher craft:

ECU 240 per kW

2. For vessels with a dead-weight capacity of less than 450 tonnes, the maximum rates for the scrapping premiums set out in paragraph 1 shall be reduced by 30 %. For vessels with a dead-weight capacity of between 450 and 650 tonnes, the maximum rates for the premiums shall be reduced by 0.15 % for every tonne by which the dead-weight capacity of the vessel in question is less than 650 tonnes.

Article 6

1. Applications for scrapping premiums submitted by vessel owners must be received by the authorities of the relevant fund before 1 May 1990. Applications received after this deadline shall not be considered.

2. Applicants for scrapping premiums shall indicate in their applications the percentage, within the 70 to 100 % bracket, of the rates set out in Article 5 which they wish to receive as a premium for scrapping their vessels. This percentage is referred to hereinafter as the 'premium-rate percentage'.

3. Valid applications for scrapping premiums amounting to 70 % of the rates set out in Article 5(1) and (2) shall be deemed to be accepted by the fund within the limits of the financial resources available in the various accounts, as provided for in Article 1(2). The fund authorities shall confirm their acceptance of applications within two months of receipt.

The authorities of the various funds shall send to the Commission each month a list of the applications which they have received for scrapping premiums amounting to 70 % of the abovementioned rates. The Commission shall ensure that these applications do not exceed the financial resources referred to in Article 1(2) and shall keep the fund authorities informed of the current situation.

4. The fund authorities shall, before 1 September 1990, notify in writing applicants for scrapping premiums exceeding 70 % of the rates set out in Article 5(1) and (2) as to whether those applicants have been accepted or refused.

Article 7

1. If an application for a scrapping premium is accepted, the owner of the vessel must, by 1 December 1990:

scrap the vessel, or

lay it up permanently until it is scrapped.

2. Where a vessel is laid up in accordance with paragraph 1, the owner shall forward to the authority of the relevant fund all documents relating to that vessel, such as the certificate of water-worthiness and transport licence. The Member States shall ensure that vessels laid up are not used for transport or storage.

The owner of a laid-up vessel shall inform the authority of the relevant fund of the place where the vessel is laid up. A vessel laid up may be moved only with the agreement of the fund authority.

3. Each fund shall, at the end of each year, send to the other funds and to the Commission a list of the vessels in respect of which the fund has paid a scrapping premium and which have not yet been scrapped. The list shall state, in respect of each vessel:

(i) its name, type, tonnage and home port;

(ii) the name and address of the owner;

(iii) precise details of the place where the vessel is laid up for scrapping.

4. Vessels laid up must, in all cases, be scrapped before 1 December 1992. If a vessel is not scrapped by that date the authority of the relevant fund may have it scrapped on behalf, and at the expense, of its owner.

Article 8

1. If the finances required to cover valid applications for scrapping premiums exceed the financial resources available in the various accounts, as provided for in Article 1(2), the premium-rate percentage indicated by the vessel owner in his application shall serve as a selection criterion, in that applications for lower percentages shall be given priority over those for higher percentages.

2. To facilitate the operation of the selection procedure referred to in paragraph 1 the Commission, with the help of the authorities of the various funds, shall draw up a joint list of valid applications; such applications shall be listed in order, starting with the application for the lowest premium-rate percentage. Separate lists shall be drawn up for dry cargo vessels, tanker vessels and pusher craft.

3. The different funds shall continue to grant scrapping premiums in accordance with the list, until the financial resources available in the various accounts referred to in Article 1(2) are used up. If more than one application requesting the same premium-rate percentage is submitted, priority shall be given to the first one received.

4. If the financial resources required to cover valid applications are less than the funds available in the various accounts referred to in Article 1(2) the applications for scrapping premiums shall be deemed to be accepted in respect of the premium percentages applied for. In such cases, the period of 10 years allowed for repaying the sums prefinanced by the Member States concerned to the fund shall be reduced accordingly.

Article 9

1. The scrapping premium shall not be paid until the owner of the vessel has provided proof that the vessel had been scrapped or laid up in accordance with Article 7.

2. The rates for the scrapping premiums, expressed in ecus, shall be converted into the currencies of the relevant funds at the rate applicable on the date referred to in Article 2.

MUTUAL FINANCIAL SUPPORT

Article 10

1. With a view to operating the mutual financial support arrangements between the separate accounts of the various funds as required under Article 5(2) of Regulation (EEC) No 1101/89, each fund shall, from 1 January 1991, communicate the following information to the Commission at the beginning of each year:

(i) the fund's debts on 31 December of the previous year (Dn);

(ii) the fund's receipts during the previous year (Ran), comprising receipts from annual contributions and the special contributions referred to in Article 8 of Regulation (EEC) No 1101/89.

2. The Commission, with the help of the fund authorities, shall determine, on the basis of the information referred to in paragraph 1:

(i) the total debts of all the funds on 31 December of the previous year (Dt);

(ii) the total receipts of all the funds for the previous year (Rt);

(iii) the adjusted annual receipts of each fund (Rnn) calculated as follows:

$$Rnn = \frac{Rt}{Dt} \times Dn;$$

(iv) for each fund, the difference between annual receipts (Ran) and annual adjusted receipts (Ran — Rnn);

(v) the sums which each fund whose annual receipts exceed the adjusted annual receipts (Ran > Rnn) is required to transfer to a fund whose annual receipts are less than the adjusted annual receipts (Ran < Rnn).

3. Each of the funds involved shall transfer the sums referred to in the last indent of paragraph 2 to the other funds by 1 March.

EQUIVALENT TONNAGE

Article 11

1. Where a vessel owner brings into service one of the vessels referred to in Article 8 of Regulation (EEC) No 1101/89 and presents for scrapping a vessel or vessels of another type, the equivalent tonnage to be taken into consideration shall be determined, within each of the two categories of vessels indicated below, in accordance with the following adjustment coefficients:

Dry cargo vessels

Self-propelled barges over 650 tonnes: 1.00,

Push barges over 650 tonnes: 0.50,

Lighters over 650 tonnes: 0.36;

Tanker vessels

Self-propelled barges over 650 tonnes: 1.00,

Push barges over 650 tonnes: 0.42,

Lighters over 650 tonnes: 0.18.

2. For vessels with a dead-weight capacity of less than 450 tonnes, the coefficients set out in paragraph 1 shall be reduced by 30 %. For vessels with a dead-weight capacity of between 450 and 650 tonnes, these coefficients shall be reduced by 0.15 % for every tonne by which the dead-weight capacity of the vessel in question is less than 650 tonnes.

CONSULTING

Article 12

1. The Commission shall consult the Member States whenever it plans to amend this regulation.

2. On all matters concerning the application of the system the Commission shall request the opinion of a group made up of experts from the professional organisations representing inland waterway carriers at Community level. This group shall be known as the 'Group of Experts on Structural Improvements in Inland Waterway Transport'.

FINAL PROVISIONS

Article 13

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

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

COMMISSION REGULATION (EC) No 241/97 (*) OF 10 FEBRUARY 1997

amending Regulation (EEC) No 1102/89 laying down certain measures for implementing Council Regulation (EEC) No 1101/89 on structural improvements in inland waterway transport

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (1), as last amended by Commission Regulation (EC) No 2310/96 (2), and in particular Articles 4a, 6 and 10(3) thereof,

Whereas Regulation (EEC) No 1101/89, as amended, provides for the possibility of reducing structural overcapacity in inland waterway transport in the Member States concerned by introducing schemes coordinated at Community level for the scrapping of vessels in 1996, 1997 and 1998, with a view to reducing fleet capacity by some 15 %;

Whereas, pursuant to Commission Regulation (EEC) No 1102/89 of 27 April 1989 laying down certain measures for implementing Council Regulation (EEC) No 1101/89 on structural improvements in inland waterway transport (3), as last amended by Regulation (EC) No 2326/96 (4), the Commission establishes the practical arrangements for these scrapping schemes;

Whereas, in respect of the scrapping scheme for 1997, the total financial contribution payable to the Scrapping Funds by the Member States concerned is estimated at ECU 64 million, to achieve a reduction in capacity of about 5 %; whereas this contribution is calculated in proportion to the size of the active fleet of each Member State concerned, as provided for in Council Regulation (EC) No 2254/96 (5);

Whereas, for 1997, the financial contribution from the Member States concerned and the contribution payable by the trade must be shared between dry cargo vessels, pusher craft and tanker vessels;

Whereas, in order to achieve the objective of reducing overcapacity, the annual contribution payable by the trade must be maintained and the 50 % rate provided for in Article 3(4) must be restored to the rates laid down in Article 3(1);

Whereas the scrapping premiums should also be increased to make the scrapping scheme more attractive; whereas a procedure should also be reintroduced under which priority is given to applications for the lowest premiums within a bracket ranging from 80 % to 100 % of the maximum rates applicable from 1 January 1997, so that as much capacity as possible can be scrapped;

Whereas, in order to improve the operation of the mutual financial support arrangements between the separate national Scrapping Funds, the 'adjusted annual financial commitments' formula established in 1989 by Article 10(2) of Regulation (EEC) No 1102/89 should be adapted;

(*) OJ L 40, 11.2.1997, p. 11.
(1) OJ L 116, 28.4.1989, p. 25.
(2) OJ L 313, 3.12.1996, p. 8.
(3) OJ L 116, 28.4.1989, p. 30.
(4) OJ L 316, 5.12.1996, p. 13.
(5) OJ L 304, 27.11.1996, p. 1.

Whereas, on a transitional basis, the special contribution payable as part of the measures to avoid increasing existing overcapacity and to prevent the appearance of new overcapacity should be maintained at its 1990 level for vessels, the building of which has passed a certain stage and which are brought into service within six months following into entry into force of this regulation;

Whereas, to enable the 1997 scrapping scheme to go ahead, between May and December 1997, the lodging of new applications pursuant to Article 6(6)(a) of Regulation (EEC) No 1102/89 must be suspended so that no vessel can be placed on a quarterly waiting list and at the same time be entered under the 1997 scrapping scheme procedure; whereas the quarterly mechanism for applying for premiums from the Scrapping Funds, as provided for in Article 6(6)(b) of the regulation, as amended, must therefore also be suspended;

Whereas the budgetary implications for the Member States concerned and the need to initiate the procedure by introducing national implementing measures from the start of 1997 make it necessary to bring this regulation into force as a matter of urgency;

Whereas the Member States and the Group of Experts on Structural Improvements in Inland Waterway Transport, set up pursuant to Article 12 of Regulation (EEC) No 1102/89, have been consulted on the proposed amendments,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 1102/89 is amended as follows:

1. The following paragraph 6 is added to Article 1:

'6. Without prejudice to the provisions of paragraphs 1 to 5, and in view of the need to reduce the capacity of their inland waterway fleets by some 5 % in 1997, the Member States concerned shall pay to the Scrapping Funds, from 1 January 1997 and from their national budgets, the amounts necessary for scrapping the vessels referred to in Article 2 of Regulation (EEC) No 1101/89, namely ECU 54 million, to supplement the financial resources referred to in paragraph 4. To achieve this aim, a total budget of ECU 64 million is considered necessary for 1997, of which ECU 40 million (*) is for the scrapping of dry cargo vessels and pusher craft and ECU 24 million (*) for the scrapping of tanker vessels. For 1997, each of the Member States concerned shall pay a financial contribution proportional to the capacity of its active fleet, in equivalent tonnage, the national contributions being as follows:

— Austria: ECU 900 000,

— Belgium: ECU 7 920 000,

— Germany: ECU 13 760 000,

— France: ECU 1 260 000,

— The Netherlands: ECU 30 160 000.

(*) Approximate figure at present.'

2. Article 3(4) is deleted.

3. Article 5 is amended as follows:

(a) In paragraph 1 '100 %' is replaced by '115 %' and a new subparagraph is added:

'For 1997, the scrapping premium rates shall be as follows:

— *Dry cargo vessels:*

  — Self-propelled barges: ECU 135/tonne

  — Push barges: ECU 60/tonne

  — Lighters: ECU 47/tonne

— *Tanker vessels:*

  — Self-propelled barges: ECU 243/tonne

  — Push barges: ECU 108/tonne

  — Lighters: ECU 43/tonne

— *Pusher craft:*

  ECU 180/kW with a linear increase to ECU 240/kW where the motive power is equal to or greater than 1 000 kW.'

(b) The following text is added to paragraph 2:

'For vessels with a deadweight capacity of between 650 and 1 650 tonnes, the maximum rates for the scrapping premiums shall show a linear increase from 100 % to 115 % for vessels up to 1 650 tonnes. For vessels with a deadweight capacity of more than 1 650 tonnes, the maximum rates for the scrapping premiums shall remain at 115 %.'

(c) Paragraph 4 is deleted.

4. Article 9(2) is amended as follows:

The expression 'referred to in Article 2' is replaced by 'of publication of the first *Official Journal of the European Communities* for 1997 in which the interest rates applied by the European Monetary Institute to its operations in ecu for the month of January are specified'.

5. Article 10(2)(b), the fourth indent is replaced by the following:

'— the adjusted annual financial commitment (P_{nn}) of each Fund, calculated as follows:

$$P_{nn} = \frac{P_t}{(R_{dt}+S_t)} \times (R_{dn} + S_n).'$$

Article 2

For 1997, Article 6 of Regulation (EEC) No 1102/89 is replaced by the following:

'*Article 6*

1. Applications for scrapping premiums submitted by vessel owners must be received by the authorities of the relevant Fund between 1 May and 31 August 1997. Applications received after this deadline shall

not be considered. An application for a scrapping premium, once received by the Fund authorities, may not be withdrawn or modified.

2. Applicants for scrapping premiums shall indicate in their applications the percentage, within the bracket ranging from 80 % to 100 % of the maximum rates set out in Article 5, which they wish to receive as a premium for scrapping their vessels. This percentage is referred to hereinafter as the "premium-rate percentage".

3. Valid applications for scrapping premiums amounting to 80 % of the rates set out in Article 5(1) and (2) shall be deemed to be accepted by the Fund within the limits of the financial resources available in the various accounts, as provided for in Article 1(6). The Fund authorities shall confirm their acceptance of applications within two months of receipt.

The authorities of the various Funds shall send to the Commission each month a list of the applications which they have received for scrapping premiums amounting to 80 % of the abovementioned rates. The Commission shall ensure that these applications do not exceed the financial resources referred to in Article 1(6) and shall keep the Fund authorities informed of the current situation.

4. The Fund authorities shall, before 1 November 1997, notify in writing applicants for scrapping premiums exceeding 80 % of the rates set out in Article 5(1) and (2) as to whether those applications have been accepted or refused.'

Article 3

For 1997, Article 7 of Regulation (EEC) No 1102/89 is amended as follows:

(a) in paragraph 1, '1 December 1990' is replaced by '1 April 1998'. The final sentence is deleted;

(b) in paragraph 4, '1 December 1992' is replaced by '1 December 1999'.

Article 4

The scrapping premium, where it constitutes the special contribution payable under the system for preventing any increase in existing overcapacity or the appearance of new overcapacity, shall be maintained at its 1990 level for a transitional period of six months from the date of entry into force of this regulation in respect of vessels which meet the conditions set out in Article 8(3)(a) of Regulation (EEC) No 1101/89.

Article 5

This regulation shall enter into force on the third 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.

COUNCIL REGULATION (EEC) No 3572/90 (*) OF 4 DECEMBER 1990

amending, as a result of German unification, certain directives, decisions and regulations relating to transport by road, rail and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 75 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),

Whereas the Community has adopted a set of rules on transport by road, rail and inland waterway;

Whereas, from the date of German unification onwards, Community law will be fully applicable to the territory of the former German Democratic Republic;

Whereas certain Community legislation on transport by road, rail and inland waterway must be amended to take account of the special situation in that territory;

Whereas a specific time limit needs to be set for bringing the rules in force in the territory of the former German Democratic Republic in conformity with Community acts;

Whereas the derogations provided for in this connection should be temporary and cause the least possible disturbance to the functioning of the common market;

Whereas the information on the situation of transport by road, rail and inland waterway and on the rules governing such transport in the territory of the former German Democratic Republic is insufficient to permit the type of adjustment or the extent of the derogations to be definitively established; whereas, to allow for changes in the situation, a simplified procedure must be laid down, in accordance with the third indent of Article 145 of the Treaty;

Whereas the provisions of Directives 74/561/EEC (4) and 74/562/EEC (5), as last amended in both cases by Directive 89/438/EEC (6), should be applied in such a way as to respect both the established rights of operators already working in the territory of the former German Democratic Republic and to allow recently established transport operators time in which to meet some of the provisions concerning financial standing and professional competence;

Whereas, from the date of German unification, road vehicles registered in the territory of the former German Democratic Republic have the same legal status as road vehicles registered in the other Member

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(*) OJ L 353, 17.12.1990, p. 12.
(1) OJ L 263, 26.9.1990, p. 34, as amended on 25 October 1990 and 28 November 1990.
(2) Opinion delivered on 21 November 1990.
(3) Opinion delivered on 20 November 1990.
(4) OJ L 308, 19.11.1974, p. 18.
(5) OJ L 308, 19.11.1974, p. 23.
(6) OJ L 212, 22.7.1989, p. 101.

States; whereas Regulation (EEC) No 3821/85 (7) lays down certain provisions in respect of recording equipment installed in road vehicles; whereas such equipment is installed in new vehicles at the time of manufacture and thus presents no problem, while a reasonable transitional period must be provided to enable such equipment to be fitted to vehicles registered in the territory of the former German Democratic Republic before unification, account being taken of the additional cost and the technical capacity of approved workshops;

Whereas the name 'Deutsche Reichsbahn (DR)' should be inserted into all Community legislation which expressly mentions the names of railway undertakings; whereas a date should be set on which rules in question become applicable;

Whereas Community legislation on structural improvements in inland waterway transport must be amended to take account of the special situation of inland waterway transport operators established in the territory of the former German Democratic Republic,

HAS ADOPTED THIS REGULATION:

Article 1

The following paragraph is added to Article 5 of Directive 74/561/EEC:

'5. In respect of the territory of the former German Democratic Republic, the following dates replace those given in paragraphs 1 and 2:

in paragraph 1, "3 October 1989" replaces "1 January 1978",

in paragraph 2, "2 October 1989", "1 January 1992" and "1 July 1992" replace "31 December 1974", "1 January 1978" and "1 January 1980" respectively.'

Article 2

The following paragraph is added to Article 4 of Directive 74/562/EEC:

'5. In respect of the territory of the former German Democratic Republic, the following dates replace those given in paragraphs 1 and 2:

in paragraph 1, "3 October 1989" replaces "1 January 1978",

in paragraph 2, "2 October 1989", "1 January 1992" and "1 July 1992" replace "31 December 1974", "1 January 1978" and "1 January 1980" respectively.'

Article 3

The following Article is inserted in Regulation (EEC) No 3821/85:

'*Article 20a*

This regulation shall not apply until 1 January 1991 to vehicles registered in the territory of the former German Democratic Republic before that date.

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(7) OJ L 370, 31.12.1985, p. 8.

This regulation shall not apply until 1 January 1993 to such vehicles where they are engaged only in national transport operations in the territory of the Federal Republic of Germany. However, this regulation shall apply as from its entry into force to vehicles engaged in the carriage of dangerous goods.'

Article 4

The following subparagraph is added at the end of Article 8(1) of Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence [8]:

'The provisions of this paragraph apply also to the driving licences issued by the former German Democratic Republic.'

Article 5

This list of railway undertakings which appears in:

Article 19(1) of 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 [9],

Article 3(1) of Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings [10],

Annex II point A. 1 'Rail — Main networks' to Council Regulation (EEC) No 1108/70 of 4 June 1970 introducing an accounting system for expenditure on infrastructure in respect of transport by rail, road and inland waterway [11],

Article 2 of Council Regulation (EEC) No 2830/77 of 12 December 1977 on the measures necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings [12],

Article 2 of Council Regulation (EEC) No 2183/78 of 19 September 1978 laying down uniform costing principles for railway undertakings [13],

Article 1(1) of Council Decision 75/327/EEC of 20 May 1975 on the improvement of the situation of railway undertakings and the harmonisation of rules governing financial relations between such undertakings and States [14],

Article 1(1) of Council Decision 82/529/EEC of 19 July 1982 on the fixing of rates for the international carriage of goods by rail [15],

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[8] OJ L 375, 31.12.1980, p. 1.
[9] OJ L 156, 28.6.1969, p. 1.
[10] OJ L 156, 28.6.1969, p. 8.
[11] OJ L 130, 15.6.1970, p. 4.
[12] OJ L 334, 24.12.1977, p. 13.
[13] OJ L 258, 21.9.1978, p. 1.
[14] OJ L 152, 12.6.1975, p. 3.
[15] OJ L 234, 9.8.1982, p. 5.

Article 1(1) of Council Decision 84/418/EEC of 25 July 1983 on the commercial independence of the railways in the management of their international passenger and luggage traffic ([16]),

is hereby replaced by the following list:

Société nationale des chemins de fer belges (SNCB)/Nationale Maatschappij der Belgische Spoorwegen (NMBS),

Danske Statsbaner (DSB),

Deutsche Bundesbahn (DB),

Deutsche Reichsbahn (DR),

Οργανισμς Σιδηροδρμων Ελλδος (ΟΣΕ),

Red Nacional de los Ferrocarriles Españoles (RENFE),

Société nationale des chemins de fer français (SNCF),

Iarnród Éireann,

Ente Ferrovie dello Stato (FS),

Société nationale des chemins de fer luxembourgeois (CFL),

Naamloze Vennootschap Nederlandse Spoorwegen (NS),

Caminhos-de-Ferro Portugueses, EP (CP),

British Rail (BR),

Northern Ireland Railways (NIR).'

Article 6

Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport ([17]) is hereby amended as follows:

1. The following paragraph is added to Article 6(4):

   'For German vessels registered in the territory of the former German Democratic Republic at the date of German unification the contribution shall be obligatory as from 1 January 1991'.

2. The following paragraph 8 is added to Article 6:

   '8. If within six months of German unification the German Government proposes that a scrapping action be organised for vessels in its fleet that were, prior to unification, registered in the former

([16]) OJ L 237, 26.8.1983, p. 32.
([17]) OJ L 116, 28.4.1989, p. 25.

German Democratic Republic, it shall communicate this request to the Commission. The Commission shall lay down the rules for the scrapping action in accordance with paragraph 7 and on the basis of the same principles as those set out in Commission Regulation (EEC) No 1102/89. (*)'

3. The following paragraph is added to Article 8(3)(a):

'The conditions set out in paragraphs 1 and 2 shall also not apply to vessels which were under construction in the former German Democratic Republic before 1 September 1990, if the date of their delivery and commissioning is no later than 31 January 1991'.

4. The following paragraph is added to Article 8(3)(b):

'The conditions set out in paragraphs 1 and 2 shall apply to vessels which became part of the German fleet upon German unification but which were not registered in the former German Democratic Republic on 1 September 1990'.

5. The following paragraph 5 is added to Article 10:

'5. The Member States shall adopt the measures necessary to ensure compliance with the provisions of the fourth subparagraph of Article 6(4), and the second paragraphs of Article 8(3) and (b) before 1 January 1991 and notify the Commission thereof'.

Article 7

1. Regulations (EEC) No 2183/78 and (EEC) No 2830/77 shall apply in the territory of the former German Democratic Republic solely from 1 January 1992.

2. Regulation (EEC) No 1192/69 shall apply in the territory of the former German Democratic Republic solely from 1 January 1993.

Article 8

Decisions 75/327/EEC, 82/529/EEC and 83/418/EEC shall apply in the territory of the former German Democratic Republic solely as from 1 January 1993.

Article 9

1. Adjusting measures to fill obvious loopholes and to make technical adjustments to the measures provided for in this directive may be adopted in accordance with the procedure laid down in Article 10.

2. Adjusting measures must be designed to ensure the coherent application of Community rules in the sector covered by this directive in the territory of the former German Democratic Republic, with due regard for the specific circumstances in that territory and the special difficulties involved in the application of those rules.

They must be consistent with the principles of those rules, and be closely related to one of the derogations provided for by this directive.

(*) OJ L 116, 28.4.1989, p. 30.

3. The measures referred to in paragraph 1 may be taken until 31 December 1992. Their applicability shall be limited to the same period.

Article 10

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. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 11

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

COUNCIL DIRECTIVE 91/440/EEC OF 29 JULY 1991 (*)

on the development of the Community's railways

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 75 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),

Whereas greater integration of the Community transport sector is an essential element of the internal market, and whereas the railways are a vital part of the Community transport sector;

Whereas the efficiency of the railway system should be improved, in order to integrate it into a competitive market, while taking account of the special features of the railways;

Whereas, in order to render railway transport efficient and competitive as compared with other modes of transport, Member States must guarantee that railway undertakings are afforded a status of independent operators behaving in a commercial manner and adapting to market needs;

Whereas the future development and efficient operation of the railway system may be made easier if a distinction is made between the provision of transport services and the operation of infrastructure; whereas given this situation, it is necessary for these two activities to be separately managed and have separate accounts;

Whereas, in order to boost competition in railway service management in terms of improved comfort and the services provided to users, it is appropriate for Member States to retain general responsibility for the development of the appropriate railway infrastructure;

Whereas, in the absence of common rules on allocation of infrastructure costs, Member States shall, after consulting the infrastructure management, lay down rules providing for the payment by railway undertakings and their groupings for the use of railway infrastructure; whereas such payments must comply with the principle of non-discrimination between railway undertakings;

Whereas Member States should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure, while taking care that any financial rearrangement as may be necessary shall be made in accordance with the relevant rules laid down in the Treaty;

Whereas, in order to facilitate transport between Member States, railway undertakings should be free to form groupings with railway undertakings established in other Member States;

(*) OJ L 237, 24.8.1991, p. 25.
(1) OJ C 34, 14.2.1990, p. 8 and OJ C 87, 4.4.1991, p. 7.
(2) OJ C 19, 28.1.1991, p. 254.
(3) OJ C 225, 10.9.1990, p. 27.

Whereas, such international groupings should be granted rights of access and transit in the Member States of establishment of their constituent undertakings, as well as transit rights in other Member States as required for the international service concerned;

Whereas, with a view to encouraging combined transport, it is appropriate that access to the railway infrastructure of the other Member States should be granted to railway undertakings engaged in the international combined transport of goods;

Whereas it is necessary to establish an advisory committee to monitor and assist the Commission with the implementation of this directive;

Whereas, as a result, Council Directive 75/327/EEC of 20 May 1975 on the improvement of the situation of railway undertakings and the harmonisation of rules governing financial relations between such undertakings and States [4] should be repealed,

HAS ADOPTED THIS DIRECTIVE:

SECTION 1 — OBJECTIVE AND SCOPE

Article 1

The aim of this directive is to facilitate the adoption of the Community railways to the needs of the single market and to increase their efficiency;

by ensuring the management independence of railway undertakings;

by separating the management of railway operation and infrastructure from the provision of railway transport services, separation of accounts being compulsory and organisational or institutional separation being optional;

by improving the financial structure of undertakings;

by ensuring access to the networks of Member States for international groupings of railway undertakings and for railway undertakings engaged in the international combined transport of goods.

Article 2

1. This directive shall apply to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State.

2. Member States may exclude from the scope of this directive railway undertakings whose activity is limited to the provision of solely urban, suburban or regional services.

Article 3

For the purpose of this directive:

'railway undertaking' shall mean any private or public undertaking whose main business is to provide rail transport services for goods and/or passengers with a requirement that the undertaking should ensure traction;

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[4] OJ L 152, 12.6.1975, p. 3.

'infrastructure manager' shall mean any public body or undertaking responsible in particular for establishing and maintaining railway infrastructure, as well as for operating the control and safety systems;

'railway infrastructure' shall mean all the items listed in Annex I.A to Commission Regulation (EEC) No 2598/70 of 18 December 1970 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Regulation (EEC) No 1108/70 [5], with the exception of the final indent which, for the purposes of this directive only, shall read as follows: 'Buildings used by the infrastructure department';

'international grouping' shall mean any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States;

'urban and suburban services' shall mean transport services operated to meet the transport needs of an urban centre or conurbation, as well as the transport needs between such centre or conurbation and surrounding areas;

'regional services' shall mean transport services operated to meet the transport needs of a region.

SECTION II — MANAGEMENT INDEPENDENCE OF RAILWAY UNDERTAKINGS

Article 4

Member States shall take the measures necessary to ensure that as regards management, administration and internal control over administrative, economic and accounting matters railway undertakings have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State.

Article 5

1. Member States shall take the measures necessary to enable railway undertakings to adjust their activities to the market and to manage those activities under the responsibility of their management bodies, in the interests of providing efficient and appropriate services at the lowest possible cost for the quality of service required.

Railway undertakings shall be managed according to the principles which apply to commercial companies; this shall also apply to their public services obligations imposed by the State and to public services contracts which they conclude with the competent authorities of the Member State.

2. Railway undertakings shall determine their business plans, including their investment and financing programmes. Such plans shall be designed to achieve the undertakings' financial equilibrium and the other technical, commercial and financial management objectives; they shall also lay down the method of implementation.

3. In the context of the general policy guidelines determined by the State and taking into account national plans and contracts (which may be multiannual) including investment and financing plans, railway undertakings shall, in particular, be free to:

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(5) OJ L 278, 23.12.1970, p. 1. Regulation amended by Regulation (EEC) No 2116/78 (OJ L 246, 8.9.1978, p. 7).

(i) establish with one or more other railway undertakings an international grouping;

(ii) establish their internal organisation, without prejudice to the provisions of Section III;

(iii) control the supply and marketing of services and fix the pricing thereof, without prejudice to Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligation inherent in the concept of a public service in transport by rail, road and inland waterway (6);

(iv) take decisions on staff, assets and own procurement;

(v) expand their market share, develop new technologies and new services and adopt any innovative management techniques;

(vi) establish new activities in fields associated with railway business.

SECTION III — SEPARATION BETWEEN INFRASTRUCTURE MANAGEMENT AND TRANSPORT OPERATIONS

Article 6

1. Member States shall take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate. Aid paid to one of these two areas of activity may not be transferred to the other.

The accounts for the two areas of activity shall be kept in a way which reflects this prohibition.

2. Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity.

Article 7

1. Member States shall take the necessary measures for the development of their national railway infrastructure taking into account, where necessary, the general needs of the Community.

They shall ensure that safety standards and rules are laid down and that their application is monitored.

2. Member States may assign to railway undertakings or any other manager the responsibility for managing the railway infrastructure and in particular for the investment, maintenance and funding required by the technical, commercial and financial aspects of that management.

3. Member States may also accord the infrastructure manager, having due regard to Articles 77, 92 and 93 of the Treaty, financing consistent with the tasks, size and financial requirements, in particular, in order to cover new investments.

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(6) OJ L 156, 28.6.1969, p. 1. Regulation last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

Article 8

The manager of the infrastructure shall charge a fee for the use of the railway infrastructure for which he is responsible, payable by railway undertakings and international groupings using that infrastructure. After consulting the manager, Member States shall lay down the rules for determining this fee.

The user fee, which shall be calculated in such a way as to avoid any discrimination between railway undertakings, may in particular take into account the mileage, the composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilisation of the infrastructure.

SECTION IV — IMPROVEMENT OF THE FINANCIAL SITUATION

Article 9

1. 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.

2. To that end, Member States may take the necessary measures requiring a separate debt amortisation unit to be set up within the accounting departments of such undertakings.

The balance sheet of the unit may be charged, until they are extinguished, with all the loans raised by the undertaking both to finance investment and to cover excess operating expenditure resulting from the business of rail transport or from railway infrastructure management. Debts arising from subsidiaries' operations may not be taken into account.

3. Aid accorded by Member States to cancel the debts referred to in this article shall be granted in accordance with Articles 77, 92 and 93 of the EEC Treaty.

SECTION V — ACCESS TO RAILWAY INFRASTRUCTURE

Article 10

1. International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established.

2. Railway undertakings within the scope of Article 2 shall be granted access on equitable conditions to the infrastructure in the other Member States for the purpose of operating international combined transport goods services.

3. Railway undertakings engaged in international combined transport of goods and international groupings shall conclude the necessary administrative, technical and financial agreements with the managers of the railway infrastructure used with a view to regulating traffic control and safety issues concerning the international transport services referred to in paragraphs 1 and 2. The conditions governing such agreements shall be non-discriminatory.

SECTION VI — FINAL PROVISIONS

Article 11

1. Member States may bring any question concerning the implementation of this directive to the attention of the Commission. After consulting the committee provided for in paragraph 2 on these questions, the Commission shall take the appropriate decisions.

2. The Commission shall be assisted by an advisory committee composed of the representatives of the Member States and chaired by the representative of the Commission.

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 be taking a vote.

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 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 12

The provisions of this directive shall be without prejudice to Council Directive 90/531/EEC of 17 September 1990 on the procurement procedure of entities operating in the water, energy, transport and telecommunications sectors [7].

Article 13

Decision 75/327/EEC is hereby repealed as from 1 January 1993.

Reference to the repealed decision shall be understood to refer to this directive.

Article 14

Before 1 January 1995, the Commission shall submit to the Council a report on the implementation of this directive accompanied, if necessary, by suitable proposals on continuing Community action to develop railways, in particular in the field of the international transport of goods.

Article 15

Member States shall, after consultation with the Commission, adopt the laws, regulations and administrative provisions necessary to comply with this directive not later than 1 January 1993. They shall forthwith inform the Commission thereof.

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[7] OJ L 297, 29.10.1990, p. 1.

When Member States adopt these provisions, they shall contain a reference to this directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 16

This directive is addressed to the Member States.

2. *Sea*

Community guidelines on State aid to maritime transport (*)

1. INTRODUCTION

1.1. Development of the shipping sector: free market principle

Community maritime policy, as laid down in several communications to the Council, covers the promotion of EC shipping, external relations and maritime safety, together with shipbuilding and maritime technology. The aim has been to ensure freedom of access to shipping markets across the world for safe and environment-friendly ships, preferably registered in EC Member States with Community nationals employed on board. This approach has succeeded in opening up markets, particularly in Europe, and has given the consumer a wide choice of competitive shipping services, but the proportion of ships entered in Member States' registers and the number of EC seafarers employed have both declined significantly, especially over the last decade.

Underpinning the philosophy is legislation at international, Community and national levels. In particular on safety standards and working conditions, international conventions and resolutions apply and the Community actively promotes the raising of world standards in the appropriate fora, such as, in particular, the International Maritime Organisation. At the Community level, in 1986, the Council adopted a basic package of legislation on shipping, based on an open market, non-protectionist philosophy (1). Broadly speaking, the Community decided that there should generally be no further requirement other than establishment in the Community to confer the right to provide shipping services between the EC and third countries or between Member States. Thus, for example, Regulation (EEC) No 4055/86 provides for the freedom to provide services for all EC established carriers, irrespective of whether they operate vessels under EC or third country flags.

The exceptions to this open trade philosophy, where trades are still restricted to vessels registered in Member States and under Member States' flags are relatively minor (certain cabotage trades in particular). The registration of a vessel in a Member State therefore offers few economic advantages; on the contrary, there may be disadvantages, such as strict manning conditions to be complied with and Member States' fiscal and social arrangements for companies and their employees, which means that, in most cases, it is relatively expensive to operate EC-registered ships with EC seafarers on board. Further, there are few costs for third country operators entering the open trades. In addition, while there are no direct or indirect taxes or duties, such as apply to most imported goods and services, applicable to shipping services to ensure some comparability between EC and non-EC operators' costs, there is direct competition between Community-registered ships and third country vessels not only in international trades but also in most trades within the Community.

(*) OJ C 205, 5.7.1997, p. 5.

(1) The 1986 package, OJ L 378, 31.12.1986, pp. 1, 4, 14 and 21, consists of four regulations:

- Regulation (EEC) No 4055/86 applying the principle of freedom to provide maritime transport between Member States and between Member States and third countries, as last amended by Regulation (EEC) No 3573/90 (OJ L 353, 17.12.1990, p. 16),
- Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, as last amended by the Act of Accession of Austria, Finland and Sweden,
- Regulation (EEC) No 4057/86 on unfair pricing practices in maritime transport,
- Regulation (EEC) No 4058/86 concerning coordinated action to safeguard free access to cargoes in ocean trades.

Further, the shipping industry is extremely mobile and an onerous system can easily be avoided through registering vessels in other countries (giving absolute freedom in manning) and, if necessary, establishing a nominal level of administration or management outside the Member State (to avoid its fiscal systems). Further, there has, in recent years, been a large supply of seafarers available from low-wage third countries, giving shipowners a low-cost option when selecting crews. There is also at present cyclical and structural overcapacity which means that the indusrtry is demand-led and that shippers can drive down freight rates; this, combined with high fixed costs for shipowners, means that the incentive to cut costs and possibly corners increases and the pursuit of high quality in operations may not be commercially attractive. This may then undermine the long-term interests of the Community in safe, efficient, environment-friendly transport.

1.2. Development of the shipping sector: decreasing competitiveness of EC flags

The European shipping industry faces stiff international competition and the size of the Community-registered fleet in total worldwide maritime transport has been decreasing steadily over the last three decades. In 1970, 32 % of the world tonnage sailed under the flags of EC Member States; by 1995 this share had decreased to 14 %. The share of the major open-registry countries increased from 19 % to 38 % over the same period. There has also been a correspondingly steady decrease in the number of EC seafarers employed on board.

Recognising the problem of the lack of competitiveness of the EC flags, the Commission proposed a series of positive measures in 1989, including a Community ship register ('Euros') ([2]). This was intended to operate in conjunction with Member States' first national registers and guarantee shipowners State aid in return for accepting certain obligations as to employment of Community nationals in the crew. However, in the end, the Council was unable to accept the Euros approach.

In the absence of a Community measure providing a degree of harmonisation, Member States took initiatives independently in order to preserve their maritime interests. Important economic considerations, maintaining employment and know-how and the strategic value of the fleet have all been identified as influencing national policy decisions. It is also recognised that quality must not be prejudiced by cost-cutting by shipowners simply in order to survive in the face of low-cost competition emanating particularly from flags of convenience; quality must be preserved and improved, both in terms of the technical standards and the operation of the vessels, which entails a continuing need for training and employing people with the requisite skills.

Measures were, therefore, progressively introduced to slow down the trend to flag out, such as relaxing conditions applicable to national first registers, developing second or international registers or using State aid measures or a combination of these, but no approach has been wholly successful.

Flagging out of vessels is, however, not the end of the problem. Where a flag State outside the Community offers an attractive international services infrastructure, flagging out has tended in recent years to be followed by relocation of ancillary activities (such as ship management) to countries outside the Community, leading to an even greater loss of employment, both on board ship and on shore. A further consequence has been a loss of maritime know-how. A perception that there are a limited number of positions available at sea, a difficult working environment and few opportunities to develop a career has led to a decrease in the number of students at maritime training institutes and in the recruitment of young seafarers, which has compounded the negative effects on board and on shore.

([2]) 'A future for the Community shipping industry — measures to improve the operating conditions of Community shipping', COM(89) 266 final, 3 8.1989.

1.3. State aid guidelines of 1989

In 1989, faced with the increasing use of State aid, the Commission established guidelines defining the conditions under which State aid to shipping would be considered compatible with the common market ([3]). The two basic objectives defining the Community's common interest were deemed to be the maintenance of ships under Community flags and the employment, to the highest possible degree of Community seafarers. The Commission sought to achieve these objectives through a Community approach, addressing the problem of the cost gap between the fleet registered in Member States and vessels flags of convenience. This was the first attempt to bring about some convergence between the Member States' actions.

Ceiling

In particular, the Commission accepted that Member States' fleets faced a difficult competitive position because of advantages available to operators flying flags of third countries, including flags of convenience. These lead to differences in operating costs. The 1989 guidelines, therefore, included the outline of a method devised to ensure that the global impact of State aid would not exceed a ceiling to be defined on the basis of the cost handicap which ships operated under the flag of a low-salary Member State met on world markets. The calculation was based on the hypothetical operating cost of vessels under Portuguese and Cypriot flags, as representing the cheapest Community first register and a flag of convenience. Once weighted to reflect the composition of the national flag fleet in terms of vessel types, this resulted in a single national ceiling for annual operating aid, applicable to all types of vessel.

1.4. Revision of guidelines

Given the continuing decline in the Community fleets and the increasing divergence between Member States' policy responses to the perceived difficulties of the Community shipping sector, the Commission concluded that the Community's maritime strategy should be reviewed. The initial results of this review were presented in a communication ([4]) in March 1996.

The Commission concluded that further improving safety, access to international markets and the application of competition rules, along with efforts to enhance training and encourage employment and R&D, would enhance the competitiveness of the Community shipping sector. However, the Commission accepted that support measures may nevertheless be required for the present to maintain and develop the Community's shipping sector. The communication also raised questions about a possible new approach to State aid.

There was general consensus that the maritime State aid guidelines required revision, to take into account developments in international competition and the global trend towards liberalisation of trade in goods and services, developments in the maritime sector, experience of applying the 1989 guidelines, reactions to the communication on a maritime strategy and the inventory of State aid for shipping, drawn up in line with the commitments made in the White Paper on the 'Future Development of the Common Transport Policy' ([5]).

([3]) 'Financial and fiscal measures concerning shipping operations with ships registered in the Community', SEC(89) 921 final, 3.8.1989.

([4]) 'Towards a new Maritime Strategy', COM(96) 81 final, 13.3.1996.

([5]) 'The Future Development of the Common Transport Policy: a global approach to the construction of a Community framework for sustainable mobility', COM(92) 494 final, para 59.

In terms of general principles, the objectives of promoting a safe and competitive Community fleet with the employment of the highest possible number of Community seafarers remain valid. However, the means of achieving this objective requires aid to be more closely linked with specific actions rather than an indirect reflection of hypothetical operating cost differences.

In the matter of the ceiling, the method has proved difficult to apply so as to take sufficiently into account differences in the size of vessels, productivity, crewing arrangements and the economic performance of the operator (i.e. profits or losses obtained). It has, therefore, been concluded that an alternative approach to limit the intensity of aid schemes and to avoid a subsidies race is required (see Chapter 10).

The competitive difference between ships registered in the Community and those registered outside, especially those operated under flags of convenience, depends primarily on fiscal costs. This is because the cost of capital is essentially the same worldwide and equally there is no differential in the technology available. The fiscal costs (corporate taxation and wage related liabilities in respect of seafarers), however, have been shown by different studies to be the critical and distortive factor.

In principle, operating aid should be exceptional, temporary and degressive. In the case of maritime transport, however, the problem of the competitiveness of the EC fleet on the world market is a structural one, deriving in large part from external factors. As the immediate prospects of resolving this cost gap problem do not appear good, the need for aid measures to allow shipowners to operate Community-registered ships competitively in the global market is not likely to be short term.

In the international context, the Community has pressed for liberalisation of world maritime transport services in discussions under the WTO framework but important trading partners were unwilling to accept the proposals tabled and further debate has been postponed until the next round of comprehensive negotiations on services, which is due to take place no later than the year 2000. It also seems unlikely, in the immediate future, that there will be international agreements on the application of competition rules for maritime transport, including restriction of national aid schemes.

In the future, the level of aid may be progressively reduced, provided that the world economic and political situation allows it. In particular, if the new disciplines that are presently being negotiated in the framework of GATS relating to the potentially distortive effects of subsidies on trade in services entered into force, the current guidelines would be amended accordingly. For the present, the situation should be monitored through regular review of aid in the light of the competitiveness of Community fleets in the world market.

2. SCOPE AND GENERAL OBJECTIVES OF THE REVISED STATE AID GUIDELINES

The Community approach to State aid needs to accommodate differences in the priorities and approaches of the Member States while ensuring that competitive distortions are kept to a minimum.

The Commission's role is to set the parameters within which State aid will be approved. Aid schemes should not be 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.

2.1. Scope of revised State aid guidelines

These guidelines cover any aid granted by EC 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 also 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 (e.g. 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 the seventh directive ([6]), as extended by Council Regulation (EC) No 1904/96 ([7]), or any subsequent instrument including Council Regulation (EC) No 3094/95 ([8]) intended to give effect to the State aid provisions of the OECD agreement respecting normal competitive conditions in commercial shipbuilding and ship-repair when it enters into force) or aid for fishing vessels. Investments in infrastructure are not normally considered to involve State aid within the meaning of Article 92(1) of the Treaty, if the State provides free and equal access to the infrastructure for the benefit of all interested operators. 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 ([9]).

These guidelines will apply from the date of their publication in the *Official Journal of the European Communities*; however, they are without prejudice to aid schemes which have already been authorised prior to the publication. Nonetheless, these latter schemes will be subject to review under Article 93(1) of the Treaty and shall be amended where necessary within 18 months after these guidelines have become applicable.

2.2. General objectives of revised State aid guidelines

The Commission has stressed ([10]) 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. Since this is considered to be enhancing the competitiveness of the Community fleets, State aid may generally be granted only in respect of ships entered in Member States' registers ([11]). This policy should:

— safeguard EC employment, (both on board and on shore),

— preserve maritime know-how in the Community and develop maritime skills, and

— improve safety.

However, State aid may, in certain exceptional cases, be granted in respect of ships entered in registers under (3) of the Annex, provided that the Member State concerned establish that the register contributes directly to the objectives mentioned above.

([6]) Council Directive 90/684/EEC on aid to shipbuilding, OJ L 380, 31.12.1990, p. 27, as last amended by Directive 94/73/EC (OJ L 351, 31.12.1994, p. 10).
([7]) OJ L 251, 3.10.1996, p. 5.
([8]) OJ L 332, 30.12.1995, p. 1.
([9]) Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, Bulletin EEC, 9-1984.
([10]) XXII Report on Competition Policy, 1992, and 'Towards a New Maritime Strategy', COM(96) 81 final, 13.3.1996.
([11]) See Annex.

Additionally, flag-neutral aid measures may be approved in certain exceptional cases where a benefit to the Community is clearly demonstrated (see point 3.1 and Chapter 7).

Further objectives of the common transport policy ([12]) may also be taken into account, such as the construction of a Community framework for sustainable mobility and, as part of this, the promotion of short sea shipping and development of its full potential.

3. FISCAL AND SOCIAL MEASURES TO IMPROVE COMPETITIVENESS

3.1. Fiscal treatment of shipowning companies

In the shipping sector, Member States have responded to the difficulties caused by the diverse factors affecting international competition in different ways, reflecting different circumstances. Some have been able to rely on general measures whilst others have resorted to State aid. The discussions on the Euros proposal have shown that the possibility for harmonisation in this area is, for the time being, limited.

Many third countries have developed significant shipping registers, sometimes supported by an efficient international services infrastructure, attracting shipowners with a fiscal climate which is considerably milder than within EC 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. This leaves all Member States having significant fleets with a common problem: the creation of conditions which allow fair 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 EU 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. Furthermore, profits in shipping, which would be subject to tax, have been depressed in recent years so that the differences between effective rates of tax in the Member States have been marginal considerations. The continual decline of the fleets registered in Member States, while the proportion of world shipping under control of EC shipowners has remained relatively stable over the last decade testifies to this.

In order to counter this tendency, 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 fiscal alleviation measures which apply in a special way to shipping are considered to be State aid. Equally, the system used in certain Member States and third countries 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 earnings, or profits or losses made.

([12]) Commission White Paper: 'The Future Development of the Common Transport Policy', COM(92) 494 final.

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 earlier stated objectives, 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 is nowadays often obtained from the operation of ships under different flags, for instance, when making use of chartered vessels under foreign flag 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 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 EC fleets in the global shipping market. Consequently, fiscal alleviation 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 company 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 effectively 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, EC 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 EU and, in addition, that the beneficiaries of the schemes must be liable to corporate tax in the Community. Also 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.

Where fiscal schemes are approved on the above exceptional basis, the Commission will require the provision of regular reports, demonstrating the effect of the measure (in conjunction with any other State aid scheme operating in the Member State) on the Community-registered fleet operated from the Member State and on employment of EC seafarers. The Commission will closely monitor the situation regarding possible distortion of competition in trade between Member States.

In all cases, the benefits of schemes must facilitate the development of the shipping sector and employment in support of 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 would be required in order to prevent 'spill over' to non-shipping related activities. This approach would help EC 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

In January 1997, the Commission issued a communication on monitoring of State aid and reduction of labour costs ([13]), in general covering all sectors of the economy and concentrating particularly on

([13]) OJ C 1, 3.1.1997, p. 10.

the lower-skilled end of the market. This warns of the risks of labour cost alleviation directed towards specific sectors which can upset the proper functioning of the internal market and thus be detrimental to the competitiveness of Community industry and long-term job creating. In particular, the Commission considers the potentially negative effects of this approach on sectors with overcapacity or in crisis (defined as those in which the demand for Community products is stagnating or falling), sensitive sectors (those where there is significant intra-Community trade and competition), and sectors in international competition.

However, maritime transport presents a special case, as the Commission accepted in adopting its guidelines on State aid in 1989 and the communication on reduction of labour costs. In particular, 'aid in the field of social security and seafarers' income taxation, tending to reduce the burden borne by shipping companies without reducing the level of social security for the seafarers and resulting from the operation of ships registered in the Community may be considered compatible with the common market.' The Commission considers that this approach remains valid.

Maritime transport is a sector experiencing a certain overcapacity worldwide and where international competition is fierce. However, the problem identified in the industrial sectors with overcapacity or in crisis is that aid can have the effect of transferring difficulties — and unemployment problems —to EC competitors who do not enjoy such advantages. In maritime transport, demand for quality is increasing and there is an estimated growth potential in the market; further, there is a lack of trained and qualified seafarers worldwide. It can therefore be concluded that aid supporting employment of, particularly, skilled Community seafarers should not be discouraged on this basis. The degree of cooperation between carriers through conferences and consortia, etc. in liner trades and the proportion of cross-trading in bulk operations mean that the centre of gravity in competition is between EC and non-EC carriers. Finally, the communication suggests that the differentials between the low-wage countries and the Member States are very significant and integrating new production technology, innovation, quality and training can more durably improve performance in terms of competitiveness and employment. While this is true for most industrial sectors, it is largely not the case in maritime transport, for the reasons outlined in Chapter 1.

Support measures for the maritime sector should, therefore, aim primarily at reducing fiscal and other costs and burdens borne by EC shipowners and EC seafarers (i.e. those liable to taxation and/or social security contributions in a Member State) 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 line with the objective, therefore, the following action on employment costs should be allowed for EC shipping:

— reduced rates of contributions for the social protection of EC seafarers employed on board ships registered in a Member State,

— reduced rates of income tax for EC seafarers on board ships registered in a Member State.

For this type of aid, a maximum reduction of liabilities to zero may be permitted, allowing Member States to bring employment-related costs to levels in line with world norms which often entail exemption from tax and social security liabilities for seafarers. However, no subsidy on net wages of EC seafarers may be granted, as this might lead to a distortion of competitive conditions between Member States. The alleviation of fiscal burdens would not remove the interest of the shipowner in negotiating an appropriate salary package with potential crew members and their labour representatives. Seafarers from Member States with lower wage levels would still, therefore, have a competitive advantage over those from other Member States with higher wage expectations. In any event, EC seafarers will continue to be

more expensive than the cheapest available in the global market. Hence, there is no danger of over-compensation entailed in this measure.

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 resulting from these levies. Such an approach may generally be considered as 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 is not open to abuse.

4. CREW RELIEF

A separate measure identified in the Commission's 1989 guidelines as in the common interest of the Community is aid for crew relief. This tends to reduce the costs of employing EC seafarers, especially those on ships operating in distant waters. Although in 1989 the Commission limited aid of this type to 50 % of the total costs incurred for these reasons, the development of the new approach to a ceiling means that it is not necessary to impose a specific limitation for this type of measure. Aid, which is subject to the ceiling, may, therefore, be granted in the form of payment or reimbursement of the costs of repatriation of EC seafarers working on board ships entered in Member States' registers.

5. INVESTMENT AID

At present, some Member States grant aid for newly built vessels only, others also for the purchase of certain categories of second-hand vessels or for conversion or modernisation of existing vessels. These schemes have tended to create or maintain overcapacity, leading to lower freight rates, thus stimulating EC operators to cut costs, in many cases by flagging out. Further, the system has induced shipowners in some instances to make decisions about buying and selling ships for fiscal rather than commercial reasons.

Subsidies for fleet renewal are not common in other transport modes (road haulage, aviation). Since they tend to distort competition, the Commission has been reluctant to approve such schemes, except where part of a structural reform leading to reductions in overall fleet capacity.

Following the submission by the Commission of its communication ([14]) on shipbuilding, the Council held on 24 April 1997 decided to extend the seventh directive on shipbuilding until 31 December 1998. Therefore, investment for new ships must comply with those rules or any other Community legislation that may replace them.

Within the framework of the present guidelines, other investment aid may however be permitted, in line with the Community safe seas policy ([15]), 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, such as providing 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, thus enhancing safety and environmental controls. Such aid must comply with the shipbuilding provisions, as referred to in the second paragraph of point 2.1, when applicable.

([14]) 'Shipbuilding Policy — Options for the Future. First Reflections', SEC(97) 567.
([15]) 'A common policy on Safe Seas', COM(93) 66 final.

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 if the investment related to the construction of dedicated warehouses or purchase of fixed transhipment equipment. Investment aid for maritime companies in disadvantaged regions may then only be permitted where is also complies with the regional aid rules (see Chapter 6, below).

6. REGIONAL AID ON THE BASIS OF ARTICLE 92(3)(a) AND (c)

In the context of regional aid schemes, the Commission will apply the general rules set out in its communications on national regional aid ([16]) or future amendments thereto.

7. TRAINING

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 considered to include 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 the shipowner. State aid to training will be approved, provided the aid meets the Commission's general criteria (e.g. proportionality, non-discrimination and transparency, where appropriate, relating to training carried out on board ships entered in Community registers). 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 EC and the competitive edge of the EC 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 ([17]).

8. RESTRUCTURING AID (INCLUDING PRIVATISATION)

Although the guidelines on restructuring and rescuing firms in difficulty ([18]) apply to transport only to the extent that the specific nature of the sector is taken into account, the Commission will apply those guidelines in considering restructuring aid for maritime companies.

([16]) Communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

([17]) Framework for Aid to Research and Development (OJ C 45, 17.2.1996, p. 5), and Framework for Environmental Aid (OJ C 72, 10.3.1994, p. 3).

([18]) 'Guidelines for restructuring and rescuing firms in difficulty' (OJ C 368, 23.12.1994, p. 12).

9. PUBLIC SERVICE OBLIGATIONS AND CONTRACTS

Direct aids aiming at covering operating losses are, in general, not compatible with the common market. However, subsidisation can, in principle, be accepted for public service obligations (PSO). A PSO is defined as any obligation imposed upon a carrier to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the carrier would not assume if it were solely considering its economic interest.

PSOs may be imposed for scheduled services to ports serving peripheral regions of the Community or thinly served routes considered vital for the economic development of that region, in cases where the operation of market forces would not ensure a sufficient service level.

The Commission's practice in assessing contracts relating to PSOs is generally to consider that reimbursement of operating losses incurred as a direct result of fulfilling certain public service obligations is not State aid within the meaning of Article 92(1) of the Treaty. Notification is not, therefore, required under Article 93(3), provided that the following criteria are met:

— for public service contracts to be consistent with the common market and not to constitute State aid, the Commission expects public tenders to be made, as the development and implementation of schemes must be transparent and allow for the development of competition,

— adequate publicity must be given to the call for tender and all requirements concerning the level and frequency of the service, capacity, prices and standards required, etc. must be specified in a clear and transparent manner to ensure that all Community carriers with the right of access to the route (according to Community law) have had an equal chance to bid,

— the Member State can then award a contract to the successful bidder (except in exceptional and duly justified cases, whichever bidder requires the lowest financial compensation) and reimburse the extra costs incurred by the operator as a result of providing the service. This should be directly related to the calculated deficit made by the operator in providing the service. It should be accounted for separately for each such service so that it can be verified that there is no overcompensation or cross-subsidy and that the system cannot be used to support inefficient management and operating methods. Where a grant is made by the Member State on this basis and it is limited to reimbursement of extra costs incurred (together with a reasonable return on capital employed), the scheme will be considered not to amount to State aid.

The duration of public service contracts should be limited to a reasonable and not overlong period (normally in the order of five years), since contracts for significantly longer periods could entail the danger of creating a (private) monopoly. After expiration of the contract period, such contracts should be subject to re-tendering in accordance with the procedure described above.

Restrictions of access to the route to a single operator may only be granted if, when the public service contract is awarded according to the above mentioned procedure, there is no competitor providing, or having a demonstrated intention to provide, scheduled services on the route. The terms of any restriction or exclusivity must in any case be compatible with the provisions of Article 90 of the EC Treaty.

It must be stressed that if there is evidence that the Member State has not selected the cheapest offer, or if complaints are received alleging unfairness in the awarding procedure, the Commission will request information in order to verify whether the award includes State aid elements. If aid has been granted in breach of the procedural requirements of the Treaty, the Commission may issue an interim order suspending payment of aid and will in appropriate cases open the procedure under Article 93(2) of the Treaty.

Although it is considered appropriate for Member States to make maximum use of the above procedures, exceptions may be justified, such as in the case of island cabotage involving regular ferry services. In those instances, measures must be notified and will continue to be assessed under the general State aid rules. In its assessment of compatibility with the Treaty, the Commission will verify whether or not aid may divert significant volumes of traffic or involve overcompensation, which could allow the selected carrier to cross-subsidise operations on which other Community carriers compete.

10. LIMITS TO AID

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 cumulation of aid to levels which are disproportionate with 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 of corporate taxation of shipping activities is the maximum level of aid which may be permitted. To avoid distortion of competition, other systems of aid may not provide greater benefit than this. Consequently, 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 in the form of direct payments in the framework of Chapters 3, 4, 5 and 6 should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers; to do so would, it is considered, affect trading conditions to an extent contrary to the Treaty provisions, as the aid would be disproportionate to the objective. This approach to limiting aid will replace the previous system of an annual ceiling based on the calculated hypothetical cost gap between vessels under the cheapest Community flag and a flag of convenience (see point 1.3).

11. FINAL REMARKS

The implementation of these guidelines presupposes discipline on the part both of Member State authorities and of the Commission, particularly in respect of the formal obligations to provide notification and the time limits to be adhered to. To expedite the examination of aid measures, Member States must notify the Commission of proposed aid measures at the draft stage, supplying all the particulars necessary for their assessment, in accordance with Article 93(3) of the EC Treaty. The Commission considers that a Member State has failed to fulfil its obligations to notify where an aid measure has been put into effect either in accordance with national law or by giving a financial commitment to potential beneficiaries.

The Commission will use all the measures at its disposal to ensure that Member States fulfil their obligations under Article 93(3). If aid is granted or measures are adopted without observing the notification requirements, the Commission has the power to apply the precedent established by the *Boussac* case (Case C-301/87), *France* v *Commission* ([19]) judgment of 14 February 1990), by taking an interim decision under Article 93(2) of the Treaty on the basis of the information available to it. Further, any aid granted illegally (i.e. without a final positive decision of the Commission) may be subject to a demand for recovery from the beneficiary, following the principles established by the

([19]) [1990] ECR I-307.
([20]) [1990] ECR I-959.

Court in the *Tubemeuse* case (Case C-142/87, *Belgium* v *Commission* [20]), judgment of 21 March 1990); recovery of aid must comply with the provisions of domestic law concerned and interest must be charged from the time the aid was paid, the interest rate used being the reference rate used by the Commission in connection with regional aid [21].

The Commission seeks to ensure that nationals and companies of all Member States have full access to the facilities, products and services found in one Member State without discrimination. In the case of establishment by entry in shipping registers, this principle has been applied since the judgment of the Court of Justice of 25 July 1991 in Case C-221/89, *The Queen* v *Secretary of State for Transport*, ex parte *Factortame Ltd, et al.* [22]. Similarly, State aid may not discriminate on grounds of nationality between companies established in a Member State.

The Commission will closely monitor the effects of aid schemes to ensure that competition in trade between Member States is not distorted and that Community objectives are being served.

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[21] Commission communication to the Member States, letter SG(95) D/1971 of 22 February 1995.
[22] [1991] ECR I-3905.

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 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 to the Community; only Part IV of the Treaty applies to it. It is responsible for its own fiscal regime),

— the registers of:

— Hong Kong (the Treaty does not apply to this territory),

— Isle of Man (only specific parts of the Treaty apply to the Isle — see Article 227(5)(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; only Part IV of the Treaty applies to them. They have a fiscal autonomy).

4. In the case of Gibraltar, the Treaty applies fully and, although the territory is not considered part of the UK, the Gibraltar register is, for the purposes of these guidelines, considered to be a Member State's register.

3. Aviation

Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (*)

I. INTRODUCTION

I.1. Liberalisation of the Community's air transport

1. Community air transport has been characterised 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 liberalisation 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 liberalisation 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 scrutinise 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 jeopardise both the common interest and the basic objectives of the liberalisation process.

(*) OJ C 350, 10.12.1994, p. 5.

(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 liberalised by regulation in February 1991. In July 1992 the Council adopted the third, and final, package of liberalisation 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.

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.

It is the Commission's opinion that transparency requirements are not being satisfactorily implemented. In the course of the enquiry the Commission criticised 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 ulitmately lead to privatisation;

  (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 assesssment procedure. Results of this assessment should be made public in conjunction with any eventual Commission decision;

([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.

(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 Comite'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 Articles 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, unforseeable 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 privatisation 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 liberalisation 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 Articles 92 and 93 of the EC Treaty (Annex IV of Memorandum No 2) ([6]).

([3]) Commission decision of 24 July 1991, Case C-21/91, ex N 204/91, *Sabena* (1991), OJ L 300, 31.10.1991, p. 48.
Commission decision of 21 December 1993 — Case C-34/93, ex NN 557/93, *Aer Lingus*, OJ 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.

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 evalution 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.

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 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 subsidisation of which could benefit airlines such as flight schools (8), duty free shops, airport facilities, franchises, airport charges, within the limits which will be defined in the following chapters.

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(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 L 254, 30.9.1994.

(8) Commission decision opening the Article 92(2) procedure with regard to the acquisition by KLM of a pilot school, Case C-31/93, OJ C 293, 29.10.1993.

However, this communication does not intend to deal with subsidisation of aircraft production ([9]). 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 with 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 context of the Community's external policy towards third countries in the aviation sector.

II.3. State infrastructure investments

12. The construction of 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

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([9]) 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.

([10]) Reply of the Commission to written question No 28 of Mr Dehousse of 10 April 1967, OJ 118, 20.6.1967, p. 2311/67.

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.

III. OPERATIONAL SUBSIDISATION OF AIR ROUTES

III.1. Operating aids

14. The raport 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 authorisation of unrestricted cabotage from 1 April 1997([14]) has led the Council to clarify its position on subsidisation of domestic routes. Such subsidisation 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-subsidise between the subsidised 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 subsidisation 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

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([11]) Court of Justice, Case 173/73, *Italy* v *Commission*, [1974] ECR, p. 709, grounds 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.
([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 L 240, 24.8.1992, p. 8.
([15]) Article 2(o) of Regulation (EEC) No 2408/92.

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 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

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([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.

([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.

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 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

([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.

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-subsidise 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 subsidisation 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.

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.

([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 C 178, 30.6.1993.

([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.

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 has

([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 C 307, 13.11.1993, p. 7, point 11.

([25]) 'Commission communication to the Member States' of 17 September 1984, see point 3.2.

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.

([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.

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.

The Commission is aware of the difficulties involved in making such comparisons between undertakings established in different Member States due in particular to different accounting practices or standards or the structure and organisation of these 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-à-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

([30]) Letter to all Member States of 5 April 1989, as amended by letter of 12 October 1989.

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]).

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 Commision 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 abovementioned 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 subsidisation are also covered in Chapter 3 above).

([31]) Commission decision of 7 October 1994, Case C-14/94, *Olympic Airways* in OJ L 273, 25.10.1994, p. 22.

([32]) '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', see point 38.1.

([33]) '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', see point 38.2.

([34]) Commission's communication OJ C 212, 12.8.1988; as modified by Commission communication, OJ C 163, 4.7.1990, p. 6.

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 recapitalisation 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 acitivities 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 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

([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*.
([38]) See Commission decision, Case C-23/94, *Air France*.

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 authorise 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 characterised 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 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 liberalisation 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 privatisation. 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 realised. It will in particular check that the commitments and conditions, which

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([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 L 254, 30.9.1994.
([44]) See Court of Justice, Case C-225/91, *Matra* v *Commission*, ground 41.

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 authorise 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. PRIVATISATIONS 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 privatisation, 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 privatisation, 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,

— 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:

([45]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to the Member States), of 27 July 1994 (OJ C 368, 23.12.1994, p. 12).

— 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 recapitalisation,

— all sales that are realised 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 privatised 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 privatisation 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 harmonising 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.

([46]) See Commission Decision 92/329/EEC of 25 July 1990, Case *IOR-Finalp*, OJ L 183, 3.7.1992.
([47]) Doc. SEC(92) 431 final, see points 12, 33, 35 and 36.

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. 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 subsidised 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:

([48]) Doc. SEC(92) 431 final.
([49]) Directive 80/723/EEC, OJ L 195, 29.7.1980, p. 35.
([50]) OJ L 229, 28.8.1985, p. 20.

— 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 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 ([51]), 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 ([52]).

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,

— 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 ([53]). 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.

([51]) 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 L 254, 12.10.1993, p. 16.

([52]) On 2 July 1992, the Commission adopted a communication on the accelerated clearance of aid for SMEs (OJ C 213, 19.8.1992, p. 10) which does not apply to aids in the transport sector.

([53]) See communication on the accelerated clearance of aid for SMEs.

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.

VII — Agriculture

Commission communication concerning State involvement in the promotion of agricultural and fisheries products (*)

The Director-General for Agriculture wrote to the Permanent Representatives of the Member States of the Community on 18 February 1985 drawing attention to certain matters relating to the involvement of Member States in the promotion of agricultural products, in particular the fact that the Court of Justice had held in Case 222/82 (*Apple and Pear Development Council*) that in certain circumstances these promotional campaigns could infringe Article 30 of the EEC Treaty. Governments of Member States were requested to supply details of their involvement in these promotional campaigns, which request was subsequently complied with. Nine of the ten Member States to which the request of the Commission's services was addressed admitted that their public authorities were involved in the promotion of agricultural products on their domestic markets and they all maintained that the campaigns resulting from this involvement did not overstep the limits laid down by the Court of Justice in Case 222/82.

The Commission has, since receiving the Member States' answers, carried out an examination of examples of the relevant publicity material. The Commission has noted that much of this material places emphasis on the national origin of the product being promoted, in particular by the use of the name of the Member State, national flag or other national emblem.

The Commission has also noted that in some Member States' fisheries products are promoted in an analogous way to agricultural products.

Although the Commission recognises that the involvement of the Member States in the promotion of agricultural and fisheries products can be beneficial as far as Community policies in those sectors are concerned, it nevertheless fears that some of the campaigns presently being organised on Member States' domestic markets may overstep the limits permitted by the case-law of the Court of Justice.

The Commission has therefore felt it to be appropriate to draw up the guidelines to Member States on this matter which are annexed. The Commission is of the opinion that compliance with these guidelines in respect of campaigns promoting agricultural and fisheries products should avoid breaches of Article 30 of the EEC Treaty.

The Commission reserves the right to lay down further guidelines in the future if circumstances require, and to open Article 169 proceedings if promotional campaigns transgress Article 30.

This communication is without prejudice to the position of the Commission with regard to other aspects of Community law affecting this subject matter, notably the provisions of the EEC Treaty governing State aid.

(*) OJ C 272, 28.10.1986, p. 3.

ANNEX

GUIDELINES FOR MEMBER STATES' INVOLVEMENT IN PROMOTION OF AGRICULTURAL AND FISHERIES PRODUCTS — ARTICLE 30 ASPECTS

1. Introduction

It is clear from the Jurisprudence of the Court of Justice notably in Cases 249/81 (*'buy Irish'*) and 222/82 (*Apple and Pear Development Council*) that direct or indirect involvement of Member States in promotional campaigns for agricultural products on their national markets may in certain criteria are not respected involve a breach of Article 30 of the EEC Treaty. The Commission is aware that many such campaigns presently exist within the Community and considers it appropriate to issue the following guidelines to the Member States.

In the interpretation of these guidelines the intention or implied intention of promotional material is to be judged by the 'message' put over by that material through both words and visual images.

2. Guidelines

2.1. Promotional actions which are clearly not open to objection under Article 30.

2.1.1. Export promotional campaigns organised directly or indirectly by one Member State on the market of another Member State.

2.1.2. Promotional campaigns organised on the home market of a Member State which advertise the product in a purely generic manner making no reference whatsoever to its national origin.

2.1.3. Campaigns on the home market promoting specific qualities or varieties of products even though they are typical of national production. (These are campaigns which make no specific references to the national origin of the product other than which may be evident from the references made to the qualities or varieties concerned or to the normal designation of the product.)

2.2. Promotional actions which clearly infringe Article 30.

2.2.1. Promotional campaigns which advise consumers to buy national products solely because of their national origin.

2.2.2. Promotional campaigns intended to discourage the purchase of products from other Member States or disparage those products in the eyes of consumers (negative promotion).

Positive statements about a Member State's product should not be phrased in such a way to imply that other Member State's products are necessarily inferior.

2.3. Promotional campaigns on a Member State's home market which, because of the references made to the national origin of the products may, unless certain restraints are observed, be open to objection under Article 30.

2.3.1. Promotional campaigns drawing attention to the varieties or qualities of products produced within a Member State are not in practice limited to national or regional specialities and

frequently draw attention to the particular qualities of products produced within a Member State and the national origin of the products, even though those products and their qualities are similar to those of products produced elsewhere.

If undue emphasis is placed on the national origin of the product in such promotional campaigns there is a danger of breach of Article 30. The Commission therefore requests Member States to ensure particularly that the following guideline is strictly respected.

Identification of the producing country by word or symbol may be made providing that a reasonable balance between references, on the one hand to the qualities and varieties of the product and, on the other hand, its national origin is kept. The references to national origin should be subsidiary to the main message put over to consumers by the campaign and not constitute the principal reason why consumers are being advised to buy the product.

2.3.2. Qualities of the products which it is permissible to mention include taste, aroma, freshness, maturity, value for money, nutritional value, varieties available, usefulness (recipes, etc.). To be avoided are superlatives such as 'the best', 'the tastiest', 'the finest' and expressions such as 'the real thing' or promotional campaigns which, because of the mention of the national origin, result in the product promoted being compared with the products of other Member States. References to quality control should only be made where the product is subjected to a genuine and objective system of control of its qualities.

2.3.3. Certain promotional campaigns mentioning the national origin of agricultural products may, even though they respect the abovementioned criteria, nevertheless infringe Article 30 of the EEC Treaty if they reflect a considered intention of a Member State to substitute domestic products for products imported from other Member States (see Case 249/81 *Commission* v *Ireland* (1982) ECR p. 4005 and following particularly p. 4022 ground 23) Such an intention may for example be presumed from the massive nature of a particular promotional campaign.

Framework for national aid for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products (*)

1. PRELIMINARY REMARKS

1.1. Advertising is defined for the purposes of this document as any operation which, using the media (such as press, radio, TV or posters), is designed to induce consumers to buy the relevant product. It thus excludes promotion operations in a broader sense, such as the dissemination to the general public of scientific knowledge, the organisation of fairs or exhibitions, participation in these and similar public relations operations, including surveys and market research.

1.2. In practically all the Member States, the authorities help to finance advertising of agricultural products, either through direct financial contributions from their budgets of using government resources, including 'parafiscal' charges or compulsory contributions.

Public interference of this kind in the free play of the market may, by favouring certain firms or certain products, distort competition and affect trade between the Member States; the Commission therefore takes the view that such aid should have a framework which is as specific as possible.

1.3. Since the Treaty fails to make any consistent distinction between the agricultural products listed in Annex II and those which are not listed in that annex, and since the Community should have a coherent policy on State aid, the Commission feels that is must apply the present framework system also to aid for the advertising of non-Annex II products which consist preponderantly of products listed in Annex II (in particular, milk products, cereals, sugar and ethyl alcohol) in a processed form (e.g. fruit yoghurt, milk-powder preparations with cocoa, butter/vegetable fat mixtures, pastry products, bakers' wares, confectionery, and spirituous beverages), hereinafter referred to as 'allied products'.

The present framework will not apply, however, to aids to advertising of fishery products, which will have a special framework of their own.

1.4. If such aid is not to be considered simply as operating aid for the benefit of producers or traders who derive some direct or indirect advantage from subsidised advertising campaigns and if it is to be deemed compatible with the common market under Article 92(3)(c) of the EEC Treaty, the aid granted towards a given publicity campaign:

must not interfere with trade to an extent contrary to the common interest; (see point 2 below) and

must facilitate the development of certain economic activities or certain regions by promoting the disposal of their specific products (see point 3 below).

The compatibility of each case of advertising aid should be scrutinised in this order; consequently, where there is exclusion from compatibility by one of the negative criteria below, the question as to whether the aid can be justified under one of the positive criteria referred to in point 3 no longer arises and need not be raised.

2. NEGATIVE CRITERIA

By definition, aid within the meaning of Article 92(1) is that which distorts or threatens to distort competition, but under Article 92(3)(c) such aid is considered incompatible only if it adversely affects

(*) OJ C 302, 12.11.1987, p. 6.

trading conditions to an extent contrary to the common interest, as defined below, account being taken of the objectives referred to in Article 39 of the Treaty.

The granting of the aid concerned is against the common interest in the following cases:

2.1. Aid for campaigns contrary to Article 30 of the EEC Treaty

National aid for an advertising campaign which, by virtue of its content, infringes Article 30 cannot be considered as compatible with the common market within the meaning of Article 92(3).

2.1.1. To ensure that no such infringement is committed, the Commission requests the Member States to provide, whenever a draft measure concerning aid for advertising is notified, assurances that the Commissions's guidelines on this subject are being followed (see point III.1 of the annex) [1].

2.1.2. Although the criteria spelled out by the Court in the context of Article 30 apply only to advertising campaigns launched on the territory of the Member State granting the aid, within the framework of Article 92, the same criteria must be applied to subsidised publicity campaigns conducted on the territory of another Member State, in order to ensure equal conditions of competition within the Community, in line with economic logic.

2.1.3. On the other hand, the problems are more complex where advertising of this kind is aimed at consumers in non-Community countries. Here, the Commission must reserve its position until a later date, given the scope and content of the advertising campaigns which non-EEC countries conduct within the Community on behalf of their agricultural products.

2.2. Aid for advertising related to particular firms

The common interest can in no circumstances be advanced as a justification for aid for advertising relating directly to the products of one of more specific firms; this would be nothing more than operating aid, as such incompatible with the common market.

3. POSITIVE CRITERIA

The absence of any factor contrary to the public interest is not sufficient for the Commission to consider advertising aid as compatible with the common market. Such aid must also facilitate the development of certain economic activities or certain regions by promoting the disposal of their produce.

In accordance with its general guidelines [2], the Commission believes that this positive condition is met where the subsidised advertising concerns one of the following:

3.1. Surplus agricultural products

Advertising can help to develop certain activities or regions by promoting the disposal of the products concerned. Generally speaking, this condition is fulfilled if the product concerned belongs to one of the sectors showing a structural surplus at Community level.

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[1] OJ C 272, 28.10.1986, p. 3.

[2] A future for Community agriculture: Commission guidelines following the consultations in connection with the Green Paper (communication from the Commission to the Council and Parliament, 18 December 1985, p. 13).

Advertising aid for the disposal of surplus agricultural products helps to achieve two goals of Article 39 (raising of agricultural incomes and stabilisation of markets); it is also in the Community's financial interest to husband the resources of the EAGGF.

3.2. New products or replacement products not yet in surplus

To cut down the output of surplus products, action is needed to encourage the production of agricultural items which are new at Community level or which replace surplus products, provided that there are still outlets within the Community for them (e.g. oilseeds and protein plants). But aid schemes for products imitating or replacing agricultural products are excluded ([3]).

Advertising can help to promote products of alternative production methods, which is desirable in that the diversification of production can help to make the most of the Community's agricultural potential while avoiding the creation or increase of surpluses.

3.3. Development of certain regions

3.3.1. Aid for advertising may be justified for the disposal of products (even non-surplus products) from certain regions of the Community if such products are not yet sufficiently known elsewhere.

3.3.2. Similarly, aid for the advertising of products from particularly less-favoured regions could be justified under Article 92(3)(c) and, where appropriate, under Article 92(3)(a).

'Particularly less-favoured regions' are defined as regions qualifying under the Community policy on agricultural structures for preferential treatment.

3.4. Development of small and medium-sized undertakings

There may be a special justification for subsidised advertising in those sectors where the manufacture of agricultural or allied products (as referred to in this document) is largely in the hands of small and medium-sized undertakings or holdings which do not have sufficient resources with which to advertise their products and to whom the cost of advertising would outweigh any advantage to be gained thereby.

There is a special justification for such advertising in cases where small and medium-sized undertakings are exposed to strong competition from rival products, particularly substitute products marketed in the Community by powerful firms or by non-Community countries spending considerable sums on the advertising and promotion of their products.

3.5. Advertising of high-quality products and health foods

3.5.1. The Commission takes the view that, in the medium and long term, consumers appreciate products of a consistently high quality. Advertising is a particularly effective way of developing the agricultural production of such goods.

Several Member States have introduced quality control specifically for agricultural products; if the products concerned meet the quality standards laid down (which are higher or more specific than

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([3]) For milk products, see definition at point III.1.(c) of the framework system for investment aid concerning the manufacture and marketing of certain dairy products and substitute products.

those set by Community or national legislation), they are entitled to be marketed with a special label, the advertising of which is subsidised.

Provided that the genuine purpose of such a strategy is to achieve a high standard of quality and not to serve as a pretext for 'chauvinistic' advertising (see point 2.1 above), the Commission should take a favourable view of these developments. It could not, however, approve aid for the advertising of a label designed mainly to stress the national or regional origin of a product.

The same applies, only more so, to appropriately guaranteed products containing no substances for which national or Community legislation lays down a maximum permissible dose.

3.5.2. As the Commission has already pointed out, it is in the Community's interests to take account of the consumer's increasing preference for 'natural' foods and the dietary value thereof, by prohibiting harmful substances and by encouraging healthy varieties, and to provide consumers with the necessary information and guarantees which will restore a climate of confidence and have positive effects on consumption (4).

The Commission will therefore adopt a favourable attitude towards aid for the advertising of agricultural products grown by 'biological' means, provided that the consumer can be given adequate guarantees.

4. MAXIMUM LEVEL OF NATIONAL AID FOR THE ADVERTISING OF AGRICULTURAL AND ALLIED PRODUCTS

National aid for the advertising of agricultural products, even where they do not adversely affect trading conditions to an extent contrary to the public interest (point 2 above) and even where they may facilitate the development of certain economic activities or certain regions (point 3 above), may interfere with normal trade flows between Member States for a given agricultural product.

It is therefore in the public interest that additional guarantees should be sought to prevent trading conditions being influenced in favour of Member States expending substantial sums on advertising their own national products, to the detriment of those Member States which, for budgetary or other reasons, have to limit their expenditure on such advertising.

4.1. The Community's attitude towards such national aid should take account of the sums which the sector itself spends on the measures concerned. It should therefore be stipulated that, as a general rule, direct aid (from a general-purpose government budget) must not exceed the amount which the sector itself has committed to a given advertising campaign. Thus, the trade will have to contribute at least 50 % of the cost, either through voluntary contributions or through the collection of parafiscal levies or compulsory contributions (5).

4.2. It is not possible to discuss in this context those cases where sectoral funds have been employed in conjunction with Community programmes for the promotion of certain products (milk products, olive oil, etc.).

4.3. To take account of the respective weight of the various positive criteria outlined in points 3.1 to 3.5 above, however, the Commission could provide for the raising of the abovementioned maximum rate of direct aid (50 % of costs), particularly in the case of products from small and medium-sized undertakings or farms or products from certain regions (points 3.3.1 and 3.4).

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(4) See footnote to the introductory paragraph of point 3.

(5) The use made of the yield from such compulsory contributions would of course have to be considered (in the same way as direct government aid) as aid within the meaning of Articles 92 to 94 of the Treaty.

5. PROCEDURE FOR NOTIFYING AID FOR THE ADVERTISING OF AGRICULTURAL AND ALLIED PRODUCTS

5.1. In order that the Commission can ensure that the criteria contained in this framework are satisfied, specific procedures should be laid down for notifying the aid in question under Article 93(3) of the EEC Treaty.

5.1.1. Any aid scheme which a Member State plans to introduce and any changes to an existing scheme must be notified to the Commission, using the sheet of which a specimen is shown in the annex hereto.

The Commission will not authorise any new aid plans notified to it under Article 93(3) of the Treaty, that do not comply with the conditions laid down in this framework.

5.1.2. The Commission requests the Member States to confirm to it by 1 December 1987 that they will comply, as from 1 January 1988, with the provisions of this framework by adjusting their existing aid schemes accordingly, where necessary. In the event of their failure to do so, the Commission reserves the right to initiate the procedure provided for in Article 93(2) of the EEC Treaty.

5.1.3. Each Member State must forward to the Commission, for the first time on 1 March 1988 and at the end of each subsequent period of two years, a comprehensive report on the schemes which have received aid during the preceding period, specifying:

(i) which aid is intended for advertising in non-Community countries, in other Member States and on national territory;

(ii) the funds used for this purpose (total cost);

(iii) the financial contribution made by the trade interests concerned, with a breakdown into voluntary and compulsory contributions;

(iv) the general direction of the advertising (main sectors concerned);

(v) the guarantees given by the Member State as regards the material content of the proposed schemes: measures taken to prevent:

  (a) negative advertising, contrary to Article 30 of the EEC Treaty (point 2.1);

  (b) advertising relating to particular firms (point 2.2).

5.2. The Commission may verify at any time whether a specific advertising campaign qualifying for aid complies with the criteria contained in this framework. For this purpose, it will call upon the Member States, where appropriate, to provide any relevant information on a given campaign or given campaigns.

ANNEX

NOTIFICATION, UNDER ARTICLE 93(3) OF THE EEC TREATY [1], OF A DRAFT AID MEASURE FOR AN ADVERTISING CAMPAIGN ON BEHALF OF AGRICULTURAL PRODUCTS OR ALLIED PRODUCTS NOT LISTED IN ANNEX II TO THE TREATY

(Use a separate sheet for each campaign) [2]

I. Advertising campaign planned

1. Member State:

2. Product concerned:

3. Description and duration of the campaign planned [2], where appropriate reference to a similar campaign undertaken in the past:

4. Geographical area (which region(s), national territory or territory of which other Member States, which non-Community country or countries?):

5. Beneficiary of the aid:

6. Body implementing the campaign (if different from the beneficiary):

II. Financial contribution of the sectoral interests concerned (in national currency)

1. Total cost of the planned campaign:

2. Financing by direct aid from the Member State:

3. Costs borne by the parties concerned:

(i) in the form of 'parafiscal' charges or compulsory contributions:

(ii) in the form of voluntary contributions:

4. Where the financial contribution by the parties concerned (point 3) is less than 50 % of the campaign costs, this must be justified in accordance with point 4 of the framework:

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[1] In accordance with point 5.1.1. of the framework, the Commission considers to be valid notifications under Article 93(3) of the EEC Treaty only those which are submitted using this sheet.

[2] This may of course be an ad hoc specific or 'sectoral' campaign, or a campaign made up of several measures and/or concerning several product groups but forming an interrelated whole according to the aim and strategy pursued. Where the Member State proceeds to the notifications of such a set of measures, the description must show how they complement one another. In all cases, without giving necessarily the precise content of each advertising statement to be made to the consumers, notification on this sheet must show in an appropriate manner, determined on the basis of the specific case, that the rules contained in the framework will be complied with.

III. Assurances given by the Member State as to the material content of the planned campaign: measures taken to prevent:

1. Negative advertising, contrary to Article 30 of the EEC Treaty (point 2.1 of the framework):

2. Advertising geared to specific brands or firms (point 2.2 of the framework):

IV. Detailed positive justification for the aid in accordance with one or more of the criteria listed in point 3 of the framework.

Guidelines for State aid in connection with investments in the processing and marketing of agricultural products (*)

By the following letter, the Commission notified the Member States, pursuant to Article 93(1) of the EC Treaty, of the Community guidelines for State aid in connection with investments in the processing and marketing of agricultural products.

'Article 93(1) of the Treaty requires the Commission to propose to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. Following joint consideration with the Member States at the meeting of the working party on conditions of competition in agriculture held on 3 May 1995, the Commission, acting under Article 93(1) of the Treaty, is proposing to the Member States the guidelines and appropriate measures annexed to this letter.

The Commission will authorise no further aid measure for investment in the processing and marketing of agricultural products notified to it under Article 93(3) of the EC Treaty which does not comply with these guidelines and appropriate measures, which apply or will continue to apply after 1 January 1996.

If Commission Decision 94/173/EC is subsequently amended or replaced so that the field currently covered by the second and third indents of paragraph 1.2 and paragraph 2 of the annex to this decision is affected, such amendment shall apply to these guidelines and appropriate measures from the date of notification to the Member States of the amendments or replacements in question.

Pursuant to Article 93(1), the Commission is requesting the Member States to confirm within two months from the date of receipt of this letter that they will comply no later than 1 January 1996 with the annexed communication by amending their existing aids where such aids do not comply with these guidelines and appropriate measures. If it does not receive such confirmation, the Commission reserves the right to open the procedure provided for in Article 93(2) of the EC Treaty.

1. Introduction

In assessing compatibility with the common market of State aid in connection with investments in the processing and marketing of agricultural products, the Commission has an established policy of applying by analogy the sectoral restrictions governing Community part-financing of such investments.

In a communication on this policy (1), the Commission restated the rationale of this approach and stressed that, since the sectoral restrictions on Community aid in this field had been amended by Commission Decision 94/173/EC (2), it intended to make corresponding amendments to State aid policy. This point was reiterated in its communication of March 1995 (3). This policy, and in particular the amendments thereto, are considered in these guidelines and appropriate measures pursuant to Article 93(1) of the EC Treaty. Also considered are the maximum rates of State aid for such investments which the Commission considers compatible with the common market (see annex) and the relationship between these guidelines and appropriate measures and certain non-sector-specific provisions applicable in the field of State aid.

(*) OJ C 29, 2.2.1996, p.4.
(1) OJ C 189, 12.7.1994.
(2) OJ L 79, 23.3.1994.
(3) OJ C 71, 23.3.1995.

2. Philosophy of Commission policy

To the extent that State aid granted in connection with investments in the processing and marketing of agricultural products distorts or threatens to distort competition by favouring certain undertakings or certain types of production, it is, in so far as it affects trade between Member States, incompatible with the common market under Article 92(1) of the EC Treaty.

While State aid in connection with investments in the processing and marketing of agricultural products may of course benefit from one of the exceptions provided for in Article 92(3), it is established Commission policy to ensure that, in certain specific sectors of agricultural production, State aid may not enjoy one of these exceptions and that in other sectors it may enjoy such an exception only where certain strict conditions are met.

These sectoral restrictions, introduced following analysis of representative markets at Community level, are applied by the Commission in assessing whether any public aid in connection with investment in this field, whether at Community or national level, is in the Community interest. In this way, the Commission seeks to ensure consistency between the common agricultural policy and State aid policy so that investment is not encouraged where, for structural reasons, it is contrary to the Community interest.

This basic philosophy remains valid and is thus applied in the context of these guidelines and appropriate measures.

3. Commission policy concerning State aid in connection with investments in processing and marketing of agricultural products

(a) For the purposes of these guidelines and appropriate measures the following definitions apply without prejudice to paragraphs 4(b) and 4(c):

(i) 'agricultural product': the products listed in Annex II to the Treaty, excluding those products covered by Council Regulation (EEC) No 4042/89 of 19 December 1989 (fisheries products), those products falling under CN codes 4502, 4503 and 4504 (cork products) and products intended to imitate or substitute milk and milk products (4);

(ii) 'investment': acquisition of material property (land, buildings, plant equipment) in connection with processing and/or marketing activities regardless of where these activities take place (including, for example, on agricultural holdings);

(iii) 'processing': physical operation on an agricultural product where the product(s) resulting from the operation remain(s) such a product, for example the extraction of juice from fruit or the slaughter of animals for meat;

(iv) 'marketing': physical presentation for the market and/or physical movement to the market of agricultural products, for example packaging or the construction of port silos designed to handle such products.

(b) Without prejudice to paragraphs 3(d) and 4(a) of these guidelines and appropriate measures, no State aid granted in connection with any of the investments referred to in the second and third indents of point 1.2 of the annex to Commission Decision 94/173/EC or excluded unconditionally by point 2

(4) For the purposes of these provisions, products which imitate or substitute milk and/or milk products means products which could be confused with milk and/or milk products but whose composition differs from such products in that they contain fat and/or protein of non-milk origin with or without components derived from milk ('products other than milk products' as referred to in Article 3(2) of Council Regulation (EEC) No 1898/87 on the protection of designations used in marketing of milk and milk products (OJ L 182, 3.7.1987, p. 36)).

of that annex may be considered compatible with the common market. All investments referred to in point 2 of the annex to decision 94/173/EC are also excluded unless the special conditions are met.

Where State aid subject to the special conditions referred to in point 2 of the annex to Decision 94/173/EC is granted in the framework of a general, regional or sectoral aid scheme to which the Commission has raised no objection under Articles 92 and 93 of the EC Treaty, an annual report is to be provided to the Commission giving details of any instance of grant of such aid during the year in question, and in particular, containing all information necessary to enable the Commission to conclude, without recourse to additional enquiry, that each of the conditions attached to the grant of such aid referred to in point 2 of the annex to Decision 94/173/EC has in fact been met. This reporting requirement is additional to any other requirements set by the Commission, for example in the context of a decision not to raise objections to a regional aid scheme.

(c) No State aid (national, regional, local or other) in connection with the processing and/or marketing of agricultural products may be considered compatible with the common market if it exceeds the rates set out in the annex to these guidelines and appropriate measures, or if, in cumulation with other aid, it would cause those rates to be exceeded.

(d) These guidelines and appropriate measures are without prejudice to the application of Article 92(2) of the EC Treaty. The Commission will consider, on a case-by-case basis, the extent to which aid qualifies for one of the exceptions therein. The Commission also considers, on a case-by-case basis, any aid measure which should be rejected under these guidelines and appropriate measures but which would in principle be eligible for Community part-financing under Regulation (EEC) No 2328/91 ([5]).

(e) The following texts are hereby cancelled and replaced by these guidelines and appropriate measures:

(i) appropriate measures concerning the prohibition of the award of aid to glucose syrup with a high fructose content (isoglucose) ([6]);

(ii) framework system for investment aids relating to the manufacture and marketing of certain dairy products and substitute products ([7]).

(iii) national aid to investments at processing and marketing level: modification of maximum rates of aid accepted by the Commission in the framework of Article 93(3) of the Treaty ([8]).

(iv) Commission communications regarding State aid for investments in the processing and marketing of agricultural products ([9]).

4. Relationship between these guidelines and appropriate measures and certain non-sector-specific provisions applicable in the field of State aid

(a) These guidelines and appropriate measures do not affect the provisions of the:

(i) Community guidelines on State aid for environmental protection ([10]).

Aid which complies with the terms of the Community guidelines on State aid for environmental protection is considered by the Commission compatible with the common market even if it is

([5]) OJ L 218, 6. 8. 1991.
([6]) Commission letter to Member States of 29 March 1977.
([7]) OJ C 302, 12. 11. 1987.
([8]) Commission letter to the Member States of 30 October 1985.
([9]) OJ C 189, 12.7.1994; OJ C 71, 23.3.1995.
([10]) OJ C 72, 10.3.1994.

granted in respect of a product sector or activity where aid is otherwise restricted or excluded under the terms of these guidelines and appropriate measures. The maximum permissible rate of aid applicable to such investments is 55 % (75 % where the investment takes place within an Objective 1 region), except for investments on agricultural holdings, where the maximum permissible rates of aid are those specified in the Community guidelines on State aid for environmental protection (point 3.2.3, footnote 14);

(ii) framework for State aid for research and development ([11]).

Aid which complies with the terms of the framework for State aid for research and development — and in particular where any investments are aided only to the extent that they are used exclusively for the purpose of the research and development work in question — is considered compatible with the common market even if it is granted in respect of a product sector or activity where aid is otherwise restricted or excluded under the terms of these guidelines and appropriate measures. The maximum permissible rates of aid applicable to such investments are determined according to the criteria of the framework for State aid for research and development.

(b) The following rules in the field of State aid are not applicable to the products covered by these guidelines and appropriate measures:

(i) Community guidelines on State aid for small and medium-sized enterprises ([12]), and in particular the *de minimis* rule.

All measures concerning aid to be granted in connection with the production, processing and/or marketing of agricultural products is subject to prior notification to the Commission in accordance with Article 93(3) of the Treaty, irrespective of the degree to which the undertaking in question is involved in production, processing and/or marketing of such products.

(ii) Communication of the Commission on regional aid systems ([13]).

Regional aid schemes which include aid for investment in the processing and marketing of agricultural products are subject to these guidelines and appropriate measures as far as such investments are concerned. The implementation of a regional aid scheme will be subject to the intensity of the aid approved under that scheme.

(iii) Commission communication on the cumulation of aid for different purposes ([14]).

As long as an investment aid granted under a general, regional, and/or sectoral scheme in connection with the production, processing and/or marketing of agricultural products listed in Annex II to the EC Treaty complies strictly with the terms of the present guidelines and appropriate measures, it is considered compatible with the common market, irrespective of the financial scale of the investment in absolute terms. Thus for Annex II products there is no pre-set threshold in terms of the amount of aid expressed in absolute terms or as a percentage of total investment costs which triggers notification of individual cases of application of general, regional or sectoral schemes.

([11]) OJ C 83, 11.4.1986.
([12]) OJ C 213, 19.8.1992.
([13]) OJ C 31, 3.2.1979.
([14]) OJ C 3, 5.1.1985.

(c) Attention is drawn to the following:

Communication to the Member States on the accelerated clearance of aid schemes for small and medium-sized enterprises and of amendments of existing schemes ([15]).

Point 2 of this communication (certain types of minor amendment to existing schemes to which the Commission has raised no objection) applies, *inter alia*, to aid in connection with production, processing and/or marketing of agricultural products listed in Annex II to the EC Treaty. Point 1 of this communication (certain types of aid to small and medium-sized enterprises) does not apply, *inter alia*, to aid in the agricultural sector thus defined.'

([15]) OJ C 213, 19.8.1992.

ANNEX

MAXIMUM PERMISSIBLE RATES OF STATE AID IN CONNECTION WITH INVESTMENTS IN PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS

Characteristics of State aid in connection with the investment	Rate of aid (gross) expressed as a percentage of total investment costs potentially eligible for State aid
1. Does not comply with the terms of these guidelines and appropriate measures or concerns the manufacture and marketing of products which imitate or substitute milk and milk products	0 %
2. Complies with the terms of these guidelines and appropriate measures and the investment in question takes place in an Objective 1 region	75 %
3. Complies with the terms of these guidelines and appropriate measures and the investment in question takes place outside an Objective 1 region	55 %

Commission communication on State aids: subsidised short-term loans in agriculture (*crédits de gestion*) (*)

By means of the following letter, the Commission sent a communication to the Member States pursuant to Article 93(1) of the EC Treaty on State aids involving subsidised short-term loans in agriculture.

'Article 93(1) of the Treaty provides that the Commission shall propose to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. After an examination carried out with the Member States in the Working Group on Conditions of Competition in Agriculture during the meeting of 3 May 1995, the Commission is proposing to the Member States the communication annexed to this letter pursuant to Article 93(1) of the Treaty.

The Commission will no longer authorise any aid measure concerning *crédits de gestion* that may be notified to it pursuant to Article 93(3) of the EC Treaty, which is not in accordance with this communication and would apply or continue to apply after 1 January 1996.

Pursuant to Article 93(1) of the EC Treaty, the Commission invites the Member States to confirm within a period of two months from the date of this letter that they will comply with the annexed communication not later than 1 January 1996 by amending their existing aid measures if they are not in accordance with the communication. In the absence of such confirmation, the Commission reserves the right to open the procedure provided for under Article 93(2) of the EC Treaty.

Purpose of this communication

For several years, the Commission has been applying a policy of not opposing State aid granted through subsidised short-term loans in the agricultural sector. The only conditions set by the Commission for such subsidies are that the period of the loan is a maximum of one year and that its availability is not limited simultaneously to one product only and one operation only. There is no limit on the intensity of the aid element, nor is there an obstacle as regards each beneficiary, to the subsidised loan being renewed each year.

When taking a position on such aid measures, the Commission expressly reserves its right of review on the basis of Article 93(1) of the Treaty. The Commission carried out this review, taking account of Member State comments made at the meeting of the Group on Conditions of Competition in Agriculture on 3 May 1995. It has arrived at the following conclusions:

A. The Commission recognises that agriculture in the Community may, for reasons inherent in the nature of farming and related activities, in particular seasonality of production and structure of farm businesses, be at a relative disadvantage to operators elsewhere in the economy both in terms of their need for, and ability to finance, short-term loans.

However, any aid destined to reduce the cost of such loans is evidently State aid of an operating nature which fulfils the conditions of Article 92(1) of the Treaty. Consequently, such aid must be subject to appropriate rules governing its grant.

B. The Commission considers it necessary to ensure that these subsidised loans are not used to aid selectively specific sectors or operators in agriculture on grounds not solely related to the abovementioned difficulties. Consequently, Commission policy will be to refuse such aid, subject to the derogation in the

(*) OJ C 44, 16.2.1996, p. 2.

next subparagraph, whenever it is not made available within the administrative region of the authority granting the aid to all operators in agriculture on a non-discriminatory basis irrespective of the agricultural activity (or activities) for which the operator needs short-term loans.

The Commission will, however, accept national aid for such loans which, at the discretion of the Member State concerned, excludes certain activities and/or certain operators, provided that the Member State is able to demonstrate that all such instances of exclusion are justified on the grounds that the problems of obtaining short-term loans faced by those excluded are inherently less significant than in the rest of the agricultural economy.

C. The element of aid under any programme must be limited to that which is strictly necessary to compensate for the disadvantages referred to under A. A Member State wishing to apply subsidised loans under B must quantify the financing disadvantages under A, using the method which it considers appropriate but always remaining within the limits of the gap between the interest rate paid by a typical agricultural operator and the interest rate paid in the rest of the economy of the Member State concerned for short-term loans of a similar amount per operator, not linked with investments. This quantification and methodology must be communicated to the Commission so that they can be taken into account when the compatibility of the aid under Articles 92 and 93 of the Treaty is being assessed. The amount of subsidised loans to any beneficiary must not exceed the cash flow requirements arising from the fact that production costs are incurred before income from output sales is received. The amount may be fixed on a flat-rate basis. In no case may the aid be linked to particular marketing or production operations.

D. The Commission intends to maintain all other aspects of its current policy in this area, namely that the duration of the subsidised loans shall be a maximum of one year (but renewable for any beneficiary each year for the duration of the scheme in question provided the conditions for its grant continue to be fulfilled) and that the beneficiaries may, at the discretion of the Member State concerned, and subject to the fulfilment of the conditions under B and C, include any operator marketing exclusively agricultural products as defined in Annex II to the EC Treaty and/or involved in processing agricultural products defined in the same way.'

Community guidelines on State aid for rescuing and restructuring firms in difficulty (*) (1)

1. INTRODUCTION

1.1. The need for comprehensive and firm control of State aid in the European Community has been widely acknowledged in recent years. The distortive effect of aid is magnified as other government-induced distortions are eliminated and markets become more open and integrated. Hence, in the single market it is more important than ever to maintain tight control of State aid.

In the medium term the single market is expected to yield significant benefits in terms of increased economic growth, although currently growth is stalled by the recession. A major part of the increase in economic growth that should ultimately result from the single market will be due to the extensive structural change that it will induce in the Member States. While structural change is easier in an expanding economy, even in a recession it is undesirable that Member States should frustrate or unduly retard the process of structural adjustment through subsidies to firms which in the new market situation ought to disappear or restructure. Such aid would shift the burden of structural change on to other, more efficient firms and encourage a subsidy race. As well as preventing the full benefits of the single market for the Community as a whole, subsidies can place severe strain on national budgets and so impede economic convergence.

1.2. On the other hand, there are circumstances in which State aid for rescuing firms in difficulty and helping them to restructure may be justified. It may be warranted, for instance, by social or regional policy considerations, by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation, by wider economic benefits of the small and medium-sized enterprise (SME) sector, and by the special needs of SMEs and of small agricultural enterprises (SAEs).

1.3. The Commission set out its policy on aid for rescuing and restructuring firms in difficulty in 1979 in the *Eighth report on competition policy* (2). This policy has been endorsed many times by the Court of Justice (3).

However, for the reasons given in paragraph 1.1 the advent of the single market required the policy to be reviewed and updated. Furthermore it had to be adapted to take account of the objective of economic and social cohesion (4) and clarified in the light of developments in the policies towards government capital injections (5), financial transfers to public enterprises (6), and aid for SMEs (7).

(*) OJ C 283, 19.9.1997, p. 2.

(1) An updated policy in this area was published as guidelines at the end of 1994 (OJ C 368, 23.12.1994, p. 12). The current text maintains that policy except as regards the agricultural sector. For this sector various amendments are introduced by this text. The Commission intends revising these guidelines in due course, except for the provisions specific to agriculture.

(2) Paragraphs 227 and 228 and paragraph 177.

(3) See, in particular, judgments of the Court of Justice of 14 February 1990, Case C-301/87, *France* v *Commission* [1990] ECR I, p. 307 (*Boussac*); of 21 March 1990, Case C-142/87, *Belgium* v *Commission* [1990] ECR I, p. 959 (*Tubemeuse*); of 21 March 1991, Case C-303/88, *Italy* v *Commission* [1991] ECR I, p. 1433 (*ENI-Lanerossi*); of 21 March 1991, Case C-305/89, *Italy* v *Commission* [1991] ECR I, p. 1603 (*Alfa Romeo*). See also judgments of the Court of Justice of 14 November 1984, Case 323/82, *Intermills* v *Commission* [1984] ECR 3809; of 13 March 1985, Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809; of 10 July 1986, Case 234/84, *Belgium* v *Commission* [1986] ECR, p. 2263 (*Meura*).

(4) Article 130a of the EC Treaty. Article 130b of the EC Treaty inserted by the Treaty on European Union states that other policies must contribute to this objective: '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 130a and shall contribute to their achievement.'

(5) Bull. EC 9-1984, paragraph 3.5.1.

(6) OJ C 307, 13.11.1993, p. 3.

(7) OJ C 213, 19.8.1992, p. 2.

An updated policy in this area was published as guidelines at the end of 1994 ([8]). The current text maintains that policy except as regards the agricultural sector ([9]). For this sector various amendments are introduced by this text.

2. DEFINITIONS AND SCOPE OF THE GUIDELINES

2.1. Definition of rescue and restructuring aid

It is right to treat aid for rescues of companies and for restructuring together, because in both cases the government is faced with a firm in difficulties unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing, and because the rescue and the restructuring are often two parts, albeit clearly distinguishable parts, of a single operation. The financial weakness of firms that are rescued by their governments or receive help for restructuring is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value. In acute cases the company may already have become insolvent or gone into liquidation.

It is not possible to establish a universal and precise set of financial parameters to identify when aid to a company amounts to a rescue or is for restructuring. Nevertheless, the two situations show basic differences.

A rescue temporarily maintains the position of a firm that is facing a substantial deterioration in its financial position reflected in an acute liquidity crisis or technical insolvency, while an analysis of the circumstances giving rise to the company's difficulties can be performed and an appropriate plan to remedy the situation devised. In other words, rescue aid provides a brief respite, generally for not more than six months, from a firm's financial problems while a long-term solution can be worked out.

Restructuring, on the other hand, is part of 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 activities that are no longer viable or are already loss-making, the restructuring of those existing activities that can be made competitive again and, possibly, the development of, or diversification to new viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring plans take account of, *inter alia*, the circumstances giving rise to the firm's difficulties, market supply and demand for the relevant products as well as their expected development and the specific strengths and weaknesses of the firm. They allow an orderly transition of the firm to a new structure that gives it viable long-term prospects and will enable it to operate on the strength of its own resources without requiring further State assistance.

2.2. Sectoral scope

The Commission follows the general approach to rescue and restructuring aid that is set out in the guidelines in all sectors. However, in certain sectors such as steel, shipbuilding, textiles and clothing, synthetic fibres, the motor industry, transport and the coal industry, the guidelines will apply only to the extent that they are consistent with the special rules on State aid applicable to these sectors.

([8]) OJ C 368, 23.12.1994, p. 12.

([9]) That sector is defined for the purposes of this communication as covering all operators involved in production of, and/or trade in, products of Annex II to the Treaty, including fisheries.

2.3. Applicability of Article 92(1) of the EC Treaty

For the reasons stated in paragrah 1.1, State aid for rescuing or restructuring firms in difficulty will, by its very nature, tend to distort competition and affect trade between Member States. Therefore, as a rule, it falls within Article 92(1) of the EC Treaty and requires exemption.

The only general exception is aid that is too small in amount to have a significant effect on inter-State trade. This *de minimis* figure has been set at ECU 100 000 from all sources and under any scheme over three years ([10]). The *de minimis* facility is not available in sectors subject to special Community rules on State aid ([11]), including agriculture.

Aid for restructuring can take many forms, including capital injections, debt write-offs, loans, interest subsidies, relief from taxes or social security contributions, and loan guarantees. For rescues, however, it should be limited to loans at market interest rates or loan guarantees (see paragraph 3.1). The source of the aid can be any level of government, central, regional or local, and any 'public undertaking', as defined in Article 2 of the 1980 directive on the transparency of financial relations between Member States and public undertakings ([12]). Thus, for example, rescue or restructuring aid may come from State holding companies or public investment corporations ([13]).

The method used by the Commission to determine when government injections of new capital into companies, that are already State-owned or become wholly or partly State-owned as a result of the operation, involve aid was set out in a 1984 communication ([14]) and has been refined and extended to aid in other forms in the public enterprises communication of 1993 ([15]). The criterion is based on the 'private investor' principle. This provides that in circumstances where a rational private investor operating in a market economy would have made the finance available the provision or guarantee of funding to a company does not involve aid.

Where funding is provided or guaranteed by the State to an enterprise that is in financial difficulties, however, there is a presumption that the financial transfers involve State aid. Therefore, such financial transactions must be communicated to the Commission in advance, in accordance with Article 93(3) ([16]). The presumption of aid is compelling where the industry, as a whole, is in difficulties or suffering from structural overcapacity.

The assessment of rescue or restructuring aid is not affected by changes in the ownership of the business aided. Thus, it will not be possible to evade control by transferring the business to another legal entity or owner.

2.4. Basis of exemption

Article 92(2) and (3) of the EC Treaty provide for the possibility of exemption of aid falling within Article 92(1). The only basis for exempting aid for rescuing or restructuring firms in difficulty, apart from cases of natural disasters and exceptional occurrences which are exempted by Article 92(2)(b) and are not covered here, and, to the extent that Article 92(2)(c) is still applicable, aid in Germany

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([10]) See Commission communication on the *de minimis* aids (OJ C 68, 6.3.1996, p. 9).
([11]) See paragraph 2.2.
([12]) OJ L 195, 29.7.1980, p. 35, as amended (OJ L 254, 12.10.1993, p. 16).
([13]) See judgment of the Court of Justice, of 22 March 1977, Case 78/76, *Steinike und Weinlig* v *Germany*, [1977] ECR, p. 595; Crédit Lyonnais/Usinor-Sacilor, Commission press release IP(91) 1045.
([14]) See footnote 5.
([15]) See footnote 6.
([16]) See paragraph 27 of the public enterprises paper, footnote 5.

that might be covered by this provision, is Article 92(3)(c). Within the meaning of this 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'.

The Commission considers that aid for rescues and restructuring may contribute to the development of economic activities without adversely affecting trade against the Community interest if the conditions set out in Section 3 are met, and will therefore authorise such aid under those conditions. Where the firms to be rescued or restructured are located in assisted areas, the Commission will take regional considerations under subparagraphs (a) and (c) of Article 92(3) into account as described in paragraph 3.2.3.

2.5. Existing aid schemes

These guidelines, leaving aside their application to the agricultural sector, are without prejudice to aid schemes for rescuing or restructuring firms in difficulty that were already authorised when the guidelines were published in 1994.

The guidelines are also without prejudice to the application of aid schemes authorised for other purposes than rescues or restructuring, such as regional development, the development of SMEs or for the compulsory slaughter of animals to combat disease, provided that aid for rescues or restructuring granted under such schemes fulfils the conditions the Commission has approved for the schemes.

3. GENERAL CONDITIONS FOR THE AUTHORISATION OF RESCUE AND RESTRUCTURING

3.1. Rescue aid

In order to be approved by the Commission rescue aid, as defined above, must continue to satisfy the conditions laid down by the Commission in 1979 ([17]). That is, rescue aid must:

— consist of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates,

— be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies),

— be paid only for the time needed (generally not exceeding six months) ([18]) to devise the necessary and feasible recovery plan,

— be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial and agricultural situations in other Member States.

A further condition is that, in principle, the rescue should be a one-off operation. A series of rescues that effectively merely maintain the status quo, postpone the inevitable and in the meantime transfer

([17]) Eighth report on competition policy, paragraph 228.

([18]) If the Commission is still investigating the restructuring plan when the period for which rescue aid has been authorised runs out, it will consider favourably an extension of the rescue aid until the investigation is completed (see '23rd competition report', point 527).

the attendant industrial, agricultural and social problems to other, more efficient producers and other Member States is clearly unacceptable. Rescue aid should therefore normally be a one-off holding operation mounted over a limited period during which the company's future can be assessed.

Rescue aid need not be granted in a single payment. Indeed, it may be desirable to spread payment of the aid over several or more instalments subject to separate assessment in order to take account of external conditions which may be rapidly fluctuating or in order to stimulate the ailing company into taking the necessary corrective action.

In applying the above conditions to SMEs, including small agricultural enterprises (SAEs), the Commission will take account of the special features of businesses in these categories and sectors.

The approval of rescue aid is without any presumption regarding the subsequent approval of aid under a restructuring plan, which will fall to be assessed on its own merits.

3.2. Restructuring aid

3.2.1. Basic approach

Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of structural adjustment and the attendant social, industrial and agricultural problems on to other producers who are managing without aid and to other Member States. The general principle should therefore be to allow restructuring aid only in circumstances in which it can be demonstrated that the approval of restructuring aid is in the Community interest. This will only be possible when strict criteria are fulfilled and full account is taken of the possible distortive effects of the aid.

3.2.2. General conditions

Subject to the special provisions for assisted areas, SMEs set out below, and for the agricultural sector discussed in paragraph 3.2.5, for the Commission to approve aid a restructuring plan will need to satisfy all the following general conditions:

(i) Restoration of viability

The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable timescale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period. The improvement in viability must mainly result from internal measures contained in the restructuring plan and may only be based on external factors such as price and demand increases over which the company has no great influence, if the market assumptions made are generally acknowledged. Successful restructuring should involve the abandonment of structurally loss-making activities.

To fulfil the viability criterion, the restructuring plan must be considered capable of putting the company into a position of covering all its costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits. Like rescue aid, aid for restructuring should therefore normally only need to be granted once.

(ii) Avoidance of undue distortions of competition through the aid

A further condition of aid for restructuring is that measures are taken to offset as far as possible adverse effects on competitors. Otherwise aid would be 'contrary to the common interest' and ineligible for exemption within the meaning of Article 92(3)(c).

Where on an objective assessment of the demand and supply situation there is a structural excess of production capacity ([19]) in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the relevant market in the European Community by irreversibly reducing or closing capacity. A reduction or closure is irreversible when the relevant assets are scrapped, rendered permanently incapable of producing at the previous rate, or permanently converted to another use. The sale of capacity to competitors is not sufficient in this case, except if the plant is sold for use in a part of the world from which the continued operation of the facilities is unlikely to have significant effects on the competitive situation in the Community.

A relaxation of the principle of requiring a proportionate capacity reduction may be allowed if such a reduction is likely to cause a manifest deterioration in the structure of the market, for example by creating a monopoly or a tight oligopoly situation.

Where, on the other hand, there is no structural excess of production capacity in a relevant market in the Community served by the recipient, the Commission will normally not require a reduction of capacity in return for the aid. However, it must be satisfied that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as essential for restoring viability without thereby unduly distorting competition. To ensure that the aid does not distort competition to an extent contrary to the common interest, the Commission may impose any conditions and obligations as may be necessary.

As regards primary agricultural production, Commission authorisations shall be granted in conformity with the international commitments of the Community.

(iii) Aid in proportion to the restructuring costs and benefits

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. To limit the distortive effect, the form in which the aid 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. Nor should any of the aid go to finance new investment not required for the restructuring. Aid for financial restructuring should not unduly reduce the firm's financial charges.

([19]) For products of Annex II to the Treaty this excess capacity shall be defined by the Commission on a case-by-case basis taking account in particular of:

(a) 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, development of world market prices, and the presence of sector limits in Council Regulation (EC) No 950/97 (OJ L 142, 2.6.1997, p. 1). Primary products subject to production quotas shall be deemed not to have excess capacity.

(b) the presence of sector limits on the basis of the Commission letter to Member States of 20 October 1995 (OJ C 29, 2.2.1996, p. 4);

(c) specifically for fisheries, the guidelines for the examination of State aid to fisheries and aquaculture (OJ C 100, 27.3.1997, p. 12) and Council Regulation (EC) No 3699/93 (OJ L 346, 31.12.1993, p. 1).

If aid is used to write off debt resulting from past losses, any tax credits attaching to the losses must be extinguished, not retained to offset against future profits or sold or transferred to third parties, as in that case the firm would be receiving the aid twice.

(iv) Full implementation of restructuring plan and observance of conditions

The company must fully implement the restructuring plan that was submitted to and accepted by the Commission and must discharge any other obligations laid down by the Commission decision. Otherwise, unless the original decision is amended following a new notification from the Member State, the Commission will take steps to require the recovery of the aid.

(v) Monitoring and annual report

The implementation, progress and success of the restructuring plan will be monitored by requiring the submission of detailed annual reports to the Commission. The annual report will have to contain all relevant information to enable the Commission to monitor the implementation of the agreed restructuring programme, the receipt of aid by the company and its financial position and the observance of any conditions or obligations laid down in the Commission decision approving the aid. Where there is a particular need for timely confirmation of certain key information, such as closures, capacity reductions, etc., the Commission may request more frequent reports.

3.2.3. Conditions for restructuring aid in assisted areas ([20])

Economic and social cohesion being a priority objective of the Community pursuant to Article 130a of the EC Treaty and other policies being required to contribute to this objective pursuant to Article 130b ([21]), the Commission must take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an ailing firm is located in an assisted area does not, however, justify a wholly permissive approach to aid for restructuring. In the medium to long term it does not help a region to prop up artificially companies which for structural or other reasons are ultimately doomed to failure.

Furthermore, given the limited Community and national resources available to promote regional development it is in the regions' own best interest to apply these scarce resources to develop as soon as possible alternative activities that are viable and durable. Finally, distortions of competition must be minimised even in the case of aid to firms in assisted areas.

Thus, the criteria listed in paragraph 3.2.2 are equally applicable to assisted areas, even when the needs of regional development are considered. In particular, the result of the restructuring operation must be an economically viable business that will contribute to the real development of the region without requiring continual aid. Recurrent injections of aid will thus not be viewed any more leniently than in non-assisted areas. Likewise, restructuring plans must be followed through and monitored. To avoid undue distortions of competition the aid must also be in proportion to restructuring costs and benefits. Somewhat more flexibility can be shown in assisted areas, however, with regard to the requirement for a reduction in capacity in the case of markets in structural overcapacity. If regional development needs justify it, the Commission will require a smaller capacity reduction for this purpose in assisted areas than in non-assisted areas and will differentiate between areas eligible for

([20]) For the purposes of this communication such areas shall also include, for operators in the agricultural sector, the less favoured areas defined in Article 21(2) of Regulation (EC) No 950/97.

regional aid pursuant to Article 92(3)(a) of the Treaty and those eligible pursuant to Article 92(3)(c) to take account of the greater severity of the regional problems in the former areas.

Any aid for new investment not required for the restructuring must be within the limits for regional aid authorised by the Commission.

3.2.4. Aid for restructuring small and medium-sized enterprises

Provided certain acceptable intensities of aid are not exceeded, aid to firms in the small to medium-sized category, tends to affect trading conditions less than that to large firms and any harm to competition is more likely to be offset by economic benefits ([22]). This also applies to aid to help restructuring. Consequently, the Commission is justified in taking a less restrictive attitude towards such aid when it is granted to SMEs.

In the Community guidelines on State aid for small and medium-sized enterprises (SMEs) ([23]), the Commission has established a uniform definition of SME for State aid control purposes.

'SME' is defined as an enterprise which:

— has no more than 250 employees, and

either

— an annual turnover not exceeding ECU 20 million, or

— a balance sheet total not exceeding ECU 10 million, and

— is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

In relation to SMEs, the Commission will not require aid for restructuring to meet the same strict conditions as aid for restructuring large firms, particularly as regards capacity reductions and reporting obligations.

3.2.5. Provisions applicable only to aid for restructuring in the agricultural sector

The Commission, at the request of the Member State concerned, and as an alternative to the general provisions of this communication concerning capacity reduction, will apply the following provisions for operators in the agricultural sector:

(a) General case

Where there is a structural excess of production capacity, the requirement of irreversibly reducing or closing capacity set out under paragraph 3.2.2 (ii) applies. However, in the case of primary agricultural production, this requirement is replaced by the requirement that the capacity reduction or closure continues for at least five years.

([21]) See footnote 4.
([22]) Community guidelines for State aid to SMEs (OJ C 213, 19.8.1992, p. 2).
([23]) *Ibid.*, paragraph 2.2.

— For measures targeted on particular products or operators the production capacity reduction must normally atttain 16 % ([24]) of that for which the restructuring aid is effectively granted,

— for other measures not so targeted the abovementioned capacity reduction must normally attain 8 % ([24]) of the value of output of products with structural excess for which the restructuring aid is effectively granted.

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 applicable at the level of individual operators.

(b) Special case for small agricultural enterprises (SAEs)

For the purposes of this communication SAEs are defined as those operators in the agricultural sector with no more than 10 annual work units.

For SAEs the abovementioned requirement of irreversibly reducing or closing capacity may be deemed to be achieved at the relevant market level (not necessarily involving exclusively or even any of the beneficiaries of the restructuring aid). Subject to compliance with CAP provisions Member States may choose the capacity reduction system they want to apply for SAEs. In such cases Member States must, as a general rule, demonstrate that:

— for measures targeted on particular products or operators the system would, in the relevant Member State, reduce production capacity of product(s) with structural excess by 10 % ([24]) of that for which the restructuring aid is effectively granted,

— for other measures not so targeted, this capacity reduction must attain 5 % ([24]) of the value of output of products with structural excess for which the restructuring aid is effectively granted. This reduction may be either products which effectively benefit from the restructuring aid or any other Annex II products with structural excess.

The Member State must also demonstrate that the capacity reduction would be supplementary to any applicable in the absence of the restructuring aid.

Where the capacity reduction is not sought at the level of the beneficiary of the aid, measures to achieve the reduction must be implemented no later than two years after the threshold in point (c) has been attained.

(c) Particular circumstances for all operators in the agricultural sector

In this sector even very small amounts of aid are capable of fulfilling the conditions of Article 92(1) of the Treaty. However, in recognition of the practical problems associated with capacity reduction at the level of primary agricultural production (and indirectly in the processing and marketing of products pursuant to Annex II to the Treaty), yet recognising the common interest to be eligible for exemption within the meaning of Article 92(3)(c), the Commission, subject to adherence to all other conditions, will waive the capacity reduction requirements in the following situations:

([24]) For restructuring aid granted in assisted areas, including a less favoured region, the capacity reduction requirement shall be reduced by 2 percentage points.

(i) for measures targeted on any particular category of products or operators, where the totality of decisions taken in favour of all beneficiaries over any consecutive 12-month period does not involve a quantity of product which exceeds 3 % of the total annual production of such products in that country;

(ii) for other measures not so targeted, where the totality of decisions taken in favour of all beneficiaries over any consecutive 12-month period does not involve a value of product which exceeds 1.5 % of the total annual value of agricultural production in that country.

At the request of the Member State concerned, the geographic references under (i) and (ii) may, for any measure, be determined at a regional level. In all cases measurement of the production of a country (or a region) shall be based on normal production levels (in general, the average of the previous three years), and, as regards the quantity or the value of production of beneficiaries, be representative of that of their enterprises prior to the decision to grant aid.

Exemption from the capacity reduction requirement shall in no case imply tolerance of investment aid related to activities subject to sector limits.

(d) Where the limits for exemption from capacity reduction pursuant to point (c) are exceeded:

(i) the capacity reduction to be achieved shall be determined on the basis of total aided capacity, not only that part exceeding the thresholds;

(ii) as regards beneficiaries other than SAEs which already have been accepted for aid prior to the thresholds being attained, the capacity reduction may be realised through measures analogous to those for SAEs under point (b).

3.2.6. Aid to cover the social costs of restructuring

Restructuring plans normally entail reductions in, or abandonment of the affected activities. A scaling-back of the firm's activities is often necessary for the purposes of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid if the industry is suffering from structural overcapacity. Whatever the reason for them, such measures will generally lead to reductions in the company's workforce.

Member States' labour legislation may comprise general social security schemes under which the redundancy benefits and early retirement pensions are paid directly to redundant employees. Such schemes are not to be regarded as State aid falling within Article 92(1) in so far as the State deals directly with employees and the company is not involved.

Besides direct redundancy benefit and early retirement provision for employees, general social support schemes are widespread under which the government covers the cost of benefits that the company provides to redundant workers and which go beyond its statutory or contractual obligations. Where such schemes are available generally without sectional limitations to any worker meeting predefined and automatic eligibility conditions, they are not considered to involve aid pursuant to Article 92(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.

The obligations a company itself has 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. This 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 directly to the firm or are administered through a government agency to the employees.

The Commission has a positive approach to such aid, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship, and often only evens out differences in the obligations placed on companies by national legislation.

As well as to meet the cost of redundancy payments and early retirement, aid is commonly provided in connnection with a particular restructuring case 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.

Aid for social measures exclusively for the benefit of employees who are displaced by restructuring is disregarded for the purposes of determining the size of the capacity reduction under paragraph 3.2.2(ii).

4. NOTIFICATION REQUIREMENTS AND DURATION AND REVIEW OF THE GUIDELINES

4.1. Schemes for rescuing or restructuring SMEs

For SMEs within the definition given in paragraph 3.2.4 including such enterprises in the agricultural sector (as well as SAEs), the Commission will be prepared to authorise schemes of assistance for rescue or restructuring purposes. It will do so within the usual period of two months from the receipt of complete information, unless the scheme qualifies for the accelerated clearance procedure, in which case the Commission is allowed 20 working days ([25]). Such schemes must clearly identify the firms eligible, or in the case of agriculture, the nature of the operators or sectors concerned, the circumstances under which rescue or restructuring aid may be granted and the maximum amount of aid available. A condition of approval will be that an annual report is provided on the scheme's operation containing the information specified in the Commission's instructions on standardised reports ([26]). The reports, except as regards SAEs, must also include an individual list of all beneficiary firms giving: company name, sectoral code, in accordance with the NACE ([27]) two-digit sectoral classification codes, number of employees, annual turnover, amount of aid granted in year, confirmation of whether rescue or restructuring aid was received in the previous two years and, if so, the total amount previously granted. Where recourse has been had to the provisions of paragraph 3.2.5 the report must also include data showing either:

(a) the quantity (or value) of production which has effectively benefited from the restructuring aid, and data on capacity reduction achieved pursuant to that paragraph or:

(b) that the conditions for exemption from capacity reduction according to paragraph 3.2.5(c) have been fulfilled.

Awards of aid for rescuing or restructuring SMEs referred to under paragraph 3.2.5 and to any enterprises in the agricultural sector outside an approved scheme will require to be notified individually to the Commission.

([25]) OJ C 213, 19.8.1992, p. 10.
([26]) See letter to the Member States of 22 February 1994.
([27]) General industrial classification of economic activities within the European Communities, published by the Statistical Office of the European Communities.

Aid awards or aid schemes for rescuing or restructuring firms which meet the conditons of the *de minimis* facility (see paragraph 2.3) need to be notified.

4.2. Aid for rescuing or restructuring large enterprises

For aid to rescue or help restructuring large firms, i.e. those above the limits of the definition of SME, individual notification of all awards is required.

As time is usually not on the side of the firms concerned, particularly in rescue cases, the Commission will make every effort to make its decision quickly. The time limit for deciding on notifications of individual aid awards outside of authorised schemes is two months from the receipt of full information.

Member States themselves can do much to avoid unnecessary delays by:

— notifying their intentions to grant aid early. Even if, because of internal administrative procedures, the Member State is unable to notify immediately all details of a proposed rescue or restructuring aid, it will be advantageous to let the Commission know of the matters that have already been decided, in order to familiarise the Commission with the case and to reduce or avoid possible requests for further information subsequent to a later incomplete notification,

— sending complete notifications. In particular, notifications should distinguish clearly between aid which falls under the heading of rescue aid and that to be categorised as restructuring aid and should directly and distinctly address all the general approval conditions indicated above for the approval of rescue or restructuring aid under the guidelines. Failure to do so will mean that the notification is incomplete and delay clearance. In notifications Member States should also inform the Commission of all other aid granted to the firm that is not directly related to the operation so that the Commission is aware of the full circumstances surrounding the case.

4.3. Unnotified aid

The notification and prior authorisation of aid before it is granted are strict requirements. Member States are reminded of the risk of granting aid illegally, as the Commission has the power to order the recovery of such aid ([28]).

4.4. Operation and review of the guidelines

As regards the non-agricultural sector, the Commission will follow the guidelines published in 1994 ([29]) for three years from the date of their publication. However, as regards the agricultural sector only, these guidelines will enter into force on 1 January 1998 for new State aids. For existing ones, entry into force will be on the same date or, in the vent that the Commission has opened the procedure pursuant Article 93(2) of the Treaty against one or more Member States in this context, once the Commissin has adopted a final decision *vis-à-vis* the Member State(s) concerned pursuant to Article 93(2) of the Treaty.

Before the end of 1997 the Commission will review the operation of the existing guidelines in the non-agricultural sector. As regards the particular provisions relating to agriculture, the review will take place within three years from the date of publication of this text.

([28]) Commission communication on aid granted illegally (OJ C 318, 24.11.1983, p. 3). The Commission would also refer to the ruling of the Court of Justice in Case 301/87 (*Boussac*), see footnote 3, and the conclusions it has drawn from this ruling for the handling of such cases as set out in its letter to Member States of 4 March 1991.

([29]) See footnote 8.

Commission communication amending the Community framework for State aid for research and development (*)

1. Article 130(1) of the EC Treaty states that the Community and the Member States are to take action aimed at 'fostering better exploitation of the industrial potential of policies of innovation, research and technological development'.

2. It follows from the principle laid down in Article 3(g) of the EC Treaty that such actions taken by Member States have to be compatible with the common market and the rules governing State aid, which are based on Articles 92 and 93 of the EC Treaty.

3. One aim of competition policy is to improve the international competitiveness of Community industry and thereby contribute to the achievement of the objectives set out in Article 130(1) of the EC Treaty. The competition rules must therefore be applied constructively to encourage cooperation which helps new technology to be developed and disseminated in the Member States, while observing the rules on intellectual property rights. In the control of State aid, regard must be paid to the need for resources to be made available to those sectors which will contribute to improving the competitiveness of Community industry.

4. The Commission has expressed its favourable view on State aid for R&D in its Community framework for research and development (1). According to point 9 of this framework the Commission may at any time, in cooperation with the Member States, decide to amend it, should that prove necessary for reasons connected with competition policy or to take account of other Community policies and international commitments.

5. The Commission has recently reviewed this framework in cooperation with the Member States as regards certain research and development aids in the agricultural sector. It has concluded that it would be advisable for policy in this area not to be subject to the maximum limit of 75 % applicable in all instances (except for fundamental research) where the aid fulfils the conditions of Article 92(1) of the Treaty but to allow rates of up to 100 % in defined circumstances, consistent with EC obligations under the WTO. It is recalled that the agreement on agriculture provides for derogations from the agreement on subsidies where aid involves research in agriculture of a general nature.

6. In order to achieve this policy objective, the following point is inserted in the framework:

'5.14

As regards R&D aid concerning products listed in Annex II to the EC Treaty, and by way of derogation from aid intensity limitations or supplements specified elsewhere in this framework, the Commission will, as was the case prior to 1997, allow gross aid intensities of up to 100 % even in cases where the R&D is carried out by firms, subject to fulfilment in each case of the four following conditions:

— it is of general interest to the particular sector (or subsector) concerned, without unduly distorting competition in other sectors (or subsectors),

— information is pubished in appropriate journals, with at least national distribution and not limited to members of any particular organisation, to ensure that any operator potentially interested in

(*) OJ C 48, 13.2.1998, p. 2.
(1) OJ C 45, 17.2.1996, p. 5.

the work can readily be aware that it is or has been carried out, and that the results are or will be made available, on request, to any interested party. This information shall be published no later than any which may be given to members of any particular organisation,

— the results of the work are made available for exploitation by all interested parties, including the beneficiary of the aid, on an equal basis in terms both of cost and of time,

— the aid fulfils the conditions laid down in Annex II, "Domestic support: the basis.for exemption from the reduction commitments", to the agreement on agriculture concluded during the Uruguay Round of multilateral trade negotiations [2].

Cases of R&D aid for Annex II products not fulfilling the above conditions are to be examined under the normal rules of the present framework.

When examining aid schemes notified by Member States, the Commission, reserves the right to request notification of significant individual cases implementing the scheme'.

[2] OJ L 336, 23.12.1994, p. 31.

VIII — Fisheries

COUNCIL REGULATION (EEC) No 2080/93 (*) OF 20 JULY 1993

laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the Financial Instrument for Fisheries Guidance

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 43 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),

Whereas the common fisheries policy supports the general objectives of Article 39 of the Treaty; whereas, in particular, Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (4) contributes towards achieving a balance between conservation and the management of resources, on the one hand, and the fishing effort and the stable and rational exploitation of those resources, on the other;

Whereas fisheries structural measures should contribute to the attainment of the objectives of the common fisheries policy and the objectives of Article 130a of the Treaty;

Whereas the incorporation of structural measures in the fisheries and aquaculture sector into the operational framework resulting from the reform of the Structural Funds as laid down in Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (5), and Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (6), should improve the synergy of Community operations and enable a more coherent contribution to be made to the strengthening of economic and social cohesion;

(*) OJ L 193, 31.7.1993, p. 1.
(1) OJ C 131, 11.5.1993, p. 18.
(2) Opinion delivered on 14 July 1993.
(3) OJ C 201, 26.7.1993, p. 52.
(4) OJ L 389, 31.12.1992, p. 1.
(5) OJ L 185, 15.7.1988,p. 9. Regulation as amended by Regulation (EEC) No 2081/93.
(6) OJ L 374, 31.12.1988, p. 1. Regulation as amended by Regulation (EEC) No 2082/93.

Whereas the tasks of the Financial Instrument for Fisheries Guidance (FIFG) should be defined on the basis of its contribution to the achievement of Objective 5(a) as defined in Article 1 of Regulation (EEC) No 2052/88;

Whereas the Community should provide financial assistance in those fields which are crucial for the structural adaptation necessary to achieve the objectives of the common fisheries policy; whereas, furthermore, aid measures in this sector should be subject to compliance with the objectives of balance between resources and their exploitation;

Whereas the Council, after consulting the European Parliament, should decide at a later date on the detailed rules and conditions for the FIFG contribution to the measures for adaptation of fisheries structures in order to guarantee the coherence of the common fisheries policy;

Whereas the measures provided for will coincide with the scope of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector [7] and that of Council Regulation (EEC) No 4042/89 of 19 December 1989 on the improvement of the conditions under which fishery and aquaculture products are processed and marketed [8]; whereas, therefore, these regulations should be repealed and the detailed rules necessary for a transition preventing an interruption in structural aid should be laid down;

Whereas, however, Regulation (EEC) No 4028/86 establishes in a uniform manner the maximum amounts of aid which can be granted to each individual project directly contributing to priority requirements of the common fisheries policy; whereas the Council, after consulting the European Parliament, must continue to establish these maximum amounts in a uniform manner,

HAS ADOPTED THIS REGULATION:

Article 1

1. The structural measures implemented under this regulation in the fisheries and aquaculture sector and the industry processing and marketing their products (hereinafter referred to as 'the sector') shall support the general objectives of Articles 39 and 130a of the Treaty and the objectives set out in Regulations (EEC) No 3760/92 and (EEC) No 2052/88.

2. The tasks of the FIFG shall be:

(a) to contribute to achieving a sustainable balance between resources and their exploitation;

(b) to strengthen the competitiveness of structures and the development of economically viable enterprises in the sector;

(c) to improve market supply and the value-added to fisheries and aquaculture products.

Furthermore, the FIFG shall contribute towards technical assistance and information measures, and support studies and pilot projects for the adaptation of the structures of the sector.

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[7] OJ L 376, 31.12.1986, p. 7. Regulation as last amended by Regulation (EEC) No 2794/92 (OJ L 282, 26.8.1992, p. 3).
[8] OJ L 388, 30.12.1989, p. 1.

Article 2

1. FIFG assistance may be granted for the implementation of measures directly contributing towards ensuring compliance with the requirements of the common fisheries policy in the following fields:

redeployment operations

temporary joint enterprises

joint ventures

adjustment of capacities.

In the framework of the procedure referred to in Article 6, the Council may adapt the list of fields referred to in this paragraph.

2. Article 13(3) of Regulation (EEC) No 2052/88 and Article 17 of Regulation (EEC) No 4253/88 shall apply to measures referred to in paragraph 1 of this Article. However, the aid granted to each individual project under measures referred to in paragraph 1 may not exceed the maximum amount to be established pursuant to the procedure provided for in Article 6.

Article 3

1. The FIFG may contribute towards the funding for investments and operations in support of one or more of the tasks referred to in Article 1(2), in the following fields:

restructuring and renewal of the fishing fleet

modernisation of the fishing fleet

improvement of the conditions under which fishery and aquaculture products are processed and marketed

development of aquaculture and structural works in coastal waters

exploratory fishing

facilities at fishing ports

search for new markets

specific measures.

In the framework of the procedure provided for in Article 6, the Council may adapt the list of fields referred to in this paragraph.

2. In particular, the investments and operations referred to in paragraph 1 may cover the operating conditions on board vessels, an improvement in the selectivity of fishing methods and gear, an improvement in product quality and the introduction of Community standards for product hygiene, health and safety at the workplace and environment protection.

3. The limits of Community participation referred to in Article 13(3) of Regulation (EEC) No 2052/88 and in Article 17(3) of Regulation (EEC) No 4253/88 shall apply to the investments and operations referred to in this article.

4. In appropriate cases, in accordance with procedures specific to each policy, Member States shall provide the Commission with information relating to compliance with the provisions of Article 7(1) of Regulation (EEC) No 2052/88.

Article 4

Within the fields specified in Articles 2 and 3 and up to a maximum of 2 % of the appropriations available annually for structural measures in the sector, the FIFG may finance:

(i) studies, pilot projects and demonstration projects;

(ii) the provision of services and technical assistance for the purposes in particular of preparing, accompanying and evaluating the implementation of this regulation;

(iii) concerted action to remedy particular difficulties affecting specific aspects of the sector;

(iv) information campaigns.

Measures referred to in this article and implemented at the Commission's initiative may, exceptionally, be financed at a rate of 100 %; those implemented on the Commission's behalf shall be financed at a rate of 100 %.

Article 5

1. The Commission shall decide on FIFG assistance on the terms laid down in Article 14 of Regulation (EEC) No 4253/88.

2. The Member State concerned and, where appropriate, the intermediate body appointed by the Member State referred to in Article 14(1) and Article 16(1) of Regulation (EEC) No 4253/88 shall be notified of the decisions referred to in paragraph 1.

Article 6

Without prejudice to Article 33 of Regulation (EEC) No 4253/88 and Article 9 of this regulation, the Council, acting on a proposal from the Commission in accordance with the procedure laid down in Article 43 of the Treaty, shall adopt, not later than 31 December 1993, the detailed rules and conditions for the FIFG contribution to the measures for adaptation of the structures of the sectors covered by this regulation.

Article 7

1. Pursuant to Article 17 of Regulation (EEC) No 2052/88 and Article 29(2) of Regulation (EEC) No 4253/88, a standing management committee for fisheries structures under the auspices of the Commission is hereby, consisting of representatives of the Member States, under the chairmanship of

a representative of the Commission. The European Investment Bank shall designate a representative who shall not vote. The committee shall draw up its own rules of procedure.

2. The committee provided for in this article shall replace the committee established in Article 11 of Regulation (EEC) No 101/76 (°) in all functions conferred upon it pursuant to that regulation.

Article 8

Where the procedure laid down in this article is to be followed, the chairman shall refer the matter to the committee either on his own initiative or at the request of the representative of a Member State. 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 said draft within a time limit which the chairman may lay down according to the urgency of the matter under consideration. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission; the votes of the representatives of the Member States within the committee shall be weighted in the matter set out in that article. The chairman shall not vote.

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided for a period of not more than one month from the date of such communication. The Council, acting by a qualified majority, may take a different decision within a time limit of one month.

The opinions of the committee shall be communicated to the committees referred to in Articles 27, 28 and 29(1) of Regulation (EEC) No 4253/88.

Article 9

1. With effect from 1 January 1994, Regulations (EEC) No 4028/86 and (EEC) No 4042/89 and the provisions establishing the detailed rules for their implementation, with the exception of those of Commission Regulation (EEC) No 163/89 and decisions adopting the multiannual guidance programmes for fishing fleets for the period 1993 to 1996, are hereby repealed.

However:

- they shall remain valid for aid applications introduced before 1 January 1994;

- aid applications for projects submitted in 1993 under Regulation (EEC) No 4028/86 shall be examined and approved on the basis of that regulation, before 1 November 1994.

Applications under Regulation (EEC) No 4028/86 for which no aid decision has been taken by 1 November 1994 shall be considered null and void. However, the measures and projects provided for in such applications may be taken into consideration under the detailed rules provided for in Article 6 of this regulation.

2. Portions of sums committed as aid for projects adopted by the Commission before 1 January 1989 under Regulation (EEC) No 4028/86 for which no final application for payment has been submitted to

(°) OJ L 20, 28.1.1976, p. 19.

the Commission before 31 March 1995 shall be automatically released by the Commission on 30 September 1995 at the latest, without prejudice to projects which have been suspended on legal grounds.

Portions of sums committed as aid for projects adopted by the Commission between 1 January 1989 and 31 October 1994 under Regulation (EEC) No 4028/86 for which no final application for payment has been submitted to the Commission within six years and three months of the date of decision granting the aid shall be automatically released by the Commission not later than six years and nine months after the date of aid grant, without prejudice to projects which have been suspended on legal grounds.

Article 10

This regulation shall enter into force on the third 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.

COUNCIL REGULATION (EC) No 3699/93 (*) OF 21 DECEMBER 1993

laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 43 thereof,

Having regard to Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the Financial Instrument of Fisheries Guidance (1), and in particular Article 6 thereof,

Having regard to the proposal from the Commission (2),

Having regard to the opinion of the European Parliament (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (5) and Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing the said regulation (6), define the general objectives and tasks of the Structural Funds and the Financial Instrument for Fisheries Guidance, hereinafter referred to as the 'FIFG', their organisation, the assistance methods, programming and general organisation of the aid provided by the Funds and the general financial arrangements;

Whereas Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (7) lays down the objectives and general rules of the common policy; whereas the development of the Community fishing fleet must in particular be restricted according to the decisions that the Council is called to take by virtue of Article 11; whereas it is for the Commission to translate these decisions into precise measures at the level of each Member State; whereas, furthermore, the provisions of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (8) must be respected;

Whereas Council Regulation (EEC) No 2080/93 defines the specific tasks of Community structural aid measures in the fisheries and aquaculture sector and the industry processing and marketing its products, hereinafter referred to as 'the sector'; whereas under Article 6 the Council must decide, no later than 31 December 1993, on the terms and conditions of the contribution of the FIFG to adaptation measures of the structures of the sector;

(*) OJ L 346, 31.12.1993, p. 1.
(1) OJ L 193, 31.7.1993, p. 1.
(2) OJ C 305, 11.11.1993, p. 12.
(3) Opinion delivered on 17 December 1993.
(4) Opinion delivered on 21 December 1993.
(5) OJ L 185, 15.7.1988, p. 9. Regulation as last amended by Regulation (EEC) No 2081/93 (OJ L 193, 31.7.1993, p. 1).
(6) OJ L 374, 31.12.1988, p. 1. Regulation as amended by Regulation (EEC) No 2082/93 (OJ L 193, 31.7.1993, p. 20).
(7) OJ L 389, 31.12.1992, p. 1.
(8) OJ L 261, 20.10.1993, p. 1.

Whereas the Council must lay down detailed rules for the implementation of measures connected with the modification of the structures of the sector in order to ensure that FIFG assistance achieves the objectives assigned to the structural policy of the sector within the overall framework of Community structural assistance and the common fisheries policy as a whole, which comes under the exclusive competence of the Community, and so that each Member State is in a position to manage structural assistance in the sector; whereas, in so far as such assistance is not limited to the granting of Community aid, it is appropriate in particular to integrate, in a coherent manner, the programming of the restructuring of Community fishing fleets in the context of structural assistance as a whole,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

The FIFG may, under the conditions laid down in this regulation, provide assistance for the measures referred to in Titles II, III and IV, within the fields covered by the common fisheries policy as defined in Article 1 of Regulation (EEC) No 3760/92.

TITLE 1 — PROGRAMMING

Article 2

General provisions

1. The measures referred to in Article 1 of this regulation shall be the subject of a two-stage programming procedure under the conditions laid down in Articles 3 and 4.

2. Provision for the restructuring of the Community's fishing fleets shall be made in multiannual guidance programmes, as referred to in Article 5.

Article 3

Sectoral plans and aid applications

1. Each Member State shall present to the Commission in the form of a single programming document, hereinafter referred to as 'the document':

a sectoral plan,

an aid application.

Each document shall cover a period of six years, the first programming period beginning on 1 January 1994.

For the part of the programme period covered by a multiannual guidance programme already approved by the Commission under Article 5(2), the document shall be drawn up in accordance with paragraph 2 of this article.

For the remainder of the programme period not yet covered by a multiannual guidance programme approved by the Commission, the programme information given in the document shall be purely indicative; it shall be specified by Member States when the new multiannual guidance programme is approved, in accordance with its objectives.

Unless arrangements are made to the contrary with the Member States in question, documents covering the first programme period shall be submitted within three months of the entry into force of this regulation; the documents covering subsequent programme periods shall be submitted at least six months before the start of each period.

2. Each sectoral plan may cover all of the fields referred to in Titles II, III and IV. It shall contain all the information specified in Annex I. It shall be drawn up in accordance with the objectives of the common fisheries policy and the provisions of the multiannual guidance programme referred to in Article 5.

Aid applications shall be drawn up in accordance with Article 14(1) and (2) of Regulation (EEC) No 4253/88. They shall describe all the measures that are planned in order to give effect to common measures and shall specify the forms of assistance within the meaning of Article 5 of Regulation (EEC) No 2052/88.

3. The document shall draw a distinction between information relating to Objective 1 regions and information relating to other regions.

The information relating to Objective 1 regions shall be covered by the programming referred to in Article 8(7) of Regulation (EEC) No 2052/88 and Article 5(2) of Regulation (EEC) No 4253/88.

Article 4

Community programmes

1. The Commission shall examine the sectoral plans to determine whether they are consistent with the tasks of the FIFG as provided for in Article 1 of Regulation (EEC) No 2080/93 and with the provisions and policies referred to in Articles 6 and 7 of Regulation (EEC) No 2052/88.

Aid applications shall be examined in accordance with Article 14(3) and (4) of Regulation (EEC) No 4253/88.

2. On the basis of the document referred to in Article 3 of this regulation, within six months of receiving it, the Commission shall adopt a single decision on a Community programme for structural assistance in the sector.

The Commission's decision, taken in accordance with the procedure laid down in Article 8 of Regulation (EEC) No 2080/93, shall be taken in the framework of the partnership referred to in Article 4(1) of Regulation (EEC) No 2052/88 and in agreement with the Member State concerned.

The Commission's decision on a Community programme shall be communicated to the Member State concerned and published in the *Official Journal of the European Communities*.

3. Community programmes shall be drawn up in accordance with the objectives of the common fisheries policy and the provisions of the multiannual guidance programmes referred to in Article 5. They may in particular, to this end, be revised in the event of major changes and at the end of each programme period for the restructuring of the Community's fishing fleets.

Article 5

Multiannual guidance programmes for fishing fleets

1. For the purpose of this regulation, a 'multiannual guidance programme for the fishing fleet' shall mean a series of objectives accompanied by a set of measures for their realisation, allowing for management of fishing efforts on a consistent, longer-term basis.

2. On the basis of multiannual objectives and measures for restructuring the fisheries sector as laid down by the Council pursuant to Article 11 of Regulation (EEC) No 3760/92, the Commission shall, acting in accordance with the procedure provided for in Article 8 of Regulation (EEC) No 2080/93, adopt the multiannual guidance programmes for individual Member States.

3. The multiannual guidance programmes adopted for the period from 1 January 1993 to 31 December 1996, as referred to in Article 9(1) of Regulation (EEC) No 2080/93, shall remain in effect until they expire.

4. By 1 January 1996 at the latest, Member States shall supply the Commission with the information specified in Annex II to this regulation, to be used in drawing up multiannual guidance programmes for the period from 1 January 1997 to 31 December 1999.

Article 6

Monitoring multiannual guidance programmes

1. For the purpose of monitoring the implementation of multiannual guidance programmes, Member States shall transmit to the Commission, before 1 April each year, a document reviewing the progress made with their multiannual guidance programme. Within three months of this deadline the Commission shall forward an annual report to the European Parliament and the Council on the implementation of multiannual guidance programmes throughout the Community.

2. Member States shall transmit to the Commission information on the monitoring of fishing efforts by fleet segment, particularly as regards the development of capacities and the corresponding fishing activities, in accordance with the procedures implemented by the Commission.

3. To this end the Commission shall operate a Community register of fishing vessels designed for use in managing fishing efforts.

4. The Commission shall adopt the rules relating to the register referred to in paragraph 3 in accordance with the procedure laid down in Article 18 of Regulation (EEC) No 3760/92.

5. At the request of the Member State concerned or the Commission, or pursuant to provisions laid down in the multiannual guidance programmes, any multiannual guidance programme which has been adopted may be re-examined and, if necessary, revised.

6. The Commission shall decide whether or not to approve the revisions provided for in paragraph 5 of this article in accordance with the procedure laid down in Article 18 of Regulation (EEC) No 3760/92.

7. For the implementation of this article, Member States must comply in particular with Article 24 of Regulation (EEC) No 2847/93.

TITLE II — IMPLEMENTATION OF MULTIANNUAL GUIDANCE PROGRAMMES FOR FISHING FLEETS

Article 7

Common provisions

1. At the end of a multiannual guidance programme, where, with regard to a given segment of a Member State's fleet, the reductions in capacity financed by official aid lead to overachievement of the objectives for that segment, the new situation brought about solely as a result of that aid may not be invoked to bring into service new capacity.

These provisions do not apply in the particular case of small local coastal fishing fleets made up of vessels of under 220 Kw, for which fisheries quotas have not been set at Community level.

For such fleets, the Member State may finance, by State aid alone and within the limits of the premiums and ceilings of the official aid referred to in 1.3 and 2.1 of Annex IV, the capacities corresponding to this excess.

2. Each year, for each fleet segment, Member States shall ensure that aid for modernisation and construction does not result in an increase in fishing effort.

Article 8

Adjustment of fishing effort

1. Member States shall take measures to adjust fishing effort to achieve at least the objectives of the multiannual guidance programmes referred to in Article 5.

Where necessary, Member States shall take measures to stop vessels' fishing activities permanently or restrict them.

2. Measures to stop vessels' fishing activities permanently may include:

scrapping;

permanent transfer to a third country, provided such transfer is not likely to infringe international law or affect the conservation and management of marine resources;

permanent reassignment of the vessel in question to uses other than fishing in Community waters.

For vessels of less than 25 gross registered tonnes (GRT) only the scrapping of the vessel may qualify for official aid within the meaning of this article.

Member States shall ensure that vessels concerned by such measures are deleted from the registration lists for fishing vessels and from the Community fishing vessel register. They shall also ensure that deleted vessels are permanently excluded from fishing in Community waters.

3. Measures to restrict fishing activities may include restrictions on fishing days or days at sea authorised for a specific period. Such measures may not give rise to any State aid.

Article 9

Reorientation of fishing activities — temporary joint ventures and joint enterprises

1. Member States may take measures to promote the reorientation of fishing activities by encouraging the creation of temporary joint ventures and/or joint enterprises.

2. For the purposes of this regulation 'temporary joint venture' means any association based on a contractual agreement of limited duration between Community shipowners and physical or legal persons in one or more third countries with which the Community maintains relations, with the aim of jointly fishing for and exploiting the fishery resources of the third country or countries and sharing the costs, profits or losses of the economic activity jointly undertaken, with a view to the priority supply of the Community market.

The contractual agreement shall provide for the catching and, where necessary, the processing and/or marketing of those species covered, the provision of know-how and/or the transfer of technology where linked to the said operations.

3. For the purposes of this regulation 'joint enterprise' means any company regulated by private law comprising one or more Community shipowners and one or more partners in a third country, constituted in the framework of formal relations between the Community and the third country, with the aim of fishing for and possibly exploiting fishery resources in the waters under the sovereignty and/or jurisdiction of the third country, with a view to the priority supply of the Community market.

4. Where necessary, the Commission, acting in accordance with the procedure referred to in Article 8 of Regulation (EEC) No 2080/93, shall set conditions for implementing this article.

Article 10

Fleet renewal and modernisation of fishing vessels

1. Member States may take such measures to promote the construction of fishing vessels that comply with the global annual intermediate objectives and the final objectives by segment under their multiannual guidance programme within the stated time limits.

Member States shall, when forwarding any pertinent aid proposal, inform the Commission of provisions taken to ensure that this condition is complied with.

2. Member States may take measures to promote the modernisation of fishing vessels. Such measures shall be subject to the conditions referred to in paragraph 1 where investments are likely to result in an increase in fishing effort.

The measures referred to in this paragraph may be taken under the conditions referred to in Article 9(1) of Regulation (EEC) No 2080/93 for vessels regarding which the request for assistance within the meaning of Title III of Regulation (EEC) No 4028/86 has not been accepted despite its formal eligibility under the provisions of the latter regulation.

TITLE III — INVESTMENT AID IN THE FIELDS OF AQUACULTURE, THE DEVELOPMENT OF COASTAL WATERS, FISHING PORT FACILITIES AND PROCESSING AND MARKETING

Article 11

Scope

1. Member States may, under the conditions specified in Annex III, take measures to encourage capital investment in the following fields:

(i) aquaculture;

(ii) protection and development of marine resources in coastal waters in particular by the installation of fixed or movable facilities to enclose protected underwater areas;

(iii) fishing port facilities;

(iv) processing and marketing of fishery and aquaculture products.

2. In addition, Member States may take measures to encourage the devising and implementation of systems for the improvement and control of quality, hygiene conditions, statistical instruments and environmental impact, as well as research and training initiatives in enterprises. The relevant expenditure, with the exception of beneficiary enterprises' operating costs, may be funded from the FIFG, provided that it is directly linked to the investments referred to in paragraph 1.

TITLE IV — OTHER MEASURES

Article 12

Measures to find and promote new market outlets

Member States may take measures in favour of finding and promoting new market outlets for fishery and aquaculture products, in particular:

(i) operations associated with quality certification and product labelling;

(ii) promotion campaigns, including those highlighting quality issues;

(iii) consumer surveys;

(iv) projects to test consumer reactions;

(v) organisation of and participation in trade fairs and exhibitions;

(vi) organisation of study and sales visits;

(vii) market studies, including those relating to the prospects for marketing Community products in third countries, and surveys;

(viii) campaigns improving marketing conditions;

(ix) sales advice and aid, services provided to wholesalers and retailers.

The above measures must not be based around commercial brands nor make reference to particular countries or regions.

Article 13

Operations by members of the trade

Member States may take measures to promote operations carried out by members of the trade themselves and regarded by the competent authorities in the Member State as short-term operations of collective interest, provided such operations serve to attain the objectives of the common fisheries policy.

The measures referred to in this article include in particular aid to producer organisations within the meaning of Article 7 of Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (9).

Article 14

Temporary cessation of activities

Member States may take measures for the temporary cessation of activities.

FIFG assistance may be used only to finance measures intended to partially offset the loss of income suffered as a result of a temporary cessation of fishing activities caused by unforeseen and non-repetitive events resulting from biological phenomena in particular.

TITLE V — GENERAL AND FINANCIAL PROVISIONS

Article 15

Compliance with the conditions governing assistance

1. Member States shall ensure that the special conditions governing assistance listed in Annex III to this regulation are complied with.

2. When requesting payment of each annual aid instalment, Member States shall certify that compliance with the conditions governing assistance set out in this regulations has been verified.

(9) OJ L 388, 31.12.1992, p. 1. Regulation as last amended by Regulation (EEC) No 697/93 (OJ L 76, 30.3.1993, p. 12).

3. Where the conditions referred to in paragraph 2 have not been complied with, the Commission shall carry out a suitable examination of the circumstances in the framework of the partnership, in particular asking the Member State or the authorities appointed by it for implementation of the measure to submit their comments within a given period.

Following that examination, the Commission may suspend, reduce or cancel FIFG assistance in the area of assistance concerned as defined in point 1 of Annex I if the examination confirms that the conditions referred to in paragraph 2 have not been complied with.

Article 16

Scales and rates of assistance

1. The maximum amounts of assistance payable under this regulation and the limits on financial participation from the Member States, beneficiaries and the Community are listed in Annex IV.

2. Within the scope of this regulation, Member States may introduce supplementary aid measures subject to conditions or rules other than those laid down in this regulation, or covering a sum in excess of the maximum amounts referred to in this article, provided that they comply with Articles 92, 93 and 94 of the Treaty.

Article 17

Budget commitments

1. In the case of multiannual operations, Member States shall forward to the Commission each year the information required to permit commitment of the annual instalments provided for in Article 20 of Regulation (EEC) No 4253/88.

2. Budgetary resources shall be committed in line with the implementation stages set out in the decisions granting assistance.

3. Detailed rules for the application of this article shall be adopted by the Commission in accordance with the procedure laid down in Article 8 of Regulation (EEC) No 2080/93.

Article 18

Procedures for the payment of assistance

1. Financial assistance shall be paid in accordance with Article 21 of Regulation (EEC) No 4253/88 and in line with the implementation stages and financial provisions set out in the decision to grant assistance.

2. Applications for payment must be accompanied by documents providing evidence of the progress made in implementing the operation and any payments made by the Community and national authorities to the beneficiaries.

3. Detailed rules for the application of this article shall be adopted by the Commission in accordance with the procedure laid down in Article 8 of Regulation (EEC) No 2080/93.

Article 19

Entry into force

This regulation shall enter into force on 1 January 1994.

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

ANNEX I

INDICATIVE CONTENTS OF SECTORAL PLANS

1. Description of current situation broken down by area of assistance (1)

Strengths and weaknesses.

Summary of operations undertaken and impact of funds used in previous years.

Needs of the sector.

2. Strategy for adjustment of fishery structures

General objectives under the common fisheries policy.

Objectives specific to each area of assistance, quantified if possible.

Anticipated impact (on employment, production, etc.).

3. Means to attain the objectives

Measures selected (legal, financial or other) in each area of assistance.

Indicative financing schedule covering the entire programming period and listing the national and Community resources provided for each area of assistance.

Indications of how the FIFG assistance is to be used (forms of assistance, etc.).

Justification for Community assistance.

(1) 'Area of assistance' means subsectors of the fishery sector whose problems can be grouped together, for example:
adjustment of fishing effort,
renewal and modernisation of the fishing fleet,
aquaculture,
enclosed seawater areas,
fishing port facilities,
product processing and marketing,
product promotion.

ANNEX II

MINIMUM CONTENT OF MULTIANNUAL GUIDANCE PROGRAMMES FOR THE FISHING FLEET FROM 1997 TO 1999

1. Updating of the description of the situation provided for in Annex I

This consists in describing the change in the situation regarding fisheries, fleet and related employment since the date when the sectoral plan was submitted.

2. Results from the previous programme

2.1. Identify and comment on the progress achieved in attaining the objectives set for the 1993 to 1996 programmes.

2.2. Analyse the general administrative and socioeconomic context in which it was implemented and in particular, where appropriate, the context in which measures to reduce fishing activity were implemented.

2.3. Specify and comment on the Community, national and regional financial resources committed in attaining the results achieved, for each fleet segment.

3. New guidelines

On the basis of the replies given to points 1 and 2, indicate the guidelines which should be given to the various fleet segments for the period 1997-99, in particular in relation to the following two operations:

3.1. adjustment of fishing effort: desirable levels of fishing effort per segment on 31 December 1999 in relation to the objectives set for each segment for 31 December 1996. Associated laws, regulations or administrative provisions. Systems for managing fishing activity. Extent of administrative resources and funds to be used to attain the new objectives thus set;

3.2. fleet renewal: rate of renewal desirable for each segment and associated funding. Legal or administrative provisions by each Member State for monitoring the inward and outward movements of its fleet's vessels. Measures taken by Member States per fleet segment to ensure that State aid granted for renewal and fishing effort adjustment operations does not have contradictory effects where the pursuit of the objectives of the programmes is concerned.

ANNEX III

SPECIAL CONDITIONS AND CRITERIA FOR ASSISTANCE

1. Implementation of multiannual guidance programmes (Title II)

1.1. Permanent withdrawal (Article 8(2))

(a) Permanent withdrawal may concern only vessels which have carried out a fishing activity for at least 75 days at sea in each of the two periods of 12 months preceding the date of request for permanent withdrawal or, as the case may be, a fishing activity for at least 80 % of the number of days at sea permitted by current national regulations.

As regards vessels for which a request for permanent withdrawal within the meaning of Regulation (EEC) No 4028/86 has been submitted by 31 December 1993 to the competent authority of the Member State concerned, the criteria of Article 24 of Regulation (EEC) No 4028/86 shall apply.

(b) Operations may concern only vessels more than 10 years old.

1.2. Temporary joint ventures and joint enterprises (Article 9)

(a) Operations must satisfy the following conditions:

(i) they must involve vessels of more than 25 grt, registered in a Community port, operating for more than five years under the flag of a Community Member State and technically suited to be proposed fishing operations; however, a minimum operating period of five years will not be required of vessels registered in a Community port between 1 January 1989 and 31 December 1990;

(ii) the vessels in question must fly the flag of a Member State throughout the duration of the temporary joint venture, which must consist of fishing activities lasting between six months and one year;

(iii) in the case of the founding of a joint enterprise, they must be accompanied by the permanent transfer of the vessel(s) to the third country concerned with no possibility of a return to Community waters.

(b) The financial assistance given to joint enterprise projects may not be added to other Community aid granted under this regulation or Regulation (EEC) No 2908/83 [1] or (EEC) No 4028/86. The assistance granted is to be reduced *pro rata temporis* by the amount previously received in the following cases:

(i) aid for construction during the 10 years preceding the setting up of the joint enterprise;

(ii) aid for the modernisation and/or allowance for a temporary joint venture during the five years preceding the setting up of the joint enterprise.

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[1] Council Regulation (EEC) No 2908/83 of 4 October 1983 on a common measure for restructuring, modernising and developing the fishing industry and for developing aquaculture (OJ L 290, 22.10.1983, p. 1).

1.3. Vessel construction (Article 10)

(a) Vessels must be built to comply with the regulations and directives governing hygiene and safety and the Community provisions concerning the dimension of vessels. They shall be entered in the appropriate segment of the Community register.

(b) Financial assistance shall be granted by way of priority to those vessels using the most selective fishing gear and methods.

1.4. Vessel modernisation (Article 10)

(a) Investments should relate to:

(i) the rationalisation of fishing operations, in particular by the use of more selective fishing gear and methods; and/or

(ii) improvement of the quality of products caught and preserved on board, the use of better fishing and preserving techniques and the implementation of legal and regulatory provisions regarding health; and/or

(iii) improvement of working conditions and safety; and/or

(iv) equipment on board vessels to monitor fishing activities.

(b) Operations may cover only vessels less than 30 years old. This limit shall not apply where investment relates to the improvement of working conditions and safety and/or equipment on board vessels to monitor fishing activities.

2. Investment in the areas referred to in Title III

2.0. General

(a) Investments must:

contribute to lasting economic benefits from the structural improvement in question;

offer an adequate guarantee of technical and economic viability, in particular by avoiding the risk of creating surplus production capacity.

(b) In all the spheres referred to in Title III, physical investment intended to improve conditions of hygiene or human or animal health, to improve product quality or reduce pollution of the environment shall be eligible.

(c) Investment in the purchase of land, coverage of general expenses beyond 12 % of costs and vehicles for passenger transport shall not be eligible.

2.1. Aquaculture

Measures may involve physical investments:

(a) in the construction, equipping, expansion and modernisation of aquaculture installations, such as:

(i) the construction, modernisation and acquisition of buildings;

(ii) works concerning the development or improvement of water circulation in aquaculture enterprises;

(iii) the acquisition and installation of new plant and machinery intended exclusively for aquaculture production, including service vessels and equipment concerned with data processing and data transmission;

(b) concerning projects intended to demonstrate, on a scale approaching that of normal productive investments, the technical and economic viability of farming species not yet commercially exploited in the aquaculture sector or innovative farming techniques, provided that they are based on successful research work.

2.2. Development of coastal waters

Investment should meet the following conditions:

(a) they must include scientific monitoring of the operation for at least five years, in particular the evaluation and monitoring of the development of marine resources in the waters concerned;

(b) they must be carried out by public institutions, recognised producer organisations of bodies designated for that purpose by the competent authorities of the Member State concerned.

2.3. Fishing port facilities

(a) Eligible investments shall relate in particular to installations and equipment:

(i) to improve the conditions under which fishery products are landed, handled and stored in ports;

(ii) to support fishing vessel activities (provision of fuel, ice and water, maintenance and repair of vessels);

(iii) to improve jetties with a view to improving safety during the landing or loading of products.

(b) Priority is to be given to investments:

(i) of interest to all fishermen using a port;

(ii) contributing to the general development of the port and to the improvement of services offered to fishermen.

2.4. Processing and marketing

(a) Eligible investments shall relate in particular to:

(i) the construction and acquisition of buildings and installation;

(ii) the acquisition of new equipment and installations needed for the processing and marketing of fishery and aquaculture products between the time of landing and the end-product stage (including in particular data-processing and data-transmission equipment);

(iii) the application of new technologies intended in particular to improve competitiveness and increase value-added.

(b) Investments shall not be eligible for assistance where they concern:

(i) fishery and aquaculture products intended to be used and processed for purposes other than human consumption, with the exception of investments exclusively for the handling, processing and marketing of fishery and aquaculture product wastes;

(ii) the retail trade.

3. Promotion (Article 12)

(a) Eligible expenditure shall cover in particular:

expenditure by advertising agencies and other providers of services involved in the preparation and implementation of promotion campaigns;

the purchase or hire of advertising space and the creation of slogans and labels for the duration of promotion campaigns;

expenditure on publishing external staff, premises and vehicles required for the campaigns.

(b) Priority is to be given to:

campaigns to encourage the sale of surplus or underexploited species;

campaigns of a collective nature;

operations to develop a quality policy for fishery and aquaculture products.

(c) The beneficiary's operating costs (staff, equipment, vehicles, etc.) shall not be eligible.

ANNEX IV

SCALES AND RATES OF ASSISTANCE

1. Scales of assistance relating to fishing fleets (Title II)

1.1. Permanent withdrawal and joint enterprises (Articles 8(2) and 9(3); Annex III, 1.1 and 1.2)

Table 1

Class of vessel by gross registered tonnage (GRT)	Maximum amount of premium for a 15-year-old vessel (in ecus)
0 < 25	6 215/GRT
25 < 50	5 085/GRT + 28 250
50 < 100	4 520/GRT + 56 500
100 < 400	2 260/GRT + 282 500
400 and over	1 130/BRT + 734 500

(a) The premiums for scrapping a vessel and for setting up joint enterprises paid to beneficiaries may not exceed the following amounts:

15-year-old vessels: see Table 1 above,

vessels less than 15 years old: scale from Table 1 increased by 1.5% per year less than 15,

vessels more than 15 years old: scale from Table 1 decreased by 1.5% per year over 15.

(b) Premiums for the permanent transfer of a vessel to a third country or for permanent re-assignment, in Community waters, to uses other than fishing paid to beneficiaries, may not exceed the maximum amounts for the scrapping premiums referred to in (a) above, less 50 %.

1.2. Temporary cessation of fishing activities and temporary joint ventures (Articles 14 and 9(2); Annex III, 1.2)

The laying-up premiums (for temporary cessation) and cooperation premiums (for temporary joint ventures) paid to beneficiaries may not exceed the scales set out in Table 2 below.

Table 2

Class of vessel by gross registered tonnage (GRT)	Maximum amount of premium per vessel (ecu/day)
0 < 25	4.52/GRT + 20
25 < 50	4.30/GRT + 25
50 < 70	3.50/GRT + 65
70 < 100	3.12/GRT + 88
100 < 200	2.74/GRT + 120
200 < 300	2.36/GRT + 177
300 < 500	2.05/GRT + 254
500 < 1 000	1.76/GRT + 372
1 000 < 1 500	1.50/GRT + 565
1 500 < 2 000	1.34/GRT + 764
2 000 < 2 500	1.23/GRT + 956
2 500 and over	1.15/GRT + 1 137

1.3. Construction aid (Article 10; Annex III, 1.3)

The eligible expenditure for aid for the construction of fishing vessels may not exceed the scales in Table 1 above, increased by 37.5 %. However, for vessels with a steel or glass fibre hull, the coefficient of increase is 92.5 %.

1.4. Modernisation aid (Article 10; Annex III, 1.4)

The eligible expenditure for aid for the modernisation of fishing vessels may not exceed 50 % of the eligible costs for construction aid referred to in 1.3 above.

2. Participation rates

For all the operations referred to in Titles II, III and IV, the restrictions on Community participation (A), total State participation (national, regional and other) by the Member State concerned (B) and, where applicable, participation by private beneficiaries (C) shall be subject to the following conditions, expressed as a percentage of eligible costs:

2.1. Investments in enterprises

Group 1: construction and modernisation of vessels, aquaculture;

Group 2: other investments and measures with financial participation by private beneficiaries.

Table 3

	Group 1	Group 2
Objective 1 regions	A ≤ 50% B ≥ 5% C ≥ 40%	A ≤ 50% B ≥ 5% C ≥ 25%
Other regions	A ≤ 30% B ≥ 5% C ≥ 60%	A ≤ 30% B ≥ 5% C ≥ 50%

2.2. Other measures: scrapping premiums, temporary cessation premiums, temporary joint ventures, joint enterprises and investments and measures financed exclusively by the Community and the national, regional or other authorities of the Member States concerned.

Table 4

Objective 1 regions	50% ≤ A ≤ 75% B ≥ 25%
Other regions	25% ≤ A ≤ 50% B ≥ 50%

COUNCIL REGULATION (EC) No 2719/95 (*) OF 20 NOVEMBER 1995

amending Regulation (EC) No 3699/93 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 43 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),

Whereas Council Regulation (EC) No 3699/93 (4) lays down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products;

Whereas the fishing industry is now undergoing far-reaching changes in the context of a serious crisis; whereas the necessary adjustments to the industry entailed by the application of the common fisheries policy as laid down in Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (5) are creating a need for an extensive range of accompanying measures of a socioeconomic nature;

Whereas a range of socioeconomic accompanying measures to assist enterprises and individuals in the fishing industry as well as areas dependent on fishing is already available at Community level in the general context of the Structural Funds;

Whereas these measures are not, however, sufficient to prevent the fishing industry from losing dynamic and skilled members through the reduction of fishing capacity; whereas appropriate measures should therefore be implemented at Community level, in particular to assist the oldest fishermen;

Whereas the social partners have been consulted pursuant to Article 3 of the agreement annexed to the protocol on social policy,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 3699/93 is hereby amended as follows:

1. The following Article shall be inserted.

(*) OJ L 283, 25.11.1995, p. 3.
(1) OJ C 85, 7.4.1995, p. 3.
(2) OJ C 269, 16.10.1995.
(3) OJ C 236, 11.9.1995, p. 53.
(4) OJ L 346, 31.12.1993, p. 1. Regulation as amended by the Regulation (EC) No 1624/95 (OJ L 155, 6.7.1995, p. 1).
(5) OJ L 389, 31.12.1992, p. 1.

'Article 14a

Measures of a socioeconomic nature

1. For the purposes of this article, "fisherman" shall mean anyone engaging in his main occupation on board an operational sea-going fishing vessel.

2. The Member States may take, for fishermen, measures of a socioeconomic nature associated with restructuring of the Community fisheries sector within the meaning of Article 11 of Regulation (EEC) No 3760/92.

3. Financial assistance from the FIFG may only be granted for the following measures:

(a) part-financing of national early-retirement schemes for fishermen, provided that the following conditions are fulfilled:

— at the time of early retirement, the age of the beneficiaries of the measure must be not more than ten years from the legal retirement age for the purposes of the legislation in force in the Member State, or, the beneficiaries must be aged at least 55,

— the beneficiaries can show that they have worked for at least 10 years as fishermen.

However, contributions to the normal retirement scheme for fishermen during the period of early retirement shall not be eligible for financial assistance from the FIFG.

In each Member State, for the entire programming period within the meaning of Article 3, the number of beneficiaries may not exceed the number of jobs eliminated on board fishing vessels as a result of those vessels permanently stopping fishing activities, within the meaning of Article 8(2), or because of the permanent transfer of vessels to a third country in the context of the creation of a joint enterprise, within the meaning of Article 9(3);

(b) granting individual compensatory payments to fishermen, on the basis of an eligible cost limited to ECU 7 000 per individual beneficiary, provided the vessel on which the beneficiaries were employed has been the object of measures permanently stopping its activities, within the meaning of Article 8(2), or permanently transferring it to a third country in the context of the creation of a joint enterprise, within the meaning of Article 9(3).

Under no circumstances may any one fisherman accumulate the benefits of the two measures referred to in points (a) and (b).

4. The Member States shall adopt the necessary provisions to prohibit any one fisherman from accumulating benefits from the two measures referred to in paragraphs 3(a) and (b). They shall also make the necessary arrangements to ensure that the beneficiaries of the measure referred to in paragraph 3(a) permanently give up work as fishermen and that the compensation referred to in paragraph 3(b) is refunded on a *pro rata temporis* basis where the beneficiaries return to their work as fishermen within a period of less than six months after the decision to grant them the compensation.

5. Unless provisions to the contrary are adopted according to the procedure provided for in Article 43 of the Treaty, this article shall automatically be repealed when the first programming period referred to in Article 3 of this regulation expires.'

2. In Annex IV, paragraph 2.2, the text of the 'Group 2' indent shall be supplemented as follows: 'including the measures referred to in Article 14a(3)'.

Article 2

This regulation shall enter into force on the third 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.

COUNCIL REGULATION (EC) No 965/96 (*) OF 28 MAY 1996

amending Regulation (EC) No 3699/93 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the Financial Instrument for Fisheries Guidance (1), and in particular Article 6 thereof,

Having regard to the proposal from the Commission (2),

Having regard to the opinion of the European Parliament (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas national and Community rules are at the heart of a strengthening of the conditions controlling access to fish resources, in particular by the introduction of systems of fishing licences and permits; whereas those new restrictions on access are having the effect of increasing the scrapping value of vessels, in particular those more than 30 years old; whereas this increase in value has made withdrawals of those fishing vessels more difficult to guarantee than in the past;

Whereas the current system of premiums for scrapping a vessel and for setting up joint enterprises provides for a constant reduction of 1.5 % per year in premiums for vessels more than 15 years old; whereas experience has shown that that year-by-year reduction in premiums has made them insufficient to guarantee the withdrawal of the oldest of the vessels;

Whereas provision should be made to ensure that preference is given to the withdrawal from the fleet of the oldest of the vessels; whereas the premiums should therefore be maintained at a sufficiently high level to guarantee the withdrawal of that category of vessels;

Whereas financial aid for FIFG in the case of temporary cessation of activities, taking account of this type of intervention, must remain an exceptional measure; whereas it is therefore advisable to set a ceiling on the funds allocated to this measure, without prejudice to possible appeals, on a case-by-case basis, against the specific measures referred to in Article 3 of Regulation (EEC) No 2080/93,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 3699/93 (5) is hereby amended as follows:

1. In Article 14, the following paragraph is added:

(*) OJ L 131, 1.6.1996, p. 1.
(1) OJ L 193, 31.7.1993, p. 1.
(2) OJ C 49, 20.2.1996, p. 9.
(3) OJ C 141, 13.5.1996.
(4) Opinion delivered on 27 March 1996 (OJ L 131, 1.6.1996, p. 1).
(5) OJ L 346, 31.12.1993, p. 1. Regulation as last amended by Regulation (EC) No 2719/95 (OJ L 283, 25.11.1995, p. 3).

'This grant cannot exceed, for each calendar year and for each Member State, ECU 350 000 or 0.85 % of the funds foreseen in the financial plan for each Member State for the year concerned, whichever amount is the greater.'

2. In the last indent of Annex IV, point 1.1 (a) the following phrase is hereby added:

', and up to 30 years old, the age beyond which premiums are limited to the amount for vessels 30 years old.'

Article 2

This regulation shall enter into force on the seventh 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.

COUNCIL REGULATION (EC) No 25/97 (*) OF 20 DECEMBER 1996

amending for the fourth time Regulation (EC) No 3699/93 laying down criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and for processing and marketing of its products

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 43 thereof,

Having regard to Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the Financial Instruments for Fisheries Guidance (1), and in particular Article 6 thereof,

Having regard to the proposal from the Commission (2),

Having regard to the opinion of the European Parliament (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas by Regulation (EC) No 3699/93 (5), the Council lays down criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and for processing and marketing of its products;

Whereas promotion of products or forms of processing should be encouraged in those cases where official recognition of origin with reference to a specified geographical zone is granted pursuant to Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (6); whereas the use of geographical references can be permitted only if such official recognition of origin has been granted;

Whereas Article 7b of Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (7) provides for financial aid to producer organisations implementing a plan to improve the quality and marketing of their products; whereas for reasons of legal and budgetary consistency Article 13 of Regulation (EC) No 3699/93 should refer to this aid;

Whereas the agrimonetary rate for the ecu is not being used for aid from the Financial Instrument for Fisheries Guidance, as may be implied from the premium scales shown in Annex IV to Regulation (EC) No 3699/93; whereas however the provisions on use of the agrimonetary ecu of Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy (8), apply as a general rule to all action pursuant to Article 43 of the Treaty; whereas for clarity it should therefore be specified in Regulation (EC) No

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(*) OJ L 6, 10.1.1997, p. 7.
(1) OJ L 193, 31.7.1993, p. 1.
(2) OJ C 178, 21.6.1996, p. 20.
(3) OJ C 347, 18.11.1996.
(4) Opinion delivered on 26 October 1996 (OJ L 6, 10.1.1997, p. 7).
(5) OJ L 346, 31.12.1993, p. 1. Regulation as last amended by Regulation (EC) No 965/96 (OJ L 131, 1.6.1996, p. 1).
(6) OJ L 208, 27.7.1992, p. 1. Regulation as last amended by the 1994 Act of Accession.
(7) OJ L 388, 31.12.1992, p. 1. Regulation as last amended by Regulation (EC) No 3318/94 (OJ L 350, 31.12.1994, p. 15).
(8) OJ L 387, 31.12.1992, p. 1. Regulation as last amended by Regulation (EC) No 150/95 (OJ L 22, 31.1.1995, p. 1).

3699/93 that the budgetary rate for the ecu is the only one applicable for its purposes from the date of its entry into force on 1 January 1994,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 3699/93 is hereby amended as follows:

1. The following shall be added to the last paragraph of Article 12:

'...except in specific cases where official recognition of origin with reference to a specified geographical zone for a product or process is granted pursuant to Regulation (EEC) No 2081/92 (*). The reference may be used only from the date on which the name has been entered on the register provided for in Article 6(3) of Regulation (EEC) No 2081/92.

(*) OJ L 208, 27.7.1992, p. 1.'

2. In the second paragraph of Article 13 the words 'of Article 7' shall be replaced by 'of Articles 7 and 7b'.

3. The following paragraph shall be added to Article 16:

'1a. Amounts in ecus set by this regulation shall be converted into national currency at the rate published in the *Official Journal of the European Communities*, series C.

The conversion shall be made at the rate applicable on 1 January of the year of the Member State's decision to grant the premium or aid.'

Article 2

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

However, the first subparagraph of the additional paragraph 1a to Article 16 of Regulation (EC) No 3699/93 referred to in point 3 of Article 1 of this regulation shall apply with effect from 1 January 1994.

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

COMMISSION REGULATION (EC) No 2636/95 (*) OF 13 NOVEMBER 1995

laying down conditions for the grant of specific recognition and financial aid to producers' organisations in the fisheries sector in order to improve the quality of their products

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (1), as last amended by Regulation (EC) No 3318/94 (2), and in particular Articles 7a(4) and 7b(4) thereof,

Whereas Article 7a of Regulation (EEC) No 3759/92 provides that specific recognition may be granted to producers' organisations which implement a plan to improve the quality and marketing of their products; whereas conditions should be laid down governing the grant and withdrawal of such specific recognition;

Whereas specific recognition may be granted only to recognised producers' organisations within the meaning of Article 4 of Regulation (EEC) No 3759/92;

Whereas the information to be provided by the producers' organisations and certain aspects of the procedure for the grant and withdrawal of specific recognition should be laid down;

Whereas Article 7b of the said regulation provides also that Member States may grant financial aid to producers' organisations that have been specifically recognised; whereas it is necessary to lay down certain provisions for the calculation of the aid and the procedure governing its financing by the Financial Instrument for Fisheries Guidance;

Whereas the measures provided for in this regulation are in accordance with the opinion of the Management Committee for Fishery Products,

HAS ADOPTED THIS REGULATION:

Article 1

This regulation lays down detailed rules of application for:

— specific recognition of producers' organisations as referred to in Article 7a of Regulation (EEC) No 3759/92, and

— the financial aid for producers' organisations that have been specifically recognised as provided for in Article 7b of that regulation, hereinafter referred to as the 'basic Regulation'.

(*) OJ L 271, 14.11.1995, p. 8.
(1) OJ L 388, 31.12.1992, p. 1.
(2) OJ L 350, 31.12.1994, p. 15.

Article 2

1. Under the conditions laid down in Article 7a(1) of the basic Regulation, specific recognition may be granted only to producers' organisations recognised pursuant to Article 4 of the basic Regulation.

2. Withdrawal by a Member State of recognition from a producers' organisation pursuant to Article 4 of Council Regulation (EEC) No 105/76 [3] on the recognition of producers' organisations in the fishing industry shall entail also the withdrawal of specific recognition which may have been granted to that producers' organisation.

Article 3

1. Specific recognition of a producers' organisation shall be withdrawn in cases where the requirements laid down in Article 7a of the basic Regulation are no longer met or where such recognition is based on erroneous information.

2. If a producers' organisation fails to fulfil its obligations or to forward to the Member State the information required for monitoring its activities, the Member State may refuse or withdraw specific recognition.

3. Specific recognition shall be withdrawn with retroactive effect where the organisation to which it has been granted has used it or benefits from it fraudulently. In such cases, any aid granted under Article 7b of the basic Regulation shall be recovered by the Member State.

Article 4

Producers' organisations which seek specific recognition shall forward to the competent authorities in the Member State:

(a) a list of the products marketed by them or by their members in accordance with the common rules laid down by the organisation and which are subject to a plan to improve their quality and marketing;

(b) details of the plan to improve the quality and marketing of those products; the plan shall include as a minimum a full description:

— of its objectives,

— of the measures together with the resources that will be implemented at each stage of production and marketing (preservation on board, landing and transportation, wholesale and retail trade) in order to improve the quality and the marketing of the products,

— of any innovative features included in the proposed measures,

— of a permanent system of evaluation and monitoring for ensuring that the plan meets the objectives sought;

(c) the forecast budget for implementing the plan over three years.

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[3] OJ L 20, 28.1.1976, p. 39.

Article 5

1. Within 30 days following receipt of a plan submitted by a producers' organisation the Member State shall forward to the Commission a full copy thereof.

Where the Commission rejects the plan within the period specified in Article 7a(3) of the basic Regulation, the Member State may not grant specific recognition to the producers' organisation which submitted the plan.

Where the Commission requests changes to a plan, the Member State concerned may approve the plan and grant specific recognition provided that the changes requested have been made.

2. The Member State shall notify the producers' organisation of its decision in writing not later than 30 days after the expiry of the period specified in Article 7a(3) of the basic Regulation. Where recognition is refused reasons shall be given for the Member State's decision.

3. Where it is planned to withdraw specific recognition, that intention together with the reasons for the withdrawal shall be notified by the Member State to the producers' organisation at least two weeks prior to such withdrawal.

4. Member States shall inform the Commission within two months of any decision to grant, withdraw or refuse specific recognition.

Article 6

1. The aid referred to in Article 7b(2) of the basic Regulation shall be calculated taking into consideration the turnover at the first sale derived, during the year for which the aid is requested, from the marketing by the producers' organisation of the products covered by the plan to improve quality.

To that end, the organisation shall keep separate accounts for the products included in the plan.

2. Article 1(1)(c) and (e) of Commission Regulation (EEC) No 1452/83 defining the administrative expenses of producers' organisations in the fishery products sector [4] shall apply *mutatis mutandis* for the purpose of calculating the maximum amount of the aid provided for in Article 7b(2) of the basic Regulation provided that separate accounts show clearly that the costs in question are used for implementing the plan.

Article 7

1. Applications for financing shall relate to expenditure incurred by Member States during a calendar year and shall be submitted to the Commission once yearly before 1 May of the following year.

2. The Commission shall decide on these applications, on one or more occasions.

3. The provisions concerning the information which must be included in Member States' applications for financing, the form it is to take and the supporting documents which the Member State concerned must submit to the Commission shall be adopted in accordance with the procedure laid down in Article 8 of Council Regulation (EEC) No 2080/93 [5] laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the financial instrument for fisheries guidance.

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[4] OJ L 149, 7.6.1983, p. 5.
[5] OJ L 193, 31.7.1993, p. 1.

Article 8

This regulation shall enter into force on the twentieth 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.

COMMISSION REGULATION (EC) No 2374/96 (*) OF 13 DECEMBER 1996

on applications for financing of the aid granted by the Member States to producers' organisations in the fisheries sector in order to improve the quality and marketing of their products

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 2636/95 of 13 November 1995 laying down conditions for the grant of specific recognition and financial aid to producers' organisations in the fisheries sector in order to improve the quality of their products (1), and in particular Article 7(3) thereof,

Whereas applications for financing the aid granted by the Member States in accordance with Regulation (EC) No 2636/95 must contain certain information whereby it can be ascertained whether expenditure meets the requirements of that regulation;

Whereas, in order for effective checks to be carried out, the Member States must keep the supporting documents at the disposal of the Commission for three years after the last payment has been made;

Whereas the measures provided for in this regulation are in accordance with the opinion of the Standing Management Committee on Fisheries Structures,

HAS ADOPTED THIS REGULATION:

Article 1

1. The applications for financing referred to in Article 7(1) of Regulation (EC) No 2636/95 must be drawn up in accordance with the tables in the annexes.

2. Information on recoveries must be presented as soon as possible after each recovery using the form in Annex III.

Article 2

The Member States shall keep at the disposal of the Commission all the supporting documents or certified copies in their possession on the basis of which the aid provided for in Article 7b of Council Regulation (EEC) No 3759/92 (2) was granted for each beneficiary for three years after the last payment was made.

Article 3

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

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

(*) OJ L 325, 14.12.1996, p. 1.
(1) OJ L 271, 14.11.1995, p. 8.
(2) OJ L 388, 31.12.1992, p. 1.

ANNEX I

APPLICATION FOR FINANCING

of aid granted by the Member State to producers' organisations which have been granted specific recognition in order to improve the quality of their products in accordance with Regulation (EC) No 2636/95

Documents to be presented each year for each producers' organisation within the deadline provided for in Article 7(1) of Regulation (EC) No 2636/95. The table must be completed each time for the year in question and the previous years

Member State .....

— European serial number of the producers' organisation (1) .....

— Producers' organisation (name and address) .....

.....

— Date of specific recognition to improve quality .....

Aid granted for the ..... year following the date of specific recognition of the producers' organisation

	Date of payment of the aid by the Member State	Amount (2) of aid granted by Member State pursuant to Article 7b of Regulation (EEC) No 3759/92	Amount (2) of reimbursement requested by Member State
Aid for the first year following the date of specific recognition			
Aid for the second year following the date of specific recognition			
Aid for the third year following the date of specific recognition			

In accordance with Article 7b(3) of Regulation (EEC) No 3759/92, the application for financing must be accompanied by a report describing the progress as regards improvements in quality for each producers' organisation benefiting from the specific recognition.

Stamp and signature of the competent authority

(1) Serial number in the list of producers' organisations published each year in the Official Journal in accordance with Article 6 of Council Regulation (EEC) No 105/76 (OJ L 20, 28.1.1976, p. 39).

(2) Amount in national currency.

ANNEX II

TABLES CONCERNING THE AID GRANTED TO PRODUCERS' ORGANISATIONS FOR IMPROVEMENTS IN QUALITY

Documents to be presented each year for each producers' organisation within the deadline provided for in Article 7(1) of Regulation (EC) No 2636/95

Member State: .....

— European serial number of the producers' organisation (1) .....

Aid granted for the..... year following the date of specific recognition of the producers' organisation

1. Factors used in calculating the aid

Products		Value of production turnover of the first sale of products concerned under the quality plan (2) (3) 19..		Amount (3) of research costs for carrying out the quality plan 19..
Description of products	Common customs tariff No	Turnover	Quantity (tonnes)	

2. Calculation of the aid

Amount of administrative costs in accordance with Article 6(2) of Regulation (EC) No 2636/95 used to implement the quality plan	Amount of aid granted under Article 7b(1) of Regulation (EEC) No 3759/92 19..	Percentage of aid granted calculated in accordance with Article 7b(2) of Regulation (EEC) No 3759/92	
		Percentage of value of production	Percentage of research and administrative costs
(c)			
(e)			
Total:			

(1) Serial number in the list of producers' organisations published each year in the Official Journal in accordance with Article 6 of Regulation (EEC) No 105/76.
(2) Turnover and quantity of products concerned during the year for which aid is applied for.
(3) Amount in national currency.

It is confirmed that:

(a) The producers' organisation keeps separate accounts for the products covered by the quality plan.

(b) The costs in question are used to implement the quality plan.

(c) The amount of administrative costs referred to in Article 7b of Regulation (EEC) No 3759/92 has been determined in accordance with Regulation (EC) No 2636/95 and approved by the competent authorities of the Member State.

Stamp and signature of the competent authority

ANNEX III

RECOVERIES MADE DURING 19.. FOR AID PAID IN ACCORDANCE WITH ARTICLE 7B OF REGULATION (EEC) NO 3759/92

Document to be presented for each producers' organisation after each recovery. The table must be filled out each time for the year in question and the previous years

Member State .....

— European serial number of the producers' organisation (1) .....

— Producers' organisation (name and address) .....

.....

— Date of specific recognition to improve quality .....

	Date of recovery by the Member State	Date of original payment of aid by the Member State	Amount of the eligible aid recovered by the Member State	Amount to be deducted from the FIFG's contribution
Recoveries during the second year following the date of specific recognition				
Recoveries during the third year following the date of specific recognition				
Recoveries during the fourth year following the date of specific recognition				
Recoveries during the ... year following the date of specific recognition				

Stamp and signature of the competent authority

(1) Serial number in the list of producers' organisations published each year in the Official Journal in accordance with Article 6 of Regulation (EEC) No 105/76.

Guidelines for the examination of State aid to fisheries and aquaculture (*)

INTRODUCTION

The maintenance of a system of free and undistorted competition is one of the basic principles of the European Community. Community policy towards State aid is directed towards ensuring free competition, efficient allocation of resources and the unity of the Community market. Consequently, since the founding of the common market, the Commission's attitude has always been one of particular vigilance in this field.

The common fisheries policy aims to establish the conditions necessary for ensuring the viability and future of the fisheries sector. The market organisation stabilises prices and unifies the Community market; the rules of fishing provide for the best possible use of available stocks and their optimum conservation whilst ensuring relative stability of access for fishermen; and in addition to these measures, durable links have been established at international level with a view to maintaining or developing access to stocks outside Community waters. Moreover, the incorporation of the structural aspect of fisheries within the framework of the Structural Funds seeks to ensure the structural adaptation necessary to attain the objectives of the common fisheries policy by requiring action in the sector to comply with the objective of establishing balance between stocks and their exploitation.

State aid is only justified, therefore, if it is in accordance with the objectives of this policy.

It is within this framework that the Commission intends to administer the derogations to the principle of incompatibility of State aid with the common market (Article 92(1) of the EC Treaty) provided for in Article 92(2) and(3) of the Treaty and in its implementing instruments.

These guidelines apply to the entire fisheries sector and concern the exploitation of living aquatic resources and aquaculture together with the means of production, processing and marketing of the resultant products, but excluding non-commercial recreation and sports.

The Commission can, under the procedure for authorising State aid schemes, ask the Member States to provide it with a report on the implementation of individual operations undertaken. The Commission would point out that these reports are a prerequisite for the authorisation of aid. They enable checks to be made that the aid has been granted in compliance with the Commission authorisation and the Community rules and that it has not been misused.

In order to ensure that the common market functions properly and develops gradually, the Commission finds it necessary to propose to the Member States, pursuant to Article 93(1) of the EC Treaty, that they apply to their existing aid schemes for fisheries the criteria laid down in these guidelines.

These guidelines take the place of earlier ones published in 1994 as a result of the development of the common fisheries policy, notably through the adoption of Council Regulations (EC) No 1624/95 (1) and (EC) No 2719/95 (2) amending Regulation (EC) No 3699/93 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products.

(*) OJ C 100, 27.3.1997, p. 12.
(1) OJ L 155, 6.7.1995, p. 1.
(2) OJ L 283, 25.11.1995, p. 3.

1. GENERAL PRINCIPLES

1.1. These guidelines relate to all measures entailing a financial advantage in any form whatsoever funded directly or indirectly from the budgets of public authorities (national, regional, provincial, departmental or local). The following are to be considered as aid: capital transfers, reduced-interest loans, interest subsidies, certain State holdings in the capital of undertakings, aid financed by special levies and aid granted in the form of State securities against bank loans or the reduction of or exemption from charges or taxes, including accelerated depreciation and the reduction of social contributions.

All these measures are covered by the term 'State aid' as referred to in Article 92(1) of the Treaty.

1.2. State aid may be granted only if it is consistent with the objectives of the common policy.

Aid may not be protective in its effect: it must serve to promote the rationalisation and efficiency of the production and marketing of fishery products in a way which encourages and accelerates the adaptation of the industry to the new situation it faces.

In more practical terms, aid must provide incentives for development and adaptation which cannot be undertaken under normal market circumstances because of insufficient flexibility in the sector and the limited financial capacity of those employed in it. It must yield lasting improvements so that the industry can continue to develop solely on the basis of market earnings. Its duration must therefore be limited to the time needed to achieve the desired improvements and adaptations.

Consequently the following principles apply:

— State aid must not impede the application of the rules of the common fisheries policy. In particular, aid to the export of or to trade in fishery products within the Community is incompatible with the common market.

— Those aspects of the common fisheries policy that cannot be considered to be fully regulated, in particular as regards structural policy, may still warrant State aid provided such aid complies with the objectives of the common rules so as not to jeopardise or risk distorting the full effect of these rules; this is why it must, where relevant, be included in the various programming instruments provided for under Community rules.

— State aid which is granted without imposing any obligation on the part of recipients and which is intended to improve the situation of undertakings and increase their business liquidity (subject to 2.10.2), or is calculated on the quantity produced or marketed, product prices, units produced or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipient's income is, as operating aid, incompatible with the common market. The Commission will examine such aid on a case-by-case basis where it is directly linked to a restructuring plan considered to be compatible with the common market.

1.3. The examination of aid schemes will be based on values expressed in gross subsidy equivalent. However, account will be taken of all factors making it possible to assess the real (net) advantage to the recipient.

The cumulative effect for the recipient of all measures involving an element of subsidy granted by the State authorities pursuant to Community, national, regional or local law, particularly those that are designed to promote regional development, will be taken into account when State aid schemes are being assessed.

If the available Community funds are insufficient to cover the part-financing of the measures eligible for such assistance, the overall rate of the State aid may be aggregated, where appropriate, with the rate of Community part-financing provided it does not exceed the overall rate of the aid laid down under the Community rules.

1.4. State aid is to be considered incompatible with the common market where it is financed by means of parafiscal taxes on products other than those of the Member State concerned. However, in view of the particular characteristics of certain activities in the fisheries and aquaculture sector, aid schemes funded by special charges, in particular parafiscal charges, will be considered on a case-by-case basis in the light of the criteria laid down by the Court of Justice and taking into account the international obligations of the Community.

1.5. In its letter of 21 December 1978 ([3]), the Commission informed the Member States of the principles of coordination which it would apply to regional aid schemes in force or to be established in the regions of the Community. These principles, as set out in that communication, do not apply to the products listed in Annex II to the EC Treaty in so far as Article 92(3)(c) is concerned and, consequently, the components of regional aid schemes involving the fisheries sector will therefore be examined on the basis of the present guidelines.

The method to be followed for the application of Article 92(3)(a), on the other hand, applies to the products listed in Annex II to the EC Treaty. In this case, the principles of coordination to be observed are defined in the Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid ([4]).

1.6. The Commission will consider aid for fisheries and aquaculture to which these guidelines do not apply on a case-by-case basis in the light of the objectives of the common fisheries policy and Articles 92 and 93 of the EC Treaty.

The same procedure will apply in the case of aid measures proposed by the Member States pursuant to Article 16(2) of Regulation (EC) No 3699/93.

1.7. The Commission will continue to amplify or modify these guidelines as and when experience is gained in the regular examination of inventories of State aid and in the light of the gradual development of the common fisheries policy.

2. PRINCIPLES OF COMPATIBILITY OF THE VARIOUS CATEGORIES OF AID

2.1. Aid of a general nature

2.1.1. Aid for training and advisory services

Aid for the technical and economic training of persons working in the fisheries sector and aid to the provision of advisory services in new techniques and to technical or economic assistance is deemed to be compatible with the common market provided it is directed exclusively at improving the knowledge of recipients so as to help them increase the efficiency of their operations.

([3]) OJ C 31, 3.2.1979, p. 9.
([4]) OJ C 212, 12.8.1988.

2.1.2. Aid towards research

Aid schemes to assist research can be regarded as compatible with the common market on condition that they comply with the Community rules on State aid for research and development ([5]), subject of course to any further steps the Commission may take to implement those rules (see letter SG(96) D/7941 to the Member States, dated 11 September 1996).

2.1.3. Aid for advertising, product promotion and the search for new markets

2.1.3.1. Without prejudice to Article 12 of Council Regulation (EC) No 3699/93, advertising aid in the strict sense, namely any measure which uses advertising media to invite consumers to buy a given product, may be regarded as being compatible with the common market provided that it relates to one or more of the following schemes:

(a) an entire sector or product or group of products in such a way that they do not promote the products of one or more specific undertakings;

(b) an advertising campaign which is regarded as being compatible with Article 30 of the Treaty pursuant to the Commission communication concerning State involvement in the promotion of agricultural, fisheries and aquaculture products;

(c) generic advertising for fish in general or publicity:

— for species which have rarely or never been used for human consumption, which are not subject to quantitative catch restrictions and catches of which could be increased, or

— of a temporary nature, in particular seasonal advertising for species which are subject to quantitative restrictions and the supply of which temporarily exceeds demand, or

— for new fishery products, over a period which should not normally extend beyond the first two years after such products have been introduced on the market, or

— relating to fish products which are typical of production in particularly less-favoured regions as covered by Article 92(3)(a) of the Treaty.

2.1.3.2. Aid for product promotion and that aimed at seeking new market outlets for fishery products may be deemed to be compatible with the common market provided that the following conditions are met:

(a) it concerns the measures provided for in Article 12 of Regulation (EC) No 3699/93;

(b) the conditions for its payment are comparable with those laid down in Annex III to the above regulation and are at least as stringent.

2.1.3.3. The rate of such aid may not exceed, in subsidy equivalent, the overall rate of the national and Community subsidies permitted under Annex IV to Regulation (EC) No 3699/93.

2.1.4. Aid in the form of advice to small and medium-sized undertakings

Aid to promote better use of the undertakings' equipment, relating in particular to advice on financial and technical management and data processing, is in principle compatible with the common market.

([5]) OJ C 45, 17.2.1996.

2.2. Aid to sea-fishing

2.2.1. Aid for the permanent withdrawal of fishing vessels

Aid for the permanent withdrawal of fishing vessels which is not linked to the purchase or construction of new vessels is compatible with the common market provided that it meets the requirements of Regulation (EC) No 3699/93 for eligibility for Community aid.

In the case of vessels of less than 25 gross registered tonnes (GRT) or less than 27 gross tonnes (GT), only the scrapping of the vessel may qualify for public assistance.

2.2.2. Aid for the temporary cessation of fishing

Aid for the temporary cessation of fishing may be deemed compatible if it is intended to offset part of the loss of income associated with a temporary cessation measure introduced as a result of unforeseen and non-recurring circumstances attributable to biological causes, without prejudice to the provisions contained in the following numbered paragraph.

Other aid schemes for the temporary cessation of fishing will be examined by the Commission on a case-by-case basis.

However, aid to restrict fishing activities which is introduced for the purpose of helping to achieve the target reductions in fishing effort under the multiannual guidance programmes for Community fishing fleets is incompatible with the common market.

2.2.3. Aid for investment in the fleet

2.2.3.1. Aid for the construction of new fishing vessels may be deemed to be compatible with the common market subject to the requirements of Articles 7 and 10 and Annex III (paragraph 1.3) of Regulation (EC) No 3699/93 and provided that the scales set out in Annex IV to that regulation are observed and that the sum of the State aid does not exceed, in subsidy equivalent, the level of the State aid fixed by Annex IV to that regulation.

The construction of fishing vessels for the Community fleet qualifies for aid only under the structural regulations. No aid may be granted to shipyards for the construction of such vessels.

2.2.3.2. Aid for the modernisation of commissioned vessels may be deemed compatible with the common market subject to the requirements of Articles 7 and 10 and Annex III (paragraph 1.4) of Regulation (EC) No 3699/93 and provided that the scales set out in Annex IV to that regulation are observed and that the sum of the State aid does not exceed, in subsidy equivalent, the level of the State aid fixed by Annex IV to that regulation.

2.2.3.3. Aid for the purchase of used vessels may be deemed compatible with the common market only if all the following requirements are met:

(a) vessels which can be used for fishing for a further 10 years at least, and which, at the time of purchase, are not more than 10 years old, with possible exceptions in certain cases to be examined on an individual basis are concerned;

(b) its aim is to enable sea-fishermen to acquire part-ownership of vessels so that their means of livelihood can be kept in commission, or to help young fishermen establish themselves initially,

or to enable fishing vessels to be replaced after their total loss, e.g. in a shipwreck, or in other similar circumstances to be examined on an individual basis;

(c) the rate of aid does not exceed, in subsidy equivalent, 50 % of the participation rate provided for in Annex IV to Regulation (EC) No 3699/93, applying the scale relating to construction aid set out in that annex;

(d) any aid granted less than 10 years previously for the construction or modernisation of a vessel or for the earlier purchase of the same vessel is reimbursed in proportion to the amount of time elapsed. However, a Member State may waive this reimbursement if the purchaser in turn fulfils the conditions to qualify for aid and undertakes to assume the rights and obligations of the previous beneficiary of the aid.

2.2.4. Aid for temporary joint ventures may be deemed compatible with the common market if it meets the requirements of the Community rules (Article 9 of and Annex III to Regulation (EC) No 3699/93) provided that the scales set out in Annex IV to that regulation are observed and that its level does not exceed, in subsidy equivalent, the level of the State aid fixed in Annex IV to that regulation.

2.2.5. Aid for the creation of joint enterprises may be deemed compatible with the common market if it meets the requirements of the Community rules (Article 9 of and Annex III to Regulation (EC) No 3699/93) provided that the scales set out in Annex IV to that regulation are observed and that its level does not exceed, in subsidy equivalent, the level of the State aid fixed in Annex IV to that regulation.

2.2.6. Aid for technical assistance at sea

Aid for technical assistance at sea is compatible with the common market in so far as such assistance is provided only in emergencies which cannot be coped with by means of the equipment and supplies normally found on fishing vessels.

2.2.7. Aid for activities in ports

Aid for the operation of ports and aid granted either directly or indirectly to reduce port charges to which fishermen are liable will be examined case by case.

2.2.8. Aid for improving stock conservation and management

Where, pursuant to Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources (6), a Member State adopts measures intended to improve stock conservation and management by limiting catches by means of technical measures going beyond the minimum requirements laid down in that regulation, State aid designed to encourage or facilitate the implementation of such measures may be considered compatible with the common market subject to a case-by-case examination. The measures must not go beyond what is strictly necessary in order to attain the conservation objective pursued.

2.2.9. Aid to strengthen the monitoring of fishing activities

Aid to strengthen the monitoring of fishing activities may be deemed compatible with the common market, subject to a case-by-case examination, if it is aimed at improving the effectiveness of the control measures adopted in accordance with Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy.

(6) OJ L 288, 11.10.1986, p. 1.

2.3. Aid to processing and marketing in the fisheries sector

Aid to investment in the processing and marketing of fishery products may be deemed to be compatible with the common market provided that:

(a) the conditions for granting it are comparable with those laid down in Regulation (EC) No 3699/93 and are at least as stringent;

(b) the level of the aid does not exceed, in subsidy equivalent, the overall level of the national and Community subsidies permitted under those rules (see Annex IV to Regulation (EC) No 3699/93).

If this aid concerns investments which, according to the above regulation, are not eligible for Community assistance, the Commission shall consider its compatibility with the objectives of the common fisheries policy on a case-by-case basis.

2.4. Aid for port facilities

Aid for fishing port facilities intended to assist landing operations and the provision of supplies to fishing vessels may be regarded as being compatible with the common market provided that:

(a) it meets all the requirements for eligibility for Community aid pursuant to Regulation (EC) No 3699/93;

(b) the rate of aid does not exceed, in subsidy equivalent, the total rate of national and Community subsidies permitted under that regulation (see Annex IV to Regulation (EC) No 3699/93).

2.5. Aid for the development of coastal waters

Aid for the protection and development of fish stocks in coastal waters may be deemed to be compatible with the common market provided that:

(a) the conditions for granting it are comparable with those laid down in Regulation (EC) No 3699/93 and are at least as stringent;

(b) the rate of aid does not exceed, in subsidy equivalent, the total rate of national and Community subsidies permitted pursuant to Annex IV to that regulation.

2.6. Aid relating to product quality

Aid relating to product quality may be deemed compatible with the common market subject to the following conditions:

(a) it concerns quality control carried out under binding national or Community rules, where the aid only covers the expenditure necessary to carry out such control, or measures aimed at promoting product quality when restricted to advice to undertakings, the promotion of quality marks and to voluntary monitoring of the measures;

(b) it is granted without distinction in respect of the specified products intended for marketing within the Member State concerned.

Aid to advertising using a quality mark is subject to the provisions laid down in 2.1.3 of these guidelines.

2.7. Aid to producer associations

Aid intended to improve or provide support for the activities of producer groups or associations other than the producer organisations recognised under Council Regulation (EEC) No 3759/92 is incompatible with the common market, notwithstanding the provisions below.

Such aid for trade organisations which are not recognised under Community rules may be deemed to be compatible with the common market provided that its rate does not exceed 80 % of the rate of aid granted to such organisations recognised at Community level.

The other categories of aid granted to the said producer associations, groups and organisations are subject to examination under these guidelines.

Aid for measures implemented by members of the industry may be deemed to be compatible with the common market provided that it covers joint schemes of limited duration and contributes to attaining the objectives of the common fisheries policy.

2.8. Fresh-water fishing and aquaculture

(a) Aid for investment in commercial fresh-water fisheries (stocking with fry, restocking, installing/improving waterways and ponds) may be considered compatible with the common market.

(b) Aid for investment in aquaculture may be regarded as being compatible with the common market provided that:

— the conditions for granting it are comparable with those laid down in Article 11 of and Annex III to Regulation (EC) No 3699/93 and are at least as stringent;

— the rate of aid does not exceed, in subsidy equivalent, the overall rate of national and Community subsidies permitted pursuant to Annex IV to that regulation.

2.9. Aid in the veterinary and health fields

Aid in veterinary and health-protection fields (e.g. veterinary fees, health checks, tests, screening, preventive treatment, drugs, eradication action following outbreaks of disease) may be deemed compatible with the common market provided that there are national or Community provisions which show that the competent public authority is concerned about the disease in question, either by organising an eradication campaign, in particular a compulsory scheme with compensation, or by introducing — as a first step — an early-warning system, possibly combined with aid incentives to encourage individuals to take part on a voluntary basis in preventive measures.

This will ensure that only action involving the public interest, notably in view of the danger of contamination, will attract aid to the exclusion of cases in which managers must reasonably themselves take responsibility for the normal risks run by the firm.

The objectives of the aid measures must be either preventive, in that they involve tests, screening, action against certain living organisms transmitting disease, prevention or preventive destruction of apparently healthy fish, crustaceans or molluscs that are in fact real or presumed bearers of epizootic disease, or compensatory, in that the animals affected are destroyed by order or recommendation of the competent public authority or die following and because of previous preventive measures, imposed or recommended by that authority, or mixed, in that the compensatory aid scheme for the

loss of products affected by one of the diseases referred to is combined with the condition that the beneficiary undertakes to take appropriate preventive action as specified by the competent public authority.

2.10. Special cases

2.10.1. These guidelines also apply to fishery undertakings which are entirely or partly publicly-owned.

2.10.2. Aid in the form of *crédits de gestion* at reduced rates can be considered compatible with the common market if they respect the rules set out in the Commission communication on State aid: subsidised short-term loans in agriculture ([7]) while taking account of the specific character of the fisheries sector.

2.10.3. Direct income aid to workers in the fisheries and aquaculture sector and to workers employed in the processing and marketing of fishery and aquaculture products may be considered compatible with the common market provided it forms part of socioeconomic back-up measures designed to resolve difficulties linked to the adjustment or reduction of capacity (e.g. aid for training, in connection with retraining, etc.).

Early retirement aid for fishermen and aid for the grant of individual flat-rate premiums in particular are compatible with the common market, provided they comply with Article 14(a) of Regulation (EC) No 3699/93.

The other socioeconomic aid measures will be examined on a case-by-case basis by the Commission.

3. PROCEDURAL MATTERS

3.1. The implementation of these guidelines presupposes discipline both on the part of the authorities in the Member States and on the part of the Commission, particularly as regards the formal obligations to provide notification and the time limits set for this purpose.

In the interests of accelerating the examination of aid measures, the Commission reminds the Member States of their duty to notify aid schemes at the draft stage in accordance with Article 93(3) of the EC Treaty, supplying all the particulars necessary for their assessment. Where aid is granted without being notified beforehand or before the Commission has taken a position on the draft scheme, the Commission intends in future to apply the procedure arising from the Court of Justice judgment of 14 February 1990 in Case C-301/87 (*Boussac*). (See letter from the Commission to the Member States of 4 March 1991 on the procedure for notifying aids and the procedures regarding aids granted in breach of Article 93(3) of the EC Treaty.)

According to this aspect of the Treaty, the Member States must notify all State aid projects to the Commission, including those which benefit from a Community co-financement.

3.2. Furthermore, the Commission draws the attention of the Member States to its letter of 2 November 1983 ([8]) concerning the recovery of aid granted unlawfully and the possible repercussions of such aid on

([7]) OJ C 44, 16.2.1996, p. 2.
([8]) OJ C 318, 24.11.1983, p. 3.

the European Agricultural Guidance and Guarantee Fund. The economic effects of this aid, i.e. its impact on competition, will be taken into consideration when decisions are taken regarding the reimbursement of aid unlawfully granted.

With regard to the impact of unlawfully granted aid on the activities financed by the EAGGF Guarantee Section, any repercussions on expenditure financed by the Guarantee Section will be taken into account during the clearance of the accounts.

3.3. As regards the non-financing by the EAGGF Guarantee Section of any expenditure likely to be affected by a unilateral national measure which is incompatible in particular with the nature and objectives of the fisheries market organisation or which impedes the proper operation of its instruments, the Commission must ensure that the Community budget does not contribute to operations constituting infringements of Community law; it may therefore withhold the advances provided for in Article 5 of Regulation (EEC) No 729/70 and Regulation (EEC) No 2776/88 where such advances would finance operations affected by a national measure.

ANNEX

Chronological list of Court judgments in State aid cases

Date	Case	Parties Decision reference Keywords	ECR page reference

1. EC

1964

15.7.1964	C-6/64	*Costa* v *ENEL*	[1964] I-1141

Preliminary ruling — Interpretation — Articles 37, 52, 53, 92, 93, 102 — Member States of the EEC — Obligations to the Community binding them as States — Commission's duty of supervision — Impossibility for individuals to allege either failure by the State concerned to fulfil any of its obligations or breach of duty by the Commission — Approximation of laws — Avoidance of distortion — Aid granted by States — Elimination — Procedure — No creation of individual rights — Right of establishment — Restrictions — Elimination — Prohibition on the introduction of new restrictions — Nature of that prohibition — State monopolies of a commercial character — Prohibition — Review by the Court — Rights of individuals — Protection of those rights by national courts

Date	Case	Parties Decision reference Keywords	ECR page reference
1969			
10.12.1969	C-6/69 C-11/69	*Commission* v *France (Banque de France)* Decision 68/301/EEC, 23.7.1968, OJ L 178, p. 15; Decision 914/68/ECSC, 6.7.1968, OJ L 159, p. 4; Decision 18.12.1968 (unpublished). Failure to fulfil an obligation arising from the Treaty — Rate of preferential rediscount for exports — Granted for national products exported — Nature of the aid — Member States of the EEC — Economic policy — Balance of payments — Sudden crisis — Protective measures — Unilateral actions authorised by the Treaty as a precaution — Obligations of the Member State concerned — Failure to fulfil an obligation arising from the Treaty — Necessity for rapid intervention by the Community institutions — Reasoned opinion addressed by the Commission to the Member State concerned — Submission based on the illegality of this opinion — Inadmissibility — Adverse effect upon the conditions of competition — Action by a Member State of the ECSC — Damaging effect — Aid to undertakings in the coal and steel sector — Authorisation by the Commission — Rate of preferential rediscount for exports — Nature of the aid within the meaning of Article 67(2) ECSC — Member States of the ECSC — Failure to fulfil an obligation arising from the Treaty — Finding by the Commission — Action by the Member State concerned — Subject-matter different from that of action for annulment	[1969] I-523
1970			
25.6.1970	C-47/69	*France* v *Commission institut textile de France — Union des industries textiles)* Decision 69/266/EEC, 18.7.1979, OJ L 220, p. 1. Action for annulment — Aid to the textile industry — EEC policy — Aid granted by States or through State resources — General evaluation by the Commission — Method of financing — Taxation — Article 95 — Direct and indirect aid — Connection between method of financing and aid — Quasifiscal charge	[1970] I-487

Date	Case	Parties Decision reference Keywords	ECR page reference
1973			
19.6.1973	C-77/72	*Capolongo* v *Maya*	[1973] I-611
		Preliminary ruling — Interpretation — Articles 13, 30, 86 and 92 — Aid granted by States — Abolition — Direct effect — Conditions — Customs duties — Charges having equivalent effect — Notion — Abolition — Direct effect	
12.7.1973	C-70/72	*Commission* v *Germany (North Rhine-Westphalia)* Decision 71/121/EEC, 17.2.1971, OJ L 57, p. 19.	[1973] I-813
		Failure to fulfil an obligation arising from the Treaty — Decision of the Commission concerning aid for rationalisation of mining regions — Termination of such failure — Means — Measures of internal law — Specification by the Commission — Action — Admissibility — Aid granted by States or through State resources — Systems of aid existing — Review by the Commission — Abolition or alteration — Aspects of aid incompatible with the Treaty — Indispensable indications for the efficacy of the decision	
11.12.1973	C-120/73	*Lorenz* v *Germany*	[1973] I-1471
		Preliminary ruling — Interpretation — Article 93(3) — Aid granted by States — Proposals — Alterations in existing aid — Informing the Commission — Object — Period for consideration and examination — Length — Expiration of the period for consideration and examination — Introduction — Prior notice — Prohibition on introduction — Preliminary examination — Decision not to initiate the contentious procedure — Notification — No special form — Putting into effect — Prohibition — Direct effect — Extent — Application in Member States — Rules — Rights of the individual — Protection by national courts	

Date	Case	Parties Decision reference Keywords	ECR page reference
11.12.1973	C-121/73	*Markmann* v *Germany*	[1973] I-1495
		Preliminary ruling — Interpretation — Article 93(3) — Aid granted by States — Proposals — Alterations in existing aid — Informing the Commission — Object — Period for consideration and examination — Length — Expiration of the period for consideration and examination — Introduction — Prior notice — Prohibition on introduction — Preliminary examination — Decision not to initiate the contentious procedure — Notification — No special form — Putting into effect — Prohibition — Direct effect — Extent — Application in Member States — Rules — Rights of the individual — Protection by national courts	
11.12.1973	C-122/73	*Nordsee* v *Germany*	[1973] I-1511
		Preliminary ruling — Interpretation — Article 93(3) — Aid granted by States — Proposals — Alterations in existing aid — Informing the Commission — Object — Period for consideration and examination — Length — Expiration of the period for consideration and examination — Introduction — Prior notice — Prohibition on introduction — Preliminary examination — Decision not to initiate the contentious procedure — Notification — No special form — Putting into effect — Prohibition — Direct effect — Extent — Application in Member States — Rules — Rights of the individual — Protection by national courts	
11.12.1973	C-141/73	*Lohrey* v *Germany*	[1973] I-1527
		Preliminary ruling — Interpretation — Article 93(3) — Aid granted by States — Proposals — Alterations in existing aid — Informing the Commission — Object — Period for consideration and examination — Length — Expiration of the period for consideration and examination — Introduction — Prior notice — Prohibition on introduction — Preliminary examination — Decision not to initiate the contentious procedure — Notification — No special form — Putting into effect — Prohibition — Direct effect — Extent — Application in Member States — Rules — Rights of the individual — Protection by national courts	

Date	Case	Parties Decision reference Keywords	ECR page reference
1974			
2.7.1974	C-173/73	*Italy* v *Commission* Decision OJ L 128, 27.5.1970 p. 33; Decision 73/274/EEC, 25.7.1973, OJ L 254, p. 14.	[1974] I-709
		Action for annulment — Decision of the Commission concerning family allowances in the textile industry — Aid granted by States — Plans — Implementation in contravention of Article 93(3) — Powers of the Commission — Prohibition — Public charges devolving upon undertakings in a sector of industry — Reduction — Aim — Exemption — Classification as aid	
1975			
23.1.1975	C-51/74	*Hulst* v *Produktschap voor Siergewassen*	[1975] I-79
		Preliminary ruling — Interpretation — Articles 16, 40, 93(3) and Articles 1 and 10 of Council Regulation No 234/68 (EEC) — Customs duties on export — Charges having equivalent effect — Agriculture — Common organisation of the market — Infringements by Member States of the provisions or objects of Community — Inadmissibility — Live trees and other plants — National intervention mechanism — Internal levy falling more heavily on export sales than on sales on the national market — Incompatibility with Community law — Prohibition of discrimination within the meaning of Article 95 — Application by analogy	
18.6.1975	C-94/74	*IGAV* v *ENCC*	[1975] I-699
		Preliminary ruling — Interpretation — Article 86 — System of importation of paper, cardboard and pulp into Italy — Customs duties — Charges having equivalent effect — Concept — Internal taxation — Definition — Distinction — Prohibition — Direct effect — Due — Utilisation— Purpose incompatible with Treaty — Consequences	
1976			
21.1.1976	C-40/75	*Produits Bertrand* v *Commission*	[1976] I-1
		Application for compensation — Commission failure to initiate proceedings under Article 93(2) and to secure the abolition of aid to Italian manufacturers of semolina and pasta	

Date	Case	Parties Decision reference Keywords	ECR page reference
1977			
3.2.1977	C-52/76	*Benedetti* v *Munari*	[1977] I-163
		Preliminary ruling — Interpretation — Regulations No 120/67 (EEC) and No 132/67 (EEC) of the Council and (EEC) No 376/70 of the Commission — Agriculture — Common organisation of the markets — Cereals — Price — Formation — Member States — Intervention — Admissibility — Conditions — Prohibition	
22.3.1977	C-74/76	*Iannelli* v *Meroni*	[1977] I-557
		Preliminary ruling — Interpretation — Articles 30 and 95 — Aid granted by States — Compatibility with Community law — Challenge by individuals — Inadmissibility — Aspects of aid which are not necessary for attainment of its object or for its proper functioning — Incompatibility with Article 30 — Internal taxation — Imported product — Domestic product — Discrimination within the meaning of Article 95 — Prohibition — Field of application — Jurisdiction of the national court	
22.3.1977	C-78/76	*Steinike and Weinlig* v *Germany*	[1977] I-595
		Preliminary ruling — Interpretation — Articles 92, 93 and 95 — Aid granted by States — Compatibility with Community law — Challenge by individuals — Inadmissibility — National court — Jurisdiction — Limits — Bringing before the Court — Undertakings and production within the meaning of Article 92 — Concepts — Measures by public authority — Financing — Contributions imposed by this authority on the undertakings concerned — Customs duties — Charges having equivalent effect — Internal taxation — Distinction — Criteria — Levying subsequent to crossing the frontier — Imported products — Domestic product — Discrimination	
21.5.1977	C-31/77 (*) C-53/77R	*Commission* v *United Kingdom* Decision 77/172/EEC, 17.2.1977, OJ L 54, p. 39.	[1977] I-921
		Application for interim measures — Aid to domestic pig farmers — Article 93(2) proceedings initiated — Measures put into effect before final decision — Incompatibility with the common market — Prohibition — Possibility of granting disputed aid retroactively	

(*) Decisions marked with an asterisk* are orders rather than judgments.

Date	Case	Parties Decision reference Keywords	ECR page reference
1978			
24.1.1978	C-82/77	*Public Department the Netherlands* v *van Tiggele*	[1978] I-25
		Preliminary ruling — Interpretation — Articles 30 to 37, 92 to 94 — Quantitative restrictions — Measures having equivalent effect — Prohibition — Criteria — Fixed minimum price — Application without distinction to domestic products and imported products — Lower cost price of imported products — Not to be reflected in the selling price to consumers — Exemption from fixed minimum price and temporary nature of its application — Lack of justification — Aid granted by States — Minimum prices — Fixing by public authorities of minimum retail prices — Cost borne exclusively by consumers — Not State aid	
10.10.1978	C-148/77	*Hansen jun.* v *Hauptzollamt Flensburg*	[1978] I-1787
		Preliminary ruling — Interpretation — Articles 9, 37, 92, 93, 95 and 227 — EEC Treaty — Geographical area of application — French overseas departments — Tax provisions — Prohibition of discrimination — Applicability — Absence of any provision in the EEC Treaty — Possible basis in other treaties — Internal taxation — Preferential treatment of certain types of spirits or certain classes of producers — Products coming from other Member States — Extension of tax advantages — Criteria	
12.10.1978	C-156/77	*Commission* v *Belgium (SNCB)* Decision 76/649/EEC, 4.5.1976, OJ L 229, p. 24.	[1978] I-1881
		Failure to fulfil an obligation arising from the Treaty — Aid to SNCB for international railway tariffs for coal and steel — Transport — Aid to transport — General system of aid — Application — Procedure — Objection of illegality — Measures with regard to which an objection of illegality may be put forward	

Date	Case	Parties Decision reference Keywords	ECR page reference
1979			
13.3.1979	C-91/78	*Hansen* v *Hauptzollamt Flensburg*	[1979] I-935
		Preliminary ruling — Interpretation — Articles 37, 92 and 93 of Council Decision 70/549/EEC — Tax applicable to spirits — State monopolies of a commercial character — Provisions of the Treaty — Temporal application — Exercise of exclusive rights — Measures linked to the grant of an aid — Marketing of a product at an abnormally low resale price — Discrimination — Incompatible with Article 37 — Prohibition — Association of the overseas countries and territories — Goods coming from the countries and territories concerned — Community products subject to a monopoly of a commercial character — Equality of treatment	
26.6.1979	C-177/78	*Pigs and Bacon Commission* v *McCarren*	[1979] I-2161
		Preliminary ruling — Interpretation — Agriculture — Common organisation of the market — Pigmeat — Provisions of the Treaty on aid granted by States — Applicability — Conditions — Undermining Community rules — Prohibition — Freedom of intra-Community trade — Conferment of special advantages on national producers — Export subsidy — Exhaustive rules — National marketing scheme — Prohibition — Criteria — National levy incompatible with Community law — Impossibility of recovering — Right to reimbursement — Arrangements for securing — Discretion of national court	
11.7.1979	C-59/79*	*Producteurs de vins de table et vins de pays* v *Commission* Decision 8.12.1978, OJ C 305, p. 3.	[1979] I-2425
		Action for failure to act — Natural or legal persons — Notice to the institution to act — Request for adoption of an act — Concepts — Request for a finding that aid granted by a State is not compatible with the common market — Bar — Inadmissibility	

Date	Case	Parties Decision reference Keywords	ECR page reference
1980			
27.3.1980	C-61/79	*Amministrazione delle finanze dello Stato* v *Denkavit Italiana* Preliminary ruling — Interpretation — Article 92 — Public health inspection charges — Free movement of goods — Custom duties — Charges having an equivalent effect — Prohibition — Direct effect — Consequences — Individual rights — Protection by national courts — Principle of cooperation — National charges incompatible with Community law — Conditions for recovery — Application of national law — Conditions — Taking into account possible passing on of charge — Permissibility — Aid granted by States — Repayment of charges unduly levied — Exclusion	[1980] I-1205
24.4.1980	C-72/79	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Council Regulation (EEC) No 3330/74 — Agriculture — Common organisation of the markets — Aid granted by States — Prohibition — Appraisal of the compatibility of an aid with the rules of the common organisation — Procedure to be followed — Sugar — System of compensation for storage costs — Flat-rate refund for whole Community — Exhaustive — Appraisal by the Council alone of the justification for any amendments — Sugar carried forward to following marketing year — Exclusion	[1980] I-1411
21.5.1980	C-73/79	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Agriculture — Common organisation of the market — Sugar — National adaptation aids — Method of financing — Compatibility with Community law — Conditions — Tax provisions — Internal taxation — Discriminatory taxation coming under a system of aid — Criteria for appraisal — Cumulative application of Articles 92, 93 and 95 — Purpose to which revenue from the charge is put — Financing aid for the sole benefit of domestic products — Not permissible — Passing financial burdens on to the consumer — No effect	[1980] I-1533

Date	Case	Parties Decision reference Keywords	ECR page reference
10.7.1980	C-811/79	*Amministrazione delle finanze dello Stato* v *Ariete*	[1980] I-2545
		Preliminary ruling — Interpretations — Articles 12 and following, 85 and following — Free movement of goods — Customs duties — Charges having equivalent effect — Prohibition — Direct effect — Rights of individuals — Protection by national courts — Principle of cooperation — National charges incompatible with Community law — Recovery — Detailed rules — Application of national law — Conditions — Taking into account of fact that charge may have been passed on — Permissibility having regard to provisions of Treaty relating to competition	
10.7.1980	C-826/79	*Amministrazione delle finanze dello Stato* v *Mireco*	[1980] I-2559
		Preliminary ruling — Interpretation — Articles 9, 12, 13, 92, 93, 95, 171, 177 and 189 — Free movement of goods — Customs duties — Charges having equivalent effect — Prohibition — Direct effect — Rights of individuals — Protection by national courts — Principle of cooperation — National charges incompatible with Community law — Recovery — Detailed rules — Application of national law — Conditions — Taking into account of fact that charge may have been passed on — Permissibility having regard to provisions of Treaty relating to free movement of goods, competition and the prohibition of tax discrimination	
17.9.1980	C-730/79	*Philip Morris* v *Commission* *(Philip Morris)* Decision 79/743/EEC, 27.7.1979, OJ L 217, p. 17.	[1980] I-2671
		Action for annulment — Commission decision on proposed assistance to increase the production of a cigarette manufacturer — Aid granted by States — Effect on trade between Member States — Criteria — Prohibition — Derogations — Aid which may be considered as compatible with the common market — Commission's discretion — Reference to the Community context	

Date	Case	Parties Decision reference Keywords	ECR page reference
1981			
27.5.1981	C-142/80 C-143/80	*Amministrazione delle finanze dello Stato* v *Essevi and Salengo*	[1981] I-1413
		Preliminary ruling — Interpretation — Article 95 — Tax applicable to spirits — Failure to fulfil an obligation arising from the Treaty — Stage preceding commencement of proceedings — Reasoned opinion — Effect restricted to commencement of proceedings before the Court — Exemption of Member State from compliance with its obligations — Not permissible — Tax provisions — Internal taxation — System of differential taxation of a discriminatory nature — Grant of tax advantages subject to conditions which can be satisfied only with domestic products — Prohibition — Rule against discrimination — Direct effect — Date on which rule took effect — Aid granted by States — Aid in form of tax discrimination — Authorisation — Not permissible — National taxes incompatible with Community law — Refund — Detailed rules — Application of national law — Taking into account of any passing-on of tax — Whether permissible	
1982			
29.4.1982	C-17/81	*Pabst and Richarz* v *Hauptzollamt Oldenburg*	[1982] I-1331
		Preliminary ruling — Interpretation — Articles 37, 92 and following and 53(1) of association agreement EC/Greece — Tax applicable to spirits — Internal taxation — Discrimination between domestic products and similar imported products — Prohibition — Uniform application — Relief for national products at the expense of similar imported products from Greece — Relief prohibited — Selling price of a product covered by a national monopoly — Component in the nature of taxation forming part of that price — Tax on imported products — Tax corresponding to a non-tax component in the selling price of the similar product covered by the monopoly — Discriminatory taxation — Whether discriminatory taxation may come under a system of State aid — Relief by an equal amount for the two products — Continuation of discrimination — State monopolies of a commercial character — Specific provisions of the Treaty — Matters covered — Activities intrinsically connected with the specific function of monopolies — Relief for spirits on which tax was previously charged — Provisions not applicable — International agreements — Prohibition of discrimination in taxation	

Date	Case	Parties Decision reference Keywords	ECR page reference
6.7.1982	C-188/80 C-190/80	*France, Italy and United Kingdom* v *Commission*	[1982] I-2545
		Action for annulment — Commission Directive 80/723/EEC — Competition — Public undertakings — Transparency of financial relations between Member States and public undertakings — Commission's power to obtain information — Scope — National published information — Possibility for the Commission to require additional information — Determination of the financial relations covered — Determination of criteria common to all the Member States — Financial participation of the public authorities — Position of the public authorities in the management of the undertaking — Difference in treatment as compared with private undertakings — Situations not comparable — No discrimination	
13.10.1982	C-213/81 C-215/81	*Nordeutsches Vieh-und Fleischkontor* v *Balm*	[1982] I-3583
		Preliminary ruling — Interpretation — Article 3 of Council Regulation (EEC) No 2956/79 and Article 7 of Council Regulation (EEC) No 805/68 — Common customs tariff — Community tariff quotas — Frozen beef and veal — Member States' administrative powers — Allocation of national quota shares — Conditions — Reference to imports and to exports within the Community and exports to non-member countries — Permissible — Reference to purchase of beef and veal from intervention agencies — Whether compatible with the common organisation of the market — Financial advantage obtained from an incorrect allocation of a national quota share — Whether State aid — Exclusion	
24.11.1982	C-249/81	*Commission* v *Ireland (Irish Goods Council)*	[1982] I-4005
		Failure to fulfil an obligation arising from the Treaty — Article 30 — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Publicity campaign to promote domestic products — Provisions governing aid granted by States — Whether applicable to the method of financing the campaign — Possibility which does not exclude application of the prohibition on measures having an equivalent effect — Practice constituting a measure having equivalent effect — Requirements — Practice based on measures which are not binding — Not significant	

Date	Case	Parties Decision reference Keywords	ECR page reference
1983			
14.7.1983	C-203/82	*Commission* v *Italy* Decision 80/932/EEC, 15.9.1980, OJ L 264, p. 28. Failure to fulfil an obligation arising from the Treaty — Commission Decision 80/932/EEC — Partial taking-over by the State of employers' contributions to the sickness insurance scheme — Failure to comply within the prescribed period — Discriminatory reduction in employers' contributions — Advantage given to industries with large numbers of female employees — Textiles, clothing, footwear and leather — Aid incompatible with the common market under Article 92 — Abolition	[1983] I-2525
20.9.1983	C-171/83R*	*Commission* v *France* Decision 83/245/EEC, OJ L 137, 12.1.1983, p. 24. Application for interim measures — Aid to textile and clothing sector — Draft aid programmes — Notification to the Commission — Implementation before compatibility has been checked — Prohibition — Date of taking effect — Planned air regarded as compatible by the Member State — Irrelevance — Failure to initiate the procedure for checking compatibility, enabling each party to state its case — Implementation of the project on the expiry of the period prescribed for preliminary check on compatibility — Conditions — Prior notice to Commission	[1983] I-2621
15.11.1983	C-52/83	*Commission* v *France* Decision 83/245/EEC, OJ L 137, 12.1.1983, p. 24. Failure to fulfil an obligation arising from the Treaty — Commission decision — Aid to textile and clothing sector — Objection of illegality — Expiry of the limitation period for an action for a declaration that it is void — Inadmissibility of the objection of illegality raised with regard to the decision	[1983] I-3707

Date	Case	Parties Decision reference Keywords	ECR page reference
1984			
21.2.1984	C-337/82	*St Nikolaus Brennerei* v *Hauptzollamt Krefeld* Preliminary ruling — Validity — Commission Regulation (EEC) No 851/76 — Agriculture — Provisions of the Treaty — Article 46 — Applicability after the transitional period — Countervailing charges imposed on alcohol produced in France — Products not covered by a common organisation — Purpose — Not a charge having an effect equivalent to a customs duty	[1984] I-1051
20.3.1984	C-84/82	*Germany* v *Commission* Decision 18.11.1981 (unpublished). Action for a declaration of nullity of the authorisation for introduction — Action in respect of failure to act — Textiles and clothing — Plans to grant aid — Review by the Commission — Preliminary review and main review — Respective characteristics — Purpose — Duties of the Commission — Expiry of reasonable period for carrying out the review — Implementation of aid — Prior notice — Compatibility of the aid with the common market — Difficulties in appraisal — Notice to the institution — Express request to act — None	[1984] I-1451
27.3.1984	C-169/82	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Aid to agriculture in the region of Sicily — Common organisation of the markets — Aid granted by States — Cereals — Production of durum wheat — Wine — Use of table grapes for wine production — Products processed from fruit and vegetables — Processing of tomatoes — Incompatibility with Community legislation — Fruit and vegetables — Scope — Almonds, hazelnuts and pistachio nuts — Inclusion	[1984] I-1603
5.7.1984	C-114/83	*Société d'initiatives et de coopération agricoles* v *Commission* Action for damages — Liability for refusal of a protective measure — Non-contractual liability — Importation of low-priced new potatoes from Greece — Commission's failure to act — Act of accession of new Member States to the Community — Hellenic Republic — Agriculture — Protective measure — Conditions for implementation — Appraisal by the Commission	[1984] I-2589

Date	Case	Parties Decision reference Keywords	ECR page reference
10.7.1984	C-72/83	*Campus Oil Ltd and others* v *Minister for Industry and Energy and others*	[1984] I-2727
		Preliminary ruling — Interpretation — Articles 30 and 36 — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Concept — Competition — Undertakings entrusted with the operation of services' general economic interest — Subject to the Treaty rules — Protection ensured by measures restricting imports from other Member States — Not acceptable — Supplies of petroleum products — Obligation to purchase from a national refinery — Derogations — Acceptable — Conditions and limits — Community rules for the protection of the same interests — Effects — Unnecessary or disproportionate measures — Objective covered by the concept of public security — Adoption of appropriate rules — Rules making it possible to achieve other objectives of an economic nature	
11.7.1984	C-130/83	*Commission* v *Italy* Decision 82/401/EEC, 5.5.1982, OJ L 173, p. 20.	[1984] I-2849
		Failure to fulfil an obligation arising from the Treaty — Aid to the wine, fruit and vegetables sectors in Sicily — Commission decision declaring aid compatibility with the common market — Obligation of the Member State concerned — Failure to comply within the prescribed period	
9.10.1984	C-91/83 C-127/83	*Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrecht*	[1984] I-3435
		Preliminary ruling — Interpretation — Articles 92 and 93 — Plans to grant aid — Notification to the Commission — Obligation of the Member State to inform the interested parties — Extent — Extension to alterations to the initial plan — Prohibition on the putting into effect of aid measures — Application for alterations to the initial plan — Conditions	

Date	Case	Parties Decision reference Keywords	ECR page reference
14.11.1984	C-323/82	*Intermills* v *Commission (Intermills)* Decision 82/670/EEC, 22.7.1982, OJ L 280, p. 30. Action for annulment — Commission Decision 82/670 — Aid for the reconversion of a paper manufacturing business — Provisions of the Treaty — Application to a group of undertakings created under a restructuring plan — Conditions — Plans to grant aid — Review by the Commission — Hearing of the parties concerned — Notice to the parties concerned to submit their comments — Concept of 'parties concerned' — Form of notice — Aid in the form of loans or capital holdings — Form irrelevant for purpose of the application of Article 92	[1984] I-3809
13.12.1984	C-289/83	*GAARM* v *Commission* Action for damages — Liability for refusal of a protective measure — Non-contractual liability — Importation of low-priced new potatoes from Greece — Commission's failure to act — Act of accession of new Member States to the Communities — Hellenic Republic — Agriculture — Protective measure — Conditions for implementation — Appraisal by the Commission	[1984] I-4295
1985			
15.1.1985	C-253/83	*Kupferberg* v *Hauptzollamt Mainz* Preliminary ruling — Interpretation — Articles 37 and 95 — Article 3 of Agreement EEC/Spain and Article 21(1) of Agreement EEC/Portugal — Fiscal legislation — Internal taxation — National spirits monopoly — De facto reduction in selling price — Compatibility with the EEC Treaty and the Agreements between EEC and Spain and Portugal — Conditions	[1985] I-157
30.1.1985	C-290/83	*Commission* v *France* *(Caisse nationale de crédit agricole)* Failure to fulfil an obligation arising from the Treaty — Aid granted to farmers financed from the administrative surplus of a national agricultural loans society — Aid not funded out of State resources — Aid granted through public or private bodies — Classifiable as State aid — Appraisal by the Commission — Assessment on the basis of Article 92 — Procedure under Article 93(2) — Recourse to the procedure under Article 169 — Not permissible	[1985] I-439

Date	Case	Parties Decision reference Keywords	ECR page reference
7.2.1985	C-240/83	*Procureur de la République* v *ADBHU*	[1985] I-531
		Preliminary ruling — Interpretation — Validity — Council Directive 75/439 — Approximation of laws — Disposal of waste oils — Restriction of freedom of trade and of competition — Whether permissible — Conditions — National legislation on burning — Compatibility — Criteria	
13.3.1985	C-296/82 C-318/82	*Pays-Bas and Leeuwarder Papierwaren-fabriek Commission (Leeuwarder)* Decision 82/653/EEC, 22.7.1982, OJ L 277, p. 15.	[1985] I-809
		Action for annulment — Commission Decision 82/653 — Aid to the paperboard-processing industry — Measures adopted by the institutions — Statement of reasons — Duty — Extent — Individual decision — Publication — Preservation of professional secrecy — Facts covered by professional secrecy excluded from publication — Commission decision that aid is incompatible with the common market — Duty to provide a statement — Necessary information	
13.3.1985	C-93/84	*Commission* v *France* Decision 83/313/EEC, 8.2.1983, OJ L 169, p. 32.	[1985] I-829
		Failure to fulfil an obligation arising from the Treaty — Aid to fishing undertakings — Non-compliance with a Commission decision concerning State aid — Decision not contested by means of an action for a declaration of nullity — Defences — Legality of the decision called in question — Not admissible	
3.5.1985	C-67/85* C-68/85 C-70/85R	*Van der Kooy* v *Commission* Decision 85/215/EEC, 13.2.1985, OJ L 97, p. 49.	[1985] I-1315
		Application for interim measures — Suspension of the operation of a Commission's measure C(85)284 DF — Horticulture — Price of gas — Application for interim measures — Conditions for granting — Plans to grant aid — Notification to the Commission — Aid put into effect before review of compatibility — Effect on right of the Member State concerned to challenge the Commission's decision before the Court — None	

Date	Case	Parties Decision reference Keywords	ECR page reference
7.5.1985	C-18/84	*Commission* v *France*	[1985] I-1339
		Failure to fulfil an obligation arising from the Treaty — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Measure which may be defined as aid within the meaning of Article 92 — May nevertheless be covered by the prohibition on measures having equivalent effect — Tax advantages for the press — Benefit refused in respect of publications printed in other Member States — Not allowed	
13.6.1985	C-248/84R*	*Germany* v *Commission (North Rhine-Westphalia)* Decision 85/12/EEC, 23.7.1984, OJ L 7, p. 28.	[1985] I-1813
		Application for interim measures — Suspension of the operation of Article 1 of Commission's Decision 85/12 — Aid to regional investments — Conditions for granting such a measure	
3.7.1985	C-227/83	*Commission* v *Italy (Marsala)*	[1985] I-2049
		Failure to fulfil an obligation arising from the Treaty — Reduction of the charge on spirits used in the production of Marsala wine — Tax provisions — Internal taxation — Grant of tax relief in respect of domestic products — Permissibility — Conditions — Extension to products imported from other Member States — Discriminatory taxation under a system of aid — Application of Article 95 — Discrimination — Prohibition — Limited effect of discrimination — Not relevant	
1986			
15.1.1986	C-52/84	*Commission* v *Belgium (Boch)* Decision 83/130/EEC, 16.2.1983, OJ L 91, p. 32.	[1986] I-89
		Failure to fulfil an obligation arising from the Treaty — Shareholding in an undertaking — Non-compliance with a Commission decision on State aid — Decision not challenged by way of an application for its annulment — Submissions in defence — Submission questioning the legality of the decision — Inadmissibility — Absolute impossibility of implementation — Admissibility — Commission decision finding an aid to be incompatible with the common market — Difficulties of implementation — Obligation on the part of the Commission and the Member State to cooperate in seeking a solution consistent with the Treaty	

Date	Case	Parties Decision reference Keywords	ECR page reference
28.1.1986	C-169/84	*Cofaz and others* v *Commission (Gasunie)* Decision 25.10.1983, OJ C 327, p. 3. Decision 24.4.1984 (unpublished). Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision on a complaint concerning an infringement of Community rules — Commission decision terminating a procedure investigating the grant of aid — Procedural guarantees accorded to applicant undertaking — Right of action — Conditions	[1986] I-391
6.2.1986	C-310/85R*	*Deufil* v *Commission (Deufil)* Decision 85/471/EEC, 10.7.1985, OJ L 278, p. 26. Application for interim measures — Suspension of the operation of a Commission's measure 85/471 — Aid granted by States for the production of polyamide and polypropylene yarn — Conditions for granting — Irreparable nature of the damage	[1986] I-537
30.4.1986	C-57/86R*	*Greece* v *Commission* Decision 86/187/EEC, 13.11.1985, OJ L 136, p. 61. Application for interim measures — Suspension of the operation of a Commission's measure C(85) 2087 final — Aid granted by Greece in the form of an interest rebate in respect of the exportation of all products except petroleum products — Conditions for granting	[1986] I-1497
5.6.1986	C-103/84	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Financial aid for the purchase of nationally produced vehicles — Object of the action — Established by the reasoned opinion — Time limit granted to the Member State — Subsequent compliance with its obligations — Interest in pursuing the action — Possible liability of the Member State — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Concept — Measure which may be defined as aid within the meaning of Article 92 — Possibility of being aid not a sufficient reason to exempt from the prohibition of measures having equivalent effect	[1986] I-1759

Date	Case	Parties Decision reference Keywords	ECR page reference
10.7.1986	C-234/84	*Belgium* v *Commission (Meura)* Decision 84/496/EEC, 17.4.1984, OJ L 276, p. 34. Action for annulment — Commission Decision C(84)496 — Aid granted to an undertaking at Tournai manufacturing equipment for the feed industry — Concept — Aid in the form of loans or of subscription of capital — Form irrelevant as regards the application of Article 92 — Subscription of capital — Basis of assessment — Situation of the undertaking *vis-à-vis* the private capital markets — Effect on trade between Member States — Distortion of competition — Community law — Principles — Right to be heard — Application to an administrative procedure initiated by the Commission — Scope	[1986] I-2263
10.7.1986	C-40/85	*Belgium* v *Commission (Boch)* Decision 85/153/EEC, 24.10.1984, OJ L 59, p. 21. Action for annulment — Commission Decision 85/153 — Aid to a ceramic sanitary-ware and crockery manufacturer — Concept — Aid in the form of loans or of subscription of capital — Form irrelevant as regards the application of Article 92 — Subscription of capital — Basis of assessment — Situation of the undertaking *vis-à-vis* the private capital markets — Effect on trade between Member States — Distortion of competition — Community law — Principles — Right to be heard — Application to an administrative procedure initiated by the Commission — Scope	[1986] I-2321
10.7.1986	C-282/85	*DEFI* v *Commission* Decision 85/380/EEC, 5.6.1985, OJ L 217, p. 20. Action for annulment — Commission Decisions 85/380 — Aid to textile-clothing sector — Quasi-fiscal charges — Natural or legal persons — Measures of direct and individual concern to them — Commission decision to the effect that aid planned is incompatible with the common market — Application to the Court by a State-controlled body charged with allocating the planned aid — Not admissible	[1986] I-2469

Date	Case	Parties Decision reference Keywords	ECR page reference
1987			
24.2.1987	C-310/85	*Deufil* v *Commission (Deufil)* Decision 85/471/EEC, 10.7.1985, OJ L 278, p. 26. Action for annulment — Commission Decision 85/471 — Aid granted by States for the production of polyamide and polypropylene yarn — Provisions of the Treaty — Scope — National rules pursuing general objectives of conjunctural policy — Considerations only of the effects of those rules — Prohibition — Exceptions — Aid which may be considered as compatible with the common market — Commission's discretion — Reference to the Community context — Aid projects — Implementation before the Commission's final decision — Order to national authorities to recover aid incompatible with the common market — Breach in regard to the beneficiaries of the principle of the protection of legitimate expectations — None	[1987] I-901
9.4.1987	C-5/86	*Commission* v *Belgium (Beaulieu II)* Decision 84/508/EEC, 27.6.1984, OJ L 283, p. 42. Failure to fulfil an obligation arising from the Treaty — Failure to comply with the decision on aid to a producer of polypropylene fibre and yarn — Commission decision finding an aid to be incompatible with the common market — Decision requiring the aid to be repaid — Obligation of the Member State to comply with it in the time allowed	[1987] I-1773
15.6.1987	C-142/87R*	*Belgium* v *Commission (Tubemeuse)* Decision 87/418/EEC, 4.2.1987, OJ L 227, p. 45. Application for interim measures — Suspension of the operation of a Commission Decision C(87)507 — State aid for a steel-tube undertaking — Conditions for granting — Serious and irreparable damage to the applicant	[1987] I-2589
16.6.1987	C-118/85	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Commission Directive 80/723/EEC — Transparency of financial relations between Member States and public undertakings — Distinction between the role of the State as public authority and as a producer or as a provider of services — Body integrated into the administration of the State — Designation as public undertaking — Lack of legal personality distinct from that of the State — No effect	[1987] I-2599

Date	Case	Parties Decision reference Keywords	ECR page reference
14.10.1987	C-248/84	*Germany* v *Commission* Decision 85/12/EEC, 23.7.1984, OJ L 7, p. 28. Action for annulment — Compatibility of a regional aid programme — Aid granted by regional or local bodies — Inclusion — Distinction between different kinds of aid on the basis of their objective — None — Commission decision finding an aid programme incompatible with the common market — Obligation to state reasons — Necessary details — Aid for the development of particular areas — Distinction between Article 93(3)(a) and 93(3)(c) of the Treaty	[1987] I-4013
11.11.1987	C-259/85	*France* v *Commission* Decision 85/380/EEC, 5.6.1985, OJ L 217, p. 20. Action for annulment — Commission Decision 85/380/EEC — Textile/clothing industry — Community law — Principles — Right to a fair hearing — Application to administrative procedures initiated by the Commission — Examination of aid schemes — Scope — Sectoral aid financed by a parafiscal charge levied on national production in the sector in question — Arrangement of no consequence for the purpose of the application of Article 92 — Prohibition — Derogations — Adverse effect on trading conditions to an extent contrary to the common interest	[1987] I-4393
24.11.1987	C-223/85	*RSV* v *Commission (RSV)* Decision 85/351/EEC, 19.12.1984, OJ L 188, p. 44. Action for annulment — Commission Decision 85/351/EEC — Large shipbuilding and heavy offshore engineering sector — Aid granted by States — Commission decision declaring an aid to be incompatible with the common market — Decision given after unjustifiable delay — Breach *vis-à-vis* the beneficiaries of the aid of the principle of legitimate expectation	[1987] I-4617

Date	Case	Parties Decision reference Keywords	ECR page reference
1988			
2.2.1988	C-67/85 C-68/85 C-70/85	*Van der Kooy* v *Commission (Gasunie)* Decision 85/125/EEC, 13.2.1985, OJ L 97, p. 49. Action for annulment — Commission Decision 85/215/EEC — Natural or legal persons — Measures of direct and individual concern to them — Decision addressed to a Member State, prohibiting aid to horticultural producers in the form of preferential tariff structure for gas — Action brought by a producer benefiting thereunder — Inadmissible — Action brought by a body representing horticultural producers — Participation in the tariff agreement and in the proceedings before the Commission — admissible — Aid granted through a State-controlled organisation — Preferential tariff for an energy source, without economic justification, benefiting a category of undertakings — Distortion of competition — Effect on trade between Member States — Commission decision finding an aid to be incompatible with the common market — No indication given as to the amount by which an energy tariff found to constitute a prohibited aid should be increased — No infringement of essential procedural requirements	[1988] I-219
2.2.1988	C-213/85	*Commission* v *the Netherlands (Gasunie)* Decision 85/215/EEC, 13.2.1985, OJ L 97, p. 49. Failure to fulfil an obligation arising from the Treaty — Commission Decision 85/215/EEC — Failure to comply within the prescribed period — Action under Article 93(2) — Subject-matter — Commission decision finding an aid to be incompatible with the common market — Period for implementation	[1988] I-281

Date	Case	Parties Decision reference Keywords	ECR page reference
8.3.1988	C-62/87 C-72/87	*Exécutif régional wallon and Glaverbel SA* v *Commission (Glaverbel)* Decision 87/195/EEC, 3.12.1986, OJ L 77, p. 47. Action for annulment — Flat glass industry — Pyrolytic laminated glass — Aid granted by States — Prohibition — Investment aid granted to an undertaking operation in a sector having unused capacity — Commission decision prohibiting the implementation of an aid project — Obligation to state reasons — Information required — Aid which may be considered as compatible with the common market — Aid helping to promote the execution of an important project of European interest — Aid to encourage the development of a sector of the economy — Power of appraisal of the Commission — Consideration by the Commission — Consultation procedure — Observations submitted by interested third parties — Observations not communicated to the authority granting the aid — No reference to those observations in the reasons given for the Commission decision — Infringement of the right to a fair hearing — None	[1988] I-1573
7.6.1988	C-57/86	*Greece* v *Commission* Decision 86/187/EEC, 13.11.1985, OJ L 136, p. 61. Action for annulment — Commission Decision 86/187/EEC — Aid granted by Greece in the form of an interest rebate in respect of the exportation of all products except petroleum products — Inclusion — Appraisal by the Commission for the purposes of the rules on agriculture — Irrelevant — Member States — Obligations — Exercise of powers retained in the monetary field — Unilateral measures prohibited by the Treaty — Not permissible — Aid not deriving from State resources — Aid granted through public or private bodies — Commission decision finding an aid to be incompatible with the common market — Duty to state reasons — Necessary information	[1988] I-2855

Date	Case	Parties Decision reference Keywords	ECR page reference
7.6.1988	C-63/87	*Commission* v *Greece* Decision 86/187/EEC, 13.11.1985, OJ L 136, p. 61. Failure to implement a Commission decision — Commission Decision 86/187/EEC — Aid granted by Greece in the form of an interest rebate in respect of the exportation of all products except petroleum products — Measures adopted by the institutions — Presumption of validity — Commission decision declaring aid incompatible with the common market — Non-implementation — Justification — Implementation absolutely impossible because of financial difficulties with which recipients would be confronted — Unacceptable	[1988] I-2875
13.7.1988	C-102/87	*France* v *Commission (SEB)* Decision 87/303/EEC, 14.1.1987, OJ L 152, p. 27. Action for annulment — Commission decision on a FIM (industry modernisation fund) loan to a brewery — Effect on trade between Member States — Distortion of competition — Aid granted to an undertaking whose activities are confined to the domestic market — No over-capacity	[1988] I-4067
27.9.1988	C-106/87 C-120/87	*Asteris and others* v *Greece and Commission* Action for damages — Subject-matter — Claim for compensation against the Community — Exclusive jurisdiction of the Court — Claim for compensation for damages caused by national authorities in implementing Community law — Jurisdiction of national courts — Judgment of the Court dismissing a claim for compensation against the Community in respect against the national held unlawful — Effects — Action for damages against the national authorities which implemented the unlawful regulation — Permissibility — Condition — Action on grounds other than the unlawfulness of the regulation — Aid granted by States — Concept — Compensation for damage caused by the State for which the State is liable — Exclusion — Agriculture — Common organisation of the markets — Products processed from fruits and vegetables — Aid to tomato concentrate producers — Regulation (EEC) No 381/86 granting Greek producers additional aid by reason of the unlawfulness or prior legislation — Action against the Greek State for compensation for any damage in excess of the amounts paid retrospectively — Permissibility — Limits	[1988] I-5515

Date	Case	Parties Decision reference Keywords	ECR page reference
15.12.1988	C-166/86 C-220/86	*Irish Cement Ltd* v *Commission* Decision 14.7.1986 (unpublished). Action for failure to act and for a declaration that a measure is void — Aid for the construction of a cement manufacturing plant in Northern Ireland — Action brought against a decision confirming a decision which was not contested within the time-limit for bringing proceedings — Inadmissibility — Failure to act — Concept — Measure not considered satisfactory — Excluded	[1988] I-6473
1989			
2.2.1989	C-94/87	*Commission* v *Germany (Alcan)* Decision 86/60/EEC, 14.12.1985, OJ L 72, p. 30. Failure to fulfil an obligation arising from the Treaty — Aid to an undertaking producing primary aluminium — Non-compliance with a Commission decision on State aid — Decision not challenged by way of an application for its annulment — Submissions in defence — Absolute impossibility of implementation — Admissibility — Commission decision finding an aid to be incompatible with the common market — Difficulties of implementation — Obligation on the part of the Commission and the Member State to cooperate in seeking a solution consistent with the Treaty — Recovery of illegal aid — Application of national law — Conditions and limits — Interests of the Community to be taken into consideration	[1989] I-175
17.3.1989	C-303/88R*	*Italy* v *Commission (ENI-Lanerossi)* Decision 89/43/EEC, 26.7.1988, OJ L 16, p. 52. Application for interim measures — Suspension of the operation of a Commission measure — Aid to *ENI-Lanerossi* — Conditions for granting — Serious and irreparable damage suffered by the applicant	[1989] I-801

Date	Case	Parties Decision reference Keywords	ECR page reference
1990			
14.2.1990	C-301/87	*France* v *Commission (Boussac)* Decision 87/585/EEC, 15.7.1987, OJ L 352, p. 42. Action for annulment — Commission Decision 87/585/EEC — Aid to a producer of textiles, clothing and paper products *(Boussac Saint Frères)* — Capital contributions, provision of loans at reduced rates of interest and reduction in social security — Plans to grant aid — Absence of notification — Implementation before a final decision by the Commission — Commission's power to issue an order — Refusal to comply with order — Consequences — Community law — Principles — Legal certainty — Right to be heard — Whether applicable to administrative procedures initiated by the Commission — Examination by the Commission of plans to grant aid — Abnormal length of examination — Justification — Attitude of the Member State in question — Decision of the Commission that aid which has been not notified is incompatible with the common market — Obligation to state reasons — Financial assistance granted to an undertaking by a Member State — Criterion for appraisal — Position of the undertaking with regard to private capital markets — Trading conditions affected to an extent contrary to the common interest	[1990] I-307
21.2.1990	C-74/89	*Commission* v *Belgium* Decision 84/111/EEC, 30.11.1983, OJ L 62, p. 18. Failure to fulfil an obligation arising from the Treaty — Article 93(2) — Aid to a synthetic fibre producer — Member States — Obligations — Failure to fulfil an obligation arising from the Treaty — Justification — Not permissible — Recovery — Non-implementation	[1990] I-491
20.3.1990	C-21/88	*Du Pont de Nemours Italiana* v *Carrara* Preliminary ruling — Interpretation — Articles 30, 92 and 93 — Public supply contracts — Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Reservation of a proportion of a public supply contract to undertakings located in a particular region of the national territory — Not permissible — Measure benefiting only part of domestic production — No effect — Measure which may be defined as aid within the meaning of Article 92 — Applicability of the prohibition on measures having equivalent effect not precluded by that possibility	[1990] I-889

Date	Case	Parties Decision reference Keywords	ECR page reference
21.3.1990	C-142/87	*Belgium* v *Commission (Tubemeuse)* Decision 87/507/EEC, 4.2.1987, OJ L 227, p. 45. Action for annulment — Commission Decision 87/507/EEC — Aid to a steel tube undertaking — Plans to grant aid — Lack of notice — Implemented before the Commission's final decision — Commission's power to issue an order — Consequences — Financial assistance granted by a Member State to an undertaking — Criteria for appraisal — Undertaking's position in regard to the capital market — Export aid — Effect on trade between Member States — Community law — Principles — Application to administrative procedures initiated by the Commission — Consideration of aid projects — Scope — Aid which may be regarded as compatible with the common market — Commission's discretion — Reference to the Community context — Withdrawal by way of recovery — Infringement of the principle of proportionality — None — Application of national law — Conditions and limits	[1990] I-959
12.7.1990	C-169/84	*CdF Chimie AZF* v *Commission* Action for annulment — Tariff system in the Netherlands for the supply of natural gas — Preferential tariff essentially favouring a specific category of undertakings and not justified on economic grounds — Natural or legal persons — Measures of direct and individual concern to them — Commission decision on a complaint concerning an infringement of Community rules — Procedural guarantees accorded to applicant undertaking — Right of action — Commission decision terminating a procedure investigating the grant of aid	[1990] I-3083
12.7.1990	C-35/88	*Commission* v *Greece* Failure to fulfil an obligation arising from the Treaty — Council Regulation (EEC) No 2727/75 — Market in feed grain — Aid granted by States — Assessment of an aid scheme in the light of Community rules other than the rules under Article 92 — Infringement of the rules of a common organisation of the agriculture markets — Price formation — National measures — Incompatible with Community legislation — Plans to grant or alter aid — Notification to the Commission — Member States — Obligation — Failure to fulfil an obligation arising from the Treaty — Cooperation in investigations into failure to fulfil obligations	[1990] I-3125

Date	Case	Parties Decision reference Keywords	ECR page reference
20.9.1990	C-5/89	*Commission* v *Germany (BUG-Alutechnik)*	[1990] I-3437
		Failure to fulfil an obligation arising from the Treaty — Commission Decision 88/174/EEC — Undertaking producing semi-finished and finished aluminium products — Recovery of illegal aid — Application of national law — Aid granted contrary to the procedural rules in Article 93 — Possible legitimate expectations of recipients — Protection — Conditions and limits — Interests of the Community to be taken into consideration	
6.11.1990	C-86/89	*Italy* v *Commission*	[1990] I-3891
		Action for annulment — Wine sector — Aid for the use of rectified concentrated grape must — Prohibition — Support of the policy pursued under a common organisation of the market — Unacceptable justification	
1991			
19.2.1991	C-375/89	*Commission* v *Belgium*	[1991] I-383
		Failure to fulfil an obligation — Failure to comply with the judgement in Case 5/86 — Period for compliance — Aid to a producer of polypropylene fibre and yarn — Incompatibility with the common market — Recovery within the competence of the Flemish region	

Date	Case	Parties Decision reference Keywords	ECR page reference
21.3.1991	C-303/88	*Italy* v *Commission (ENI-Lanerossi)* Decision 89/43/EEC, 26.7.1988, OJ L 16, p. 52. Action for annulment — Commission Decision 89/43/EEC — Textiles/clothing sector — Aid granted through a body controlled by the State — Included — Financial support granted by a Member State to an undertaking — Criterion for assessment — Reasonableness of the transaction for a private investor pursuing a medium- or long-term policy — Effect on trade between Member States — Distortion of competition — Aid granted to an undertaking whose operations are restricted to the domestic market — Aid of a small amount in a sector in which there is vigourous competition — Aid which may be considered as compatible with the common market — Discretion of the Commission — Reference to the Community context — Aid granted contrary to the procedural rules laid down in Article 93 — Legitimate expectation on the part of the Member State granting the aid — Not permissible — Plans to grant aid — Failure to notify — Implementation before the final decision of the Commission — Refusal to comply — Consequences — Commission decision finding an aid to be incompatible with the common market — Difficulty of implementation — Insufficient statement of grounds for the order for recovery — Impossibility of recovering the aid — Obligation of the part of the Commission and the Member State to cooperate in finding a solution which is consistent with the Treaty	[1991] I-1433
21.3.1991	C-305/89	*Italy* v *Commission (Alfa Romeo)* Decision 89/661/EEC, 31.5.1989, OJ L 394, p. 9. Action for annulment — Motor vehicle sector — Aid granted through the intermediary of a State-controlled body — Inclusion — Financial assistance granted by a Member State to an undertaking — Assessment criterion — Reasonable nature of the operation for a private investor pursuing a medium- or long-term policy — Effect on trade between Member States — Impairment of competition — Aid granted to an undertaking operating in a sector where there is surplus production capacity and effective competition — Incompatibility with the common market — Failure to notify — Recovery of unlawful aid — Obligation flowing from the unlawful nature of the aid	[1991] I-1603

Date	Case	Parties Decision reference Keywords	ECR page reference
8.5.1991	C-356/90R*	*Belgium* v *Commission* Decision 90/627/EEC, 4.7.1990, OJ L 338, p. 21. Application for interim measures — Suspension of the operation of a Commission measure 90/627 — Aid to shipbuilding — Common maximum ceiling — Interim measures — Conditions for granting — Serious and irreparable damage suffered by the applicant	[1991] I-2423
16.5.1991	C-263/85	*Commission* v *Italy* Failure to fulfil an obligation arising from the Treaty — Aid for the purchase of vehicles of domestic manufacture — Free movement of goods — Quantitative restrictions — Measure having equivalent effect — Reservation of a part of a public contract to undertakings established in a given region of the national territory — Not permissible — Measure favouring only part of national production — No impact — Measure which may be defined as aid within the meaning of Article 92 — Possibility not excluding the applicability of the prohibition of measures having equivalent effect	[1991] I-2457
17.5.1991	C-313/90R*	*Comité international de la rayonne et des fibres synthétiques* v *Commission* Application for interim measures — Refund of aid for the creation of a manufacturing unit for polyester fibres for industrial purposes — Compatibility of the aid with the common market — Application for measures going beyond the scope of the main proceedings and requiring a prima facie assessment of matters not within their purview — Dismissal	[1991] I-2557
11.7.1991	C-351/88	*Laboratori Bruneau* v *USL RM* Preliminary ruling — Interpretation — Articles 30 and 92 — Public supply contracts — Free movement of goods — Quantitative restrictions — Measure having equivalent effect — Reservation of part of a public contract to undertakings established in a given region of the national territory — Not permissible — Measure favouring only part of national production — Measure capable of being classified as aid within the meaning of Article 92 — Possibility not excluding the applicability of the prohibition of measures having equivalent effect	[1991] I-3641

Date	Case	Parties Decision reference Keywords	ECR page reference
3.10.1991	C-261/89	*Italy* v *Commission (Aluminia-Comsal)* Decision 90/224/EEC, 24.5.1989, OJ L 118, p. 42. Action for annulment — Aid to aluminium undertakings — Capital contributions — Financial assistance granted by a Member State to an undertaking — Criterion for assessment — Reasonable nature of the operation for a private investor — Financial contribution intended for productive investment — Irrelevance — Plans to grant aid — Consideration by the Commission — Factors to be considered — Prior decision — New facts	[1991] I-4437
21.11.1991	C-354/90	*Fédération nationale du commerce extérieur et des produits alimentaires* v *France* Preliminary ruling — Interpretation — Article 93(3) — Plans to grant aid — Prohibition of giving effect to aid before the final decision of the Commission — Direct effect — Scope — Obligations of national courts — Role reserved for the Commission by the Treaty — No effect — Grant of aid in contravention of the prohibition contained in Article 93(3) — Subsequent Commission decision declaring the aid to be compatible with the common market — Effect — Regularisation *ex post facto* of national legal measures relating to the grant of the aid — None	[1991] I-5505
4.12.1991	C-225/91R*	*Matra SA* v *Commission (Matra)* Decision not published. Application for interim measures — Suspension of the operation of a Commission measure — Regional aid in the motor-vehicle sector — Aid towards the establishment of an assembly plant for multipurpose vehicles — Interim measures — Conditions for granting — Serious and irreparable damage to the applicant	[1991] I-5823

Date	Case	Parties Decision reference Keywords	ECR page reference
1992			
4.2.1992	C-294/90	*BAe, Rover* v *Commission (Rover)* Decision 89/58/EEC, 13.7.1988, OJ L 25, p. 92; Decision 91/C/21/02, 27.6.1990, OJ C 21, p. 2. Action for annulment — Commission decision imposing conditions on the authorisation to pay aid to an undertaking — Subsequent payment to the same undertaking of additional aid beyond the terms of the authorisation granted — Procedures open to the Commission under Article 93(2) — Institution of proceedings before the Court under Article 93(2)(2) or of an examination procedure under Article 93(2)(1) — Illegality of a decision establishing the incompatibility with the common market and ordering its reimbursement without having recourse to the procedure laid down by Article 93(2)(1)	[1992] I-493
11.3.1992	C-78/90 C-83/90	*Sociétés compagnie commerciale* v *Receveur principal des douanes* Preliminary ruling — Interpretation — Articles 3, 5, 6, 12, 13, 30, 31(1), 37(2), 92 and 95 — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Parafiscal charge levied on domestic and imported products but benefiting only domestic products — Included — Conditions — Basis for classification — Inapplicability of Article 30 — State monopoly of a commercial character — Parafiscal charge unconnected with the exercise of the exclusive rights existing under a monopoly — Inapplicability of Article 37	[1992] I-1847
7.4.1992	C-61/90	*Commission* v *Greece* Failure to fulfil an obligation arising from the Treaty — Regulation (EEC) No 2727/75 — Common organisation of the cereal market — Price formation — National measures — Incompatible with Community legislation — Plans to grant or alter aid — Notification to the Commission — Obligation — Non-compliance — Reasoned opinion — Application originating court proceedings — Identical nature of arguments and submissions	[1992] I-2407

Date	Case	Parties Decision reference Keywords	ECR page reference
11.6.1992	C-149/90 C-150/90	*Sanders Adour SNC* v *Directeur des services fiscaux*	[1992] I-3899
		Preliminary ruling — Interpretation — Articles 12, 92 and 95 and the rules of the common agricultural policy — Common organisation of the market — Cereals — Price system — National charge on products for which there is a common organisation of the market — Inadmissibility where the workings of the common organisation might be disturbed — Determination by the national court — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Parafiscal charge definitively levied on the importation of certain products but refunded if such products are manufactured on national territory — Classification of charge having equivalent effect — Parafiscal charge levied on domestic products and imported products alike but benefiting only domestic products — Tests — Inclusion — Conditions	
30.6.1992	C-312/90	*Espagne* v *Commission (Cenemesa)* Decision 3.8.1990 (unpublished).	[1992] I-4117
		Action for annulment — Aid to a private group of producers of electrical equipment — Letter initiating the procedure under Article 93(2) — Contestable act — Act having legal consequences — Decision to initiate, in respect of a State aid measure, proceedings to establish whether new aid measures are compatible with the common market — Classification of the disputed aid	
30.6.1992	C-47/91	*Italy* v *Commission (Italgrani)* Decision 88/318/EEC, 2.3.1988, OJ L 143, p. 37; Decision 90/C/315/06, 23.11.1990, OJ C 315, p. 7 and Decision 91/C/11/06, OJ C 11, p. 32.	[1992] I-4145
		Action for annulment — Aid to the *Italgrani* company under a framework contract — Letter initiating the procedure under Article 93(2) — Contestable act — Act having legal consequences — Decision to initiate, in respect of a State aid measure, proceedings to establish whether new aid measures are compatible	

Date	Case	Parties Decision reference Keywords	ECR page reference
12.10.1992	C-295/92R*	*Landbouwschap* v *Commission* Decision No 43/92, 29.4.1992, OJ C 184, p. 10. Application for interim measures — Suspension of the operation of a measure — Article 93(2) proceedings initiated — Action for annulment — Draft law amending the law on environmental protection — Natural or legal persons — Measures of direct and individual concern to them — Commission decision not to raise any objections to a State aid — Economic operator not in competition with the recipient of the aid — Inadmissibility	[1992] I-5003
12.11.1992	C-134/91 C-135/91	*Kerafina and others* v *Greece* Decision 88/167/EEC, 7.10.1987, OJ L 76, p. 18. Preliminary ruling — Interpretation — Council Directive 77/91/EEC and Commission Decision 88/167/EEC — Free movement of persons — Right of establishment — Companies — Alteration of the capital of a public limited company — Direct effect of Article 25(1) of Directive 77/91/EEC — National rules providing for the adoption by administrative act of a decision to increase the capital of a company in financial difficulties — Inadmissibility — Aid granted by States — Prohibition — Derogations — Commission's discretion — Limits	[1992] I-5699
18.11.1992	C-222/92R*	*SFEI and others* v *Commission* Decision 10.3.1992 (unpublished). Action for annulment — Decision to take no further action in a case of infringement of Article 92 and following — Withdrawal of the decision — Decision unnecessary	
16.12.1992	C-17/91	*Lornoy en Zonen* v *Belgium* Preliminary ruling — Interpretation — Articles 12, 13, 30, 92 and 95 — Parafiscal charges — Compulsory contribution to a fund for animal health and livestock production — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Compulsory contribution in the form of a parafiscal charge levied on domestic products and imported products but benefiting only domestic products — Tests — Inapplicability of Article 30 — Rules of the Treaty — Direct effect — Jurisdiction of national courts — Scope	[1992] I-6523

Date	Case	Parties Decision reference Keywords	ECR page reference
16.12.1992	C-114/91	*Public Department* v *Claeys*	[1992] I-6559
		Preliminary ruling — Interpretation — Articles 9 and 12 — Parafiscal charges — Compulsory contribution to a national marketing office for agricultural and horticultural products — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Compulsory contribution in the form of a parafiscal charge levied on domestic products and imported products but benefiting only domestic products — Tests — Inapplicability of Article 30 — Rules of the Treaty — Direct effect — Jurisdiction of national courts — Scope	
16.12.1992	C-144/91 C-145/91	*Demoor Gilbert en Zonen* v *Belgium*	[1992] I-6613
		Preliminary ruling — Interpretation — Articles 12, 92 and 95 — Parafiscal charges — Compulsory contribution to a fund for animal health and livestock production — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Compulsory contribution in the form of a parafiscal charge levied on domestic products and imported products but benefiting only domestic products — Tests — Inapplicability of Article 30 — Rules of the Treaty — Direct effect — Jurisdiction of national courts — Scope	
1993			
17.3.1993	C-72/91 C-73/91	*Sloman Neptun Schiffarts AG* v *Bodo Ziesemer*	[1993] I-887
		Preliminary ruling — Interpretation — Articles 92 and 117 — National shipping legislation — Employment of foreign seafarers without a permanent abode or residence in FRG employed at rates of pay on conditions of employment less favourable than those applicable to German seafarers — Aid granted by States — Concept — Advantage conferred without any transfer from public resources — Exclusion	

Date	Case	Parties Decision reference Keywords	ECR page reference
24.3.1993	C-313/90	*CIRFS and others* v *Commission* Decision 1.8.1990 (unpublished).	[1993] I-1125
		Action for annulment — Aid towards the establishment of a high-resistance polyester yarn unit — Prior notification required — Procedure — Intervention — Objection of inadmissibility not raised by the defendant — Inadmissibility — Acts open to challenge — Act having definitive legal consequences — Decision to refuse to initiate, in respect of a State aid measure, proceedings to establish whether new aid measures are compatible with the common market — Natural or legal persons — Measures of direct and individual concern to them — Decision addressed to a Member State excluding a State aid from the scope of the obligation to notify — Application brought by an association including the main international manufacturers in the industry and maintaining active contact with the Commission regarding aid in the industry — Admissibility — Aid granted by States — Rules for a particular industry set out by the Commission in a notice and accepted by the Member States — Binding effect — Implicit amendment by an individual decision — Inadmissibility — Precedent set	
28.4.1993	C-364/90	*Italy* v *Commission (Mezzogiorno)* Decision 91/175/EEC, 25.7.1990, OJ L 86, p. 23.	[1993] I-2097
		Action for annulment — Commission Decision 91/175/EEC — Special aid for certain areas of the Mezzogiorno affected by natural disasters — Prohibition — Derogations — Duty of cooperation on Member State seeking exemption	
4.5.1993	C-17/92	*Federacion de Distribuidores Cinematograficos* v *Spain*	[1993] I-2239
		Preliminary ruling — Interpretation — Articles 30 to 36, 59 and 92, Council Directives 63/607/EEC and 65/264/EEC — National rules encouraging the distribution of national films — Freedom to supply services — Provisions of the Treaty — Scope — Screening in a Member State, in cinemas or on television, of cinema films produced in other Member States — Inclusion	

Date	Case	Parties Decision reference Keywords	ECR page reference
18.5.1993	C-356/90 C-180/91	*Belgium* v *Commission* Decision 90/627/EEC, 4.7.1990, OJ L 338, p. 21; Decision 91/375/EEC, 13.3.1991, OJ L 203, p. 105. Action for annulment — Commission Decisions 90/627/EEC and 91/375/EEC — Aid to shipbuilding — Prohibition — Derogations — Scope — Direct and indirect aid — Examination by the Commission — Assessment under Article 92 — Article 93(2) proceedings — Compliance with a general ceiling — Incompatibility with the common market of any aid exceeding the ceiling — Commission's role — Establishing that the ceiling has been complied with	[1993] I-2323
19.5.1993	C-198/91	*W. Cook* v *Commission* Decision 29.5.1991, NN 12/91 (unpublished). Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision addressed to a Member State, finding that a State aid measure is compatible with the common market — Actions brought by 'parties concerned' within the meaning of Article 93(2) — Admissibility — Plans to grant or alter aid — Examination by the Commission — Preliminary stage and stage at which comments are invited — Difficulties in determining whether aid is compatible — Obligation on the Commission to initiate proceedings giving parties the opportunity to submit their comments	[1993] I-2487

Date	Case	Parties Decision reference Keywords	ECR page reference
10.6.1993	C-183/91	*Commission* v *Greece (export tax relief)* Decision 89/659/EEC, 3.5.1989, OJ L 349, p. 1. Action for failure to fulfil an obligation arising from the Treaty — Commission Decision 89/659/EEC — Tax exemption on export earnings — Failure to comply with a Commission decision concerning State aid — Decision not challenged by means of an action for annulment — Arguments advanced in defence — Challenge to the lawfulness of the decision — Inadmissibility — Absolute impossibility of implementation — Admissibility — Recovery of aid unlawfully granted — Possibility of recovery by means other than retroactive taxation contrary to the general principles of Community law — Absolute impossibility of implementation — None — Aid granted in infringement of the procedural rules in Article 93 — Legitimate expectations of recipients — Protection — Conditions and limits — Commission decision finding that an aid is incompatible with the common market — Difficulty of implementation — Obligation on the part of the Commission and the Member State to cooperate in finding that a solution is consistent with the Treaty	[1993], I-3131

Date	Case	Parties Decision reference Keywords	ECR page reference
15.6.1993	C-225/91	*Matra SA* v *Commission* Decision 16.7.1991 (unpublished).	[1993] I-3203
		Action for annulment — Aid towards the establishment of an assembly plant for multipurpose vehicles — Complaint by a competitor — Failure to initiate examination proceedings — Procedure — Intervention — Objection of inadmissibility not raised by the defendant — Inadmissibility — Natural or legal persons — Measures of direct and individual concern to them — Commission decision addressed to a Member State, finding that a State aid measure is compatible with the common market — Actions brought by 'parties concerned' within the meaning of Article 93(2) — Admissibility — Plans to grant or later aid — Initiation of proceedings — Commission's discretion — Reference to the Community context — Review by the Court — Limits — Preliminary stage and stage at which comments are invited — Compatibility of an aid with the common market — Difficulties in assessment — Obligation on the Commission to initiate proceedings giving parties the opportunity to submit their comments — Scale of the investment or aid — Irrelevant — Decision finding compatible with the common market an aid measure whose consequences are contrary to specific provisions of the Treaty, in particular those on competition — Inadmissibility — Obligation to await the outcome of competition proceedings before reaching a decision on the compatibility of an aid measure — None	
15.6.1993	C-213/91	*Abertal Sat* v *Commission*	[1993] I-3177
		Action for annulment — Commission Regulations (EEC) No 1304/91 and (EEC) No 2159/89 — Aid measures for nuts and locust beans — Natural or legal persons — Measures of direct and individual concern to them — Amendment to detailed rules for their application — Admissibility	
15.6.1993	C-264/91	*Abertal Sat* v *Council*	[1993] I-3265
		Action for annulment — Council Regulations (EEC) No 2145/91 and (EEC) No 790/89 — Aid measures for nuts and locust beans — Natural or legal persons — Measures of direct and individual concern to them — Regulation amending the maximum amount of aid for quality and marketing improvement in the nut and locust bean sector — Action for annulment brought by producer's organisations — Admissibility	

Date	Case	Parties Decision reference Keywords	ECR page reference
16.6.1993	C-325/91	*France* v *Commission*	[1993] I-3283
		Action for annulment — Commission Directive 80/723/EEC — Public undertakings in the manufacturing sector — Transparency of financial relations between Member States and public undertakings — System of information — Act open to challenge — Acts having legal consequences — Commission communication purporting to clarify the application of Articles 92 and 93 and of Article 5 of Directive 80/723/EEC but in fact imposing new obligations on the Member States — Community law — Principles — Legal certainty — Community rules — Need for clarity and certainty — Express indication of legal basis	
2.8.1993	C-266/91	*Celulose Beira Industrial* v *Fazenda Publica*	[1993] I-4337
		Preliminary ruling — Interpretation — Articles 9, 12 and following, 30, 92 and 95 — Parafiscal charge on chemical pulp — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Parafiscal charge levied on domestic products and imported products alike but benefiting only domestic products — Tests — Offsetting the burden on domestic products — Inapplicability of Article 30 — Inclusion — Conditions	

Date	Case	Parties Decision reference Keywords	ECR page reference
6.10.1993	C-55/91	*Italy* v *Commission* Decision 90/644/EEC, 30.11.1990, OJ L 350, p. 82. Action for annulment — Commission Decision C(90)2337 — Agriculture — Clearance of EAGGF accounts — Financial year 1988 — Commission entitled to have checks carried out by its own officials — Refusal to charge to the EAGGF expenditure arising out of irregularities in the application of Community rules — Alleged irregularity in the calculation of sums due to the EAGGF — Denial by Member State — Burden of proof — Common agricultural policy — EAGGF financing — Compliance of expenditure with Community rules — Verification — Limits — Refusal to cover expenditure in the absence of verification by the national authorities — Challenge based on the impossibility of recovery in the absence of proven and substantial irregularities — No effect — Obligation on the Commission to refuse to charge irregular expenditure to the EAGGF — Irregularities tolerated for one financial year on ground of equity — Strict application of the rules in the following financial year — Infringement of the principles of legal certainty and the protection of legitimate expectations — None — Decision on the clearance of accounts — Time limits — Failure to comply — Absence of liability on the part of the Commission except for negligence	[1993] I-4813
27.10.1993	C-72/92	*Scharbatke* v *Germany* Preliminary ruling — Interpretation — Articles 9, 12, 92 and 95 — Parafiscal charges — Compulsory contributions to support a marketing fund for agricultural, forestry and food products — Free movement of goods — Customs duties — Charges having equivalent effect — Internal taxation — Compulsory contributions constituting a parafiscal charge levied on domestic products and imported products alike but benefiting only domestic products — Tests — Account not taken of similar charge levied in the Member State of exportation — Point not decisive — Inclusion — Conditions	[1993] I-5509

Date	Case	Parties Decision reference Keywords	ECR page reference
30.11.1993	C-189/91	*Kirsammer-Hack* v *Nurhan Sidal*	[1993] I-6185
		Preliminary ruling — Interpretation — Article 92(1) and Council Directive 76/207/EEC — Domestic rules providing protection against unfair dismissal — Equal treatment for men and women — Exclusion of small businesses from the ambit of protection against unfair dismissal — Advantage conferred without any transfer from public resources — Exclusion — Social policy — Male and female workers — Access to employment and working conditions — Equal treatment — Domestic rules excluding small businesses from a national system of protection of workers against unfair dismissal — Workforce calculated by excluding employees with short working hours — Admissible where it is not established that the undertakings excluded employ a greater number of women than men, and in the light of the economic objectives pursued	
7.12.1993	C-6/92	*Federazione sindacale italiana dell'industria estrattive (Federmineraria) and others* v *Commission* Decision 91/523/EEC, 18.9.1991, OJ L 283, p. 20.	[1993] I-6357
		Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision prohibiting State aid towards the rail transport of mineral ores and products — Action brought by undertakings extracting or processing ores — Inadmissibility	
1994			
9.3.1994	C-188/92	*TWD Textilwerke Deggendorf* v *Germany* Decision 86/509/EEC, OJ L 300, 21.5.1986, p. 34.	[1994] I-833
		Preliminary reference seeking assessment of validity — Action challenging internal measures implementing a Commission decision — Definitive nature of the decision *vis-à-vis* the recipient of the aid to which it relates	
15.3.1994	C-387/92	*Banco Exterior de Espana* v *Ayuntamiento de Valencia*	[1994] I-877
		Preliminary ruling — Interpretation — Articles 86, 90 and 92 — Public undertakings — Tax exemption — Abuse of a dominant position — State aid	

Date	Case	Parties Decision reference Keywords	ECR page reference
13.4.1994	C-324/90 C-342/90	*Germany* v *Commission* Decision 91/389/EEC, 18.7.1990, OJ L 215, p. 1. Action for annulment — Decision on aid granted by the city of Hamburg — Repayment	[1994] I-1173
9.8.1994	C-44/93	*Les assurances du crédit Namur* v *Office national du ducroire and others* Reference for a preliminary ruling — Brussels Court of Appeal — State aid — Interpretation of Articles 92 and 93 of the EC Treaty — Public credit insurance undertaking enjoying advantages accorded by the Belgian authorities and authorised to extend its activities to include credit insurance transactions involving exports to the other Member States of the Community — Concepts of new aid and existing aid	[1994] I-3829
14.9.1994	C-278/92 C-279/92 C-280/92	*Spain* v *Commission* Decision 92/317/EEC, 25.3.1992, OJ L 171, p. 54; Decision 92/318/EEC, 25.3.1992, OJ L 172, p. 76; Decision 92/321/EEC, 25.3.1992, OJ L 176, p. 57. Action for annulment — State aid to public undertakings in the textile and footwear sectors — Capital contributions — Concept — Financial assistance granted to an undertaking by a Member State — Criterion of assessment — Reasonableness of the operation for a private investor pursuing a medium or long-term policy — Not reasonable since it concerns a reinvestment at greater cost than liquidation before transfer of the undertaking — Effect on trade between Member States — Impairment of competition — Prohibition — Derogations — Aid intended for the development of specified regions — Aid granted for use by undertakings in difficulty on the basis of ad hoc decisions — Criteria for inclusion — Aid which may fall within the scope of the derogation provided for in Article 92(3)(c) of the Treaty — Aid to an undertaking in difficulty which does not form part of a restructuring programme designed to reduce or redirect its activities — Exclusion — Recovery of unlawful aid — Breach of the principles of proportionality, protection of legitimate expectations and legal certainty — None	[1994] I-4103

Date	Case	Parties Decision reference Keywords	ECR page reference
14.9.1994	C-42/93	*Spain* v *Commission* Decision 93/133/EEC, 4.11.1992, OJ L 55, p. 54. Action for annulment — State aid to a public undertaking in the agricultural processing industry — Injection of capital — Concept — Financial assistance granted to an undertaking by a Member State — Criterion of assessment — Reasonableness of the operation for a private investor pursuing a medium- or long-term policy — Prohibition — Derogations — Aid granted not contributing to the development of a region or a sector and capable of affecting trade between Member States — Aid not within the derogations laid down in Article 92(3)(a) and (c) of the Treaty	[1994] I-4175
5.10.1994	C-47/91	*Italy* v *Commission* Commission Decision, OJ C 11, p. 32. Action for annulment — State aid — General scheme of aid approved by the Commission — Notification of individual implementing measures — Obligation — None — Individual aid measure presented as coming within the scope of the approval — Assessment primarily in the light of the approval decision, and only on an ancillary basis under Article 92 of the Treaty — Application of scheme of new aid and prohibition on implementation before the final decision — Conditions	[1994] I-4635
5.10.1994	C-400/92	*Germany* v *Commission* Decision 92/569/EEC, 31.7.1992, OJ L 367, p. 29. Action for annulment — State aid — Prohibition — Derogations — Aid to shipbuilding — Directive 90/684 — Derogation criteria — Aid granted as development assistance to a developing country — Incompatibility with the common market of aid not pursuing a development objective — Role of the Commission — Determination as to whether the development objective is genuine	[1994] I-4701

Date	Case	Parties Decision reference Keywords	ECR page reference
1995			
23.2.1995	C-349/93	*Commission* v *Italy* Decision 89/661/EEC, 31.5.1989, OJ L 394, p. 9. Proceedings concerning failure by Member States — State aid — Commission decision determining that an aid is incompatible with the common market — Difficulties of implementation — Failure to implement a Commission decision concerning State aid — Validity of the decision deriving from dismissal of an action for its annulment — Plea in defence — Absolute impossibility of implementation — Obligation of the Commission and the Member State to cooperate in finding a solution conforming to the Treaty	[1995] I-343
23.2.1995	T-488/93	*Hanseatische Industrie* v *Commission* Decision 93/412/EEC, 6.4.1993, OJ L 185, p. 43. Action for annulment — Procedure — Allocation of jurisdiction between the Court of Justice and the Court of First Instance — Proceedings instituted by a natural or legal person on the basis of the fourth paragraph of Article 173 of the EC Treaty concerning the implementation of the rules on State aid and pending before the Court of First Instance — Proceedings for the annulment of the same act, but instituted by a Member State, pending before the Court of Justice — In the interest of the proper administration of justice for the Court of Justice to consider the arguments of the natural or legal person — Disclaimer of jurisdiction by the Court of First Instance	[1995] II-469
23.2.1995	T-490/93	*Bremer Vulkan* v *Commission* Decision 93/412/EEC, 6.4.1993, OJ L 185, p. 43. Action for annulment — Procedure — Allocation of jurisdiction between the Court of Justice and the Court of First Instance — Proceedings instituted by a natural or legal person on the basis of the fourth paragraph of Article 173 of the EC Treaty concerning the implementation of the rules on State aid and pending before the Court of First Instance — Proceedings for the annulment of the same act, but instituted by a Member State, pending before the Court of Justice — In the interest of the proper administration of justice for the Court of Justice to consider the arguments of the natural or legal person — Disclaimer of jurisdiction by the Court of First Instance	[1995] II- 477

Date	Case	Parties Decision reference Keywords	ECR page reference
4.4.1995	C-348/93	*Commission* v *Italy* Decision 89/661/EC, 31.1989, OJ L 394, p. 9. Proceedings concerning failure by Member States — Public holding company — Failure to comply with a Commission decision concerning State aid — Validity of the decision resulting from dismissal of an action for annulment — Plea in defence — Absolute impossibility of implementation — Commission decision declaring aid to be incompatible with the common market — Difficulties in implementation — Obligation on the Commission and the Member State to cooperate in seeking a solution consistent with the Treaty — Determination of the obligations of the Member State — Obligation to recover — Scope — Re-establishment of the previously existing situation	[1995] I-673
4.4.1995	C-350/93	*Commission* v *Italy (ENI—Lanerossi)* Decision 89/43/EEC, 26.7.1988, OJ L 16/89, p. 52. Proceedings concerning failure by Member States — Public holding company — Failure to comply with a Commission decision concerning State aid — Validity of the decision resulting from dismissal of an action for annulment — Plea in defence — Absolute impossibility of implementation — Commission decision declaring aid to be incompatible with the common market — Difficulties in implementation — Obligation on the Commission and the Member State to cooperate in seeking a solution consistent with the Treaty — Determination of the obligations of the Member State — Obligation to recover — Scope — Re-establishment of the previously existing situation	[1995] I-699

Date	Case	Parties Decision reference Keywords	ECR page reference
27.4.1995	T-435/93	*Association of Sorbitol Producers and others* v *Commission* Decision 91/474/EEC, 16.8.1991, OJ L 254, p. 14. Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision authorising the payment of State aid to an undertaking operating in a market characterised by a small number of producers and surplus capacity — Competitor undertaking — Right of action — Commission — Principle of collegiality — Scope — State aid — General scheme of aids approved by the Commission — Individual aid presented as coming under the approval — Examination by the Commission — Assessment primarily in the light of the approval decision — Commission decision authorising payment of an individual aid covered by a previously approved general scheme of aids — Decision requiring the examination of complex problems — Adoption under the habilitation procedure — Not permissible — Commission decision ruling on the permissibility of a State aid — Adoption by the college of Commissioners required — Amendment after adoption — Unlawfulness — Acts of the institutions — Non-existent act — Concept — Commission act within the competence of the college and erroneously adopted under the habilitation procedure — Not included	[1995] II-1281

Date	Case	Parties Decision reference Keywords	ECR page reference
27.4.1995	T-442/93	*Association des Amidonneries and others* v *Commission and Italgrani* Decision 91/474/EEC, 16.8.1991, OJ L 254, p. 14. Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision authorising the payment of State aid to an undertaking operating in a market characterised by a small number of producers and surplus capacity — Competitor undertaking — Right of action — Commission — Principle of collegiality — Scope — State aid — General scheme of aids approved by the Commission — Individual aid presented as coming under the approval — Examination by the Commission — Assessment primarily in the light of the approval decision — Commission decision authorising payment of an individual aid covered by a previously approved general scheme of aids — Decision requiring the examination of complex problems — Adoption under the habilitation procedure — Not permissible — Commission decision ruling on the permissibility of a State aid — Adoption by the college of Commissioners required — Amendment after adoption — Unlawfulness — Acts of the institutions — Non-existent act — Concept — Commission act within the competence of the college and erroneously adopted under the habilitation procedure — Not included	[1995] II-1329
27.4.1995	T-443/93	*Casillo Grani* v *Commission* Decision 91/474/EEC, 16.8.1991, OJ L 254, p. 14. Actions for annulment — Interest in bringing proceedings — Applicant contesting a decision authorising national aid in favour of a competitor — Applicant subsequently declared bankrupt but before payment of the aid — No longer any interest in bringing proceedings — No need to give judgment	[1995] II-1375

Date	Case	Parties Decision reference Keywords	ECR page reference
8.6.1995	T-459/93	*Siemens* v *Commission* Decision 92/483/EEC, 24.6.1992, OJ L 288, p. 25. Action for annulment — Procedure — Intervention — Application for leave to intervene in support of the form of order sought by one of the parties but advancing different arguments — Admissibility Acts of the institutions — Statement of reasons — Obligation — Scope — Decision applying the competition rules — State aid — Prohibition — Derogations — Aid falling within the derogation provided for by Article 92(3)(c) of the Treaty — Operating aid — Excluded — Recovery of illegally granted aid — Application of national law — Possible legitimate expectations on the part of the recipients — Protection — Conditions and limitations — Interests of the Community to be taken into account — Deduction from the sum to be recovered of tax paid — Whether permissible — Breach of the principle of proportionality — None — Payment of interest justified by the need to restore the situation previously obtaining — Date from which interest is payable — Fixed by the Commission as the date of payment of the aid	[1995] II-1675
29.6.1995	C-135/93	*Spain* v *Commission* Decision 91/C 81/05, OJ 1991 C 81, p. 4. Action for annulment — Plea of illegality — Plea raised, in an action for the annulment of a decision, against a previous decision not challenged within the time limit — Inadmissible — Measures against which actions may be brought — Definition — Measures producing legal effects — Commission decision extending the validity of the Community framework for State aid in an economic sector beyond its expiry date — Necessary temporal limitation — State aid — Examination by the Commission — Community law — Interpretation — Methods	[1995] I-1651

Date	Case	Parties Decision reference Keywords	ECR page reference
6.7.1995	T-447/93 T-448/93 T-449/93	*AITEC and British Cement and Titan Cement* v *Commission and Greece and Heracles General Cement* Decision 92/C1/03, 1.8.1994, OJ C 1, p. 4. Actions for annulment — State aid — Remedying of a serious disturbance in the economy of a Member State — Authorisation of a general scheme — Conditional on notification of individual cases — Examination of the Community context in relation to individual cases — Economic assessment — Natural or legal persons — Measures of direct and individual concern to them — Decision of the Commission in response to a complaint that the Community rules have been infringed — Decision of the Commission finding aid compatible with the Treaty — Procedural guarantees available to complainant undertakings — Right to bring an action — Conditions — Action brought by a professional association which participated in the administrative procedure with a view to defending therein the interests of its members, to whom the matter is of direct and individual concern — Admissible — General aid scheme approved by the Commission — Approval conditional on notification of individual significant cases with a view to an examination of their impact on intra-Community trade and competition — Commission obliged to undertake the examination provided for — Examination by the Commission — Aid granted to Greek undertakings — Protocol No 7 to the Act of Accession of the Hellenic Republic — Scope	[1995] II-1971

Date	Case	Parties Decision reference Keywords	ECR page reference
13.9.1995	T-244/93 T-486/93	*TWD Textilwerke Deggendorf and Germany* v *Commission* Decision 91/391/EEC, 26.3.1991, OJ L 215, p. 16; Decision 92/330/EEC, 18.12.1991, OJ L 183, p. 36. Action for annulment — State aid — Prohibition — Derogations — Commission decision making authorisation to pay aid dependent on prior repayment by the undertaking concerned of unlawful aid previously received — Condition laid down in order to avoid an accumulation of aid altering trading conditions in a way contrary to the general interest — Respective powers of the Community and of the Member States — Commission's power to adopt a decision making the payment of aid dependent on prior repayment of unlawful aid, despite the fact that the undertaking concerned disputes the existence of an obligation to repay on the ground of the protection of legitimate expectations by national law and of national rules of administrative procedure — Aid which may be regarded as compatible with the common market — Discretion of the Commission — Review by the Court — Limits — Plea of illegality — Raised in relation to an act against which the applicant has not brought an action for annulment within the period prescribed — Not admissible	[1995] II-2265
18.9.1995	T-49/93	*SIDE* v *Commission and France* Actions for annulment — State aid — Articles 92 and 93 — Aid for exports of books — Planned aid — Failure to notify aid — Implementation of aid before the Commission' s final decision — Commission not obliged to use its power to order payment of the aid to be suspended and amounts already paid to be recovered — Review by the Commission — Preliminary examination and *inter partes* procedure — Compatibility with the common market of aid for exports of books for cultural purposes liable to produce effects contrary to specific provisions of the Treaty, especially relating to competition — Difficulties of assessment — Commission required to initiate the *inter partes* procedure — No requirement for a competitor of the undertaking receiving the aid to provide precise information at the stage of the administrative procedure — Pleas which may be put forward by a complainant against a decision of the Commission declaring, after a preliminary procedure only, aid to be compatible with the common market — No requirement of consistency between the complaint and the action	[1995] II-2501

Date	Case	Parties Decision reference Keywords	ECR page reference
18.9.1995	T-471/93	*Tiercé Ladbroke* v *Commission and France* Commission Decision of 18.1.1993 (not published). Action for annulment — State aid — Definition — Levy on bets taken on horse races — Transfer of resources to an undertaking established in another Member State— Acts of the institutions — Statement of reasons — Obligation — Scope — Decision refusing to recognise the existence of aid — Financial conditions laid down by the public authorities governing the assistance given, in the taking of bets, by the body managing betting on horse racing in one Member State to the equivalent body in another Member State — No advantage to the recipient — Excluded	[1995] II-2537
28.9.1995	T-95/94	*Sytraval and Brink's France* v *Commission and France* Action for annulment — State aid — Complaint by a competitor — Failure to initiate the investigation procedure — Right to a fair hearing — Acts of the institutions — Statement of reasons — Obligation — Scope — Decision of the Commission rejecting a complaint alleging infringement of Article 92 of the Treaty on the ground that the measures complained of cannot be regarded as constituting State aid — Examination of complaints — Obligations of the Commission — Possible exchange of views and arguments with the complainant at the preliminary stage	[1995] II-2651
1996			
29.2.1996	C-56/93	*Belgium* v *Commission* Action for annulment — State aid — Definition — Preferential tariff system for supplies of natural gas to Dutch nitrate fertiliser producers — Preferential tariff system for supplies of natural gas to Dutch nitrate fertiliser producers — Commission decision finding a national measure to be compatible with Article 92(1) of the Treaty — Not included — Complex economic appraisal — Review by the Court — Limits — Treaty provisions — Scope — State financial intervention affecting competition and trade between Member States, irrespective of the aims pursued — Acts of the institutions — Statement of reasons — Obligation — Scope — Account to be taken of their context and events prior to their adoption	[1996] I-723

Date	Case	Parties Decision reference Keywords	ECR page reference
29.2.1996	C-122/94	*Commission* v *Council*	[1996] I-881
		Common agricultural policy — State aid — Competition rules — Provisions of the Treaty relating to aid granted by States — Applicability in the wine sector — Consequence — Power of the Council to authorise aid by derogation in view of exceptional circumstances — Authorisation by the Council — Judicial review — Limits — Decision authorising special aid for the distillation of certain wines in Italy and France in the 1993/94 wine year — No manifest error of assessment — Acts of the institutions — Statement of reasons — Obligation — Scope	
13.3.1996	C-326/95	*Banco de Fomento e Exterior* v *Amândio Mauricio Martins Pechim and others*	[1996] I-1385
		Reference for a preliminary ruling — Inadmissibility — Questions not relating to specific technical points, submitted without providing any explanation of the factual and legislative context	
22.5.1996	T-277/94	*Associazione Italiana Tecnico Economica del Cemento (AITEC)* v *Commission*	[1996] II-351
		Action for annulment — Decision declaring State aid unlawful — Requests for initiation of Treaty infringement proceedings — Commission letter notifying person complaining of State aid of the Commission's refusal to bring infringement proceedings before the Court for failure by the Member State concerned to comply with a decision finding the aid in issue illegal — Excluded — Actions against Community institutions for failure to act — Natural or legal persons — Actionable omissions — Failure to bring infringement proceedings in a matter concerning State aid — Failure to adopt a decision on the action to be taken in response to a complaint concerning non-compliance with a decision relating to aid — Inadmissible	

Date	Case	Parties Decision reference Keywords	ECR page reference
5.6.1996	T-398/94	*Kahn Scheepvaart* v *Commission*	[1996] II-477
		Action for annulment — State aid — Shipbuilding — General aid scheme — Natural or legal persons — Acts of direct and individual concern to them — Commission decision addressed to a Member State authorising, by extending general aid schemes for shipbuilding, the application of national provisions granting tax advantages — Action brought by a maritime transport undertaking which has made a complaint to the Commission — Inadmissible	
11.7.1996	C-39/94	*Syndicat français de l'Express international (SFEI) and others* v *La Poste and others*	[1996] I-3547
		Reference for a preliminary ruling — Reference to the Court — Conformity of the decision to refer with the rules of national law governing the organisation of the courts and their procedure — Not a matter for the Court to determine — State aid — Planned aid — Grant of aid in breach of the prohibition laid down in Article 93(3) of the Treaty — Duties of the national courts where a matter has also been referred to the Commission — Complete protection of the rights of individuals — Possibility of consulting the Commission or referring questions to the Court for a preliminary ruling — Definition of State aid — Logistical and commercial assistance provided by a public undertaking to its subsidiaries which are governed by private law and carry on an activity open to free competition — Included — Condition — Remuneration less than that demanded under normal market conditions — Grant of aid in breach of the prohibition laid down in Article 93(3) of the Treaty — Duties of national courts adjudicating on a claim for repayment — Liability of the recipient — No basis in Community law — Possible application of national law	

Date	Case	Parties Decision reference Keywords	ECR page reference
26.9.1996	C-241/94	*France* v *Commission* Commission Decision SG(94)D/8907, 27.6.1994. Action for annulment — Concept of State aid within the meaning of Article 92(1) of the Treaty — State intervention of a social character — Joint financing by a public fund enjoying a degree of latitude as regards measures accompanying social plans drawn up by undertakings experiencing employment problems — Included — Conditions — Commission decision — Legality to be assessed in the light of the information available when the decision was adopted — State aid — Prohibition — Derogations — Authorisation of regional aid to a textiles company — Balancing of the objectives of free competition and Community solidarity — Discretion of the Commission — Judicial review — Limits — Objections not raised during the administrative procedure — Admissibility	[1996] I-4551
15.10.1996	C-311/94	*IJssel-Vliet Combinatie* v *Minister of Economic Affairs* Reference for a preliminary ruling — State aid — Prohibition — Derogations — Aid to shipbuilding — Directive 87/167 — Minimum requirements — Rules applicable to the fisheries sector set out by the Commission in guidelines — Acceptance by the Member States — Binding effect — Application to aid for the construction of fishing vessels intended to be operated in the Community fishing fleet	[1996] I-5023
22.10.1996	T-154/94	*Comité des salines de France and others* v *Commission and Frima* Action for annulment — State aid — General regional aid scheme — Plea of illegality — Incidental nature — Principal action inadmissible — Plea inadmissible — Actionable measures — Acts which produce binding legal effects — Letter of the Commission confined to providing information on request concerning aid covered by a general scheme — Excluded	[1996] II-1377

Date	Case	Parties Decision reference Keywords	ECR page reference
22.10.1996	T-266/94	*Foreningen af Jernskibs- og Maskinbyggerier i Danmark, Skibsvaeftsforeningen and Denmark and others* v *Commission, Germany and MTW* Actions for annulment — Shipbuilding — Exceptional rules — Shipyards in the former German Democratic Republic — Procedure — Intervention — Objection of inadmissibility not raised by the defendant — Inadmissible — Natural or legal persons — Measures of direct and individual concern to them — Commission decision authorising payment of State aid to an undertaking operating on a market characterised by the limited number of producers — Rival undertaking — Right of action — State aid — Prohibition — Derogations — Aid to shipbuilding — Directive 90/684 — Deposit in favour of the aid recipient before 31 December 1993 pending the Commission's final decision — Whether permissible — Commission's competence to authorise aid after that date — Ceiling — Basis for and method of calculation — Determination in the light of the preparatory documents — Reduction of capacity — Scope — Genuine and irreversible nature — Meaning — Commission's discretion — Judicial review — Acts of the institutions — Statement of reasons — Obligation — Scope — Taking the context into account — Proposed aid — Evaluation by the Commission — Preliminary stage and inter partes stage — Respective features	[1996] II-1399
22.10.1996	T-330/94	*Salt Union and Verein Deutsche Salzindustrie* v *Commission and Frima* Action for annulment — State aid — Actionable measures — Refusal of the Commission to propose 'appropriate measures' pursuant to Article 93(1) of the Treaty — Inadmissible	[1996] II-1475

Date	Case	Parties Decision reference Keywords	ECR page reference
24.10.1996	C-329/93 C-62/95 C-63/95	*Germany, Hanseatische Industrie-Beteiligungen and Bremer-Vulkan Verbund* v *Commission*	[1996] I-5151
		Action for annulment — State aid — Diversification of the activities of the recipient undertaking — Recovery — Acts of the institutions —Statement of reasons — Obligation — Scope — Decision classifying as aid a guarantee given by a public authority in favour of an undertaking for the acquisition of a holding in another undertaking — Commission decision assessing an intervention in favour of a shipbuilding undertaking without referring to Directive 90/684 — Commission decision finding aid incompatible with the common market	
6.12.1996	T-155/96R	*Stadt Mainz* v *Commission*	
12.12.1996	T-358/94	*Air France* v *Commission* Decision 94/662/EG, 27.7.1994, OJ L 258, p. 26.	[1996] II-2109
		Action for annulment — Air transport — Airline company in a critical financial situation — State aid — Meaning — Aid granted through a public body set up by the State — Criteria for appraising whether it forms part of the public sector — Aid from State resources — Investment made by means of repayable funds from private sources that are managed by a public body — Included — Conditions — Commission decision finding a national measure incompatible with Article 92(1) of the Treaty — Complex economic appraisal — Judicial review — Limits — Financial assistance granted by a Member State to an undertaking — Criteria for appraisal — Reasonableness of the transaction for a prudent private investor — Not reasonable in the case of subscription for almost all the securities issued by an undertaking experiencing a sharp deterioration in its financial situation that is not capable of improvement, even in the long term — Acts of the institutions — Statement of reasons — Obligation — Scope — Decisions	

Date	Case	Parties Decision reference Keywords	ECR page reference
12.12.1996	T-380/94	*Association internationale des utilisateurs de fils* de *filaments artificiels et synthétiques et de soie naturelle (AIUFASS) and Apparel, Knitting, Textiles Alliance (AKT)* v *Commission* Action for annulment — State aid — Textiles — Trade association — Admissibility — Manifest error of assessment — Excess capacity— Natural or legal persons — Measures of direct and individual concern to them — Commission decision authorising State aid — Action brought by associations representing the main international and national producers in the sector concerned, which took part in the administrative procedure for adopting the decision and played an active role *vis-à-vis* the Commission with regard to aid to that sector — Admissibility	[1996] II-2169
1997			
14.1.1997	C-169/95	*Spain* v *Commission (PYRSA)* Decision 95/438/EG, 14.3.1995, OJ L 257, p. 45. Action for annulment — State aid — Aid for the construction of a steel foundry in the Province of Teruel (Spain) — State aid — Prohibition — Derogations — Aid which may be considered to be compatible with the common market — Aid to promote the development of particular areas — Discretion of the Commission — Reference to the Community context — Examination by the Commission — Framework for aid in certain steel sectors not covered by the ECSC Treaty — Obligation to give notification — Exception — Aid granted under an existing general regional scheme authorised by the Commission — Scope — Commission decision finding aid to be incompatible with the common market — Review by the Court — Limits — Recovery of unlawful aid — Breach of the principle of proportionality — None — Aid granted in breach of the procedural rules in Article 93 of the Treaty — Possibility of legitimate expectation on the part of recipients — Protection — Conditions and limits	[1997] I-135

Date	Case	Parties Decision reference Keywords	ECR page reference
27.2.1997	T-106/95	*FFSA* v *Commission* Decision of 8.2.1995, OJ C 262, 7.10.1995, p. 11. Action for annulment — State aid — Decision finding that the tax concessions enjoyed by the French postal service (La Poste) in the exercise of its competitive activities do not constitute State aid under Article 92 of the Treaty — Close link between arguments based on Article 90(2) of the Treaty and arguments based on Article 92 of the Treaty — Additional costs arising from performance of particular tasks assigned to the public undertaking — Competitive activities — Procedure — Introduction of new pleas in law in the course of proceedings — Conditions — New matter — Concept — Public undertakings and undertakings to which the Member States grant special or exclusive rights — Commission's powers under its duty of supervision — Discretion — Review by the Court — Limits — Grant by the public authorities of a tax concession to a public undertaking — Included — Aid paid to an undertaking entrusted with the operation of a service of general economic interest — Examination by the Commission — Factors to be taken into consideration	[1997] II-229
4.3.1997	C-46/96R	*Germany* v *Commission* Decision of 29.11.1995 (C(95)3319 final). Action for annulment — Tax concessions relating to depreciation granted to German airlines — No need to give a decision	
14.3.1997	T-25/96	*Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* Decision of 29.11.1995 (C(95) 3319 final). Actions for annulment — Contested decision withdrawn in the course of proceedings — No need to give a decision	

Date	Case	Parties Decision reference Keywords	ECR page reference
20.3.1997	C-24/95	*Land Rheinland-Pfalz and Alcan Deutschland* v *Commission* Reference for a preliminary ruling — Bundesverwaltungsgericht — Interpretation of Community law governing State aid — Aid granted in breach of the procedure laid down in Article 93 of the Treaty — Obligation to recover unlawful aid — Difficulties resulting from the fact that the recipient is protected by national rules: prescription — Exceptions from the principle of *condictio indebiti* — Legal certainty — Possible legitimate expectation on the part of the recipients — Protection — Conditions and limits — Interests of the Community to be taken into account	[1997] I-1591
15.4.1997	C-292/95	*Spain* v *Commission* Decision of 6.7.1995, OJ C 284, p. 3. Action for annulment — Framework on State aid to the motor vehicle industry — Retroactive prolongation — Article 93(1) of the EC Treaty — Examination by the Commission — Commission decision prolonging, with retroactive effect, the validity of the Community framework on State aid in an economic sector after its expiry — Obligation to obtain the agreement of the Member States	[1997] I-1931
30.4.1997	C-89/97 P(R)*	*Moccia Irme* v *Commission*	[1997] I-2327
15.5.1997	C-278/95P	*Siemens* v *Commission* Decision 92/483/EEC, 24.6.1992, OJ L 288, p. 5. Appeal against Judgment of 8 June 1995 in Case T-459/93, ECR [1995] II-1675 — Acts of the institutions — Statement of reasons — Obligation — Scope — State aid — Prohibition — Derogations — Qualification of aid — Aid capable of being regarded as compatible with the common market — General aid scheme approved by the Commission — Individual aid purporting to be covered by the approval — Scrutiny by the Commission — Assessment primarily in the light of the approval decision and only secondarily in the light of Article 92 of the Treaty — Reference to the Community context — Appeals — Pleas in law — Erroneous assessment of the facts — Not admissible — Rejection — Legal characterisation of the facts — Admissible	[1997] I-2507

Date	Case	Parties Decision reference Keywords	ECR page reference
15.5.1997	C-355/95P	*Textilwerke Deggendorf (TWD) and Germany* v *Commission* Decision 91/321/EEC, 26.3.1991, OJ L 215, p.16 (TWD II); Decision 92/330/EEC, 18.12.1991, OJ L 183, p. 36 (TWD III). Appeal against Judgment of 13 September 1995 in Joined Cases T-244/93 and T-486/93, ECR [1995] II-2265 — Community law — Interpretation — Acts of the institutions — Statement of reasons — Account to be taken — State aid — Prohibition — Derogations — Discretion of the Commission — Commission decision making authorisation to pay aid dependent on prior repayment by the undertaking concerned of unlawful aid previously received — Condition laid down in order to prevent an accumulation of aid from adversely affecting trading conditions to an extent contrary to the common interest — Decision within the power of the Commission	[1997] I-2549
30.6.1997	C-66/97	*Banco de Fomento e Exterior (BFE)* v *Confecções Têxteis de Vouzela (CTV)* Reference for a preliminary ruling — Interpretation of Articles 59, 90 and 92 of the Treaty — Questions not relating to specific technical points, submitted without providing any explanation of the factual and legislative context — Inadmissibility	[1997] I-3757
23.7.1997	T-40/97	*Pearle and others* v *Commission* Decision of 31.12.1996. Action for annulment — Decision not to take action regarding complaints against aid lodged by opticians— Withdrawal of the decision — Cancellation	
6.10.1997	C-55/97P	*Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFASS) and Apparel, Knitting and Textiles Alliance (AKT) v Commission and United Kingdom* Judgment of 12.12.1996 in Case T-380/94, ECR II-2169. Appeal — Article 92(3)(a) and (c) of the EC Treaty — Textiles — Manifest error of assessment — Overcapacity — Admissibility	

Date	Case	Parties Decision reference Keywords	ECR page reference
5.11.1997	T-149/95	*Ets J. Richard Ducros* v *Commission and CMF* Decision 95/C120/03 (OJ C 120, p. 4). Action for annulment — State aid — Restructuring aid — Commission decision — Annulment — Admissibility	
20.11.1997	T-85/97	*Interprovinciale des fédérations d'hôteliers, restaurateurs cafetiers et entreprises assimilées de Wallonie ASBL (Féd. Horeca-Wallonie)* v *Commission* Decision of 24.9.1996, Letter SG(96)D/8253. Action for annulment — Procedure — Time limits — Method of calculation — Inadmissibility	
9.12.1997	C-353/95P	*Tiercé Ladbroke* v *Commission and France* Decision of 18.1.1993, not published Judgment of 18.9.1995 in Case T-471/93, ECR II-2537. Appeal — State aid — Levy on bets taken on horse races — Transfer of resources to an undertaking established in another Member State	
18.12.1997	T-178/94	*Asociación Telefónica de Mutualistas (ATM)* v *Commission* Decision of 15.2.1994 Letter D/30508. Action for annulment — State aid — Reduction in social charges — Closure of the file on the complaint — Interest in bringing proceedings — Inadmissibility	
1998			
27.1.1998	T-67/94	*Ladbroke Racing* v *Commission* Decision 93/625/EEC, 22.9.1993, OJ L 300, p. 15. Action for annulment — State aid — Market in bet-taking — Article 92(1) and (3) of the EC Treaty — Definition of aid — Tax measures — Obligation to refund	
29.1.1998	C-280/95	*Commission* v *Italy* Decision 93/496/EEC, 9.6.1993, OJ L 233, p. 10. Proceedings concerning failure by Member States — State aid — Fiscal bonus on certain taxes — Recovery of aid — Not absolutely impossible	

Date	Case	Parties Decision reference Keywords	ECR page reference
17.2.1998	T-107/96	*Pantochim* v *Commission and France* Action for failure to act — State aid — No need to adjudicate — Action for damages — Claim for an order requiring a Member State to modify the conditions for the grant of aid already accorded — Factual circumstances — Commission's lack of competence	
18.2.1998	T-189/97	*Comité d'entreprise de la Société française de production* v *Commission* Decision 97/238/EC of 2.10.1996, OJ 1997 L 95, p. 19. Action for annulment — State aid — Decision declaring aid incompatible with the common market — Trade unions and works councils — Inadmissibility	
19.2.1998	C-309/95	*Commission* v *Council and France* Council Decision of 22.6.1995. Action for annulment — State aid — Exceptional aid to producers of table wine in France	
25.3.1998	C-174/97P	*FFSA* v *Commission*	[1998] I-1303
2.4.1998	C-367/95P	*Commission, France and others* v *Sytraval and Brink's France* Appeal — State aid — Complaint by a competitor — Commission's obligations concerning the investigation of a complaint and the provision of reasons for rejecting it	
2.4.1998	T-86/96R	*Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag Lloyd Fluggesellschaft* v *Commission* Decision 96/369/EC of 13.3.1996, OJ L 146, p. 42. Application for interim measures — State aid — Commission decision classifying a national aid measure as incompatible with the common market — Order requiring authorisation for the aid to be granted on a provisional basis — Urgency — Balance of interests	
30.4.1998	T-214/95	*Het Vlaamse Gewest (Flemish Region)* v *Commission* Decision 95/466/EC of 26.7.1995, OJ L 267, p. 49. Action for annulment — Air transport — State aid — Small amount — Distortion of competition — Effect on trade between Member States — Statement of reasons	

Date	Case	Parties Decision reference Keywords	ECR page reference
30.4.1998	T-16/96	*Cityflyer Express* v *Commission* Decision 95/466/EC of 26.7.1995, OJ L 267, p. 49. Action for annulment — Air transport — State aid — Interest-free loan — Amount of the aid — Principle of the market economy investor — Principle of proportionality — Manifest error of assessment — Statement of reasons — Need for exchange of argument between the Commission and the complainant	
7.5.1998	C-52/97 C-53/97 C-54/97	*Epifanio Viscido and others* v *Ente Poste Italiane* Reference for a preliminary ruling — State aid — Meaning — National law providing that only one public utility is relieved of the obligation of observing a rule of general application relating to fixed-term employment contracts	
16.6.1998	T-238/97*	*Epifanio Viscido* v *Ente Poste Italiane*	[1998] I-2629
25.6.1998	T-371/94 T-394/94	*British Airways* v *Commission*	

Date	Case	Parties Decision reference Keywords	ECR page reference

2. ECSC

1959

4.2.1959	17/57	*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*	[1959] I-9

Action for failure to act — Procedure — Putting the High Authority on notice — Time limit set for the party concerned — Limited period for the High Authority to take a decision regarding the legality of its inaction — Action for annulment — Basis of action — Change — Prohibition — Obligations of the States — Failure to fulfil an obligation arising from the Treaty — Powers of the High Authority — Decision for approval — Prohibition — Decision for failure to act

1961

23.2.1961	30/59	*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* Decision of 30.4.1959 (unpublished).	[1961] I-3

Action for annulment — Decision individual in character concerning the applicant — Concept — Intervention — Fresh arguments — Admissibility — Aid — Subsidies — Concepts — Absolute prohibition — Articles 4(c) and 67 ECSC — Application to different fields

Date	Case	Parties Decision reference Keywords	ECR page reference
1969			
10.12.1969	6/69 11/69	*Commission* v *France (Banque de France)*	[1969] I-523
		Decision 68/301/EEC, 23.7.1968, OJ L 178, p. 15; Decision 914/68/ECSC, 6.7.1968, OJ L 159, p. 4; Decision of 18.12.1968 (unpublished).	
		Failure to fulfil an obligation arising from the Treaty in Case 6/69 — Action for annulment in Case 11/69 — Member States — Exclusive powers — Exercise derogating from the provisions of the Treaties — Conditions imposed by the Treaty — Failure to fulfil an obligation arising from the Treaty — Finding by the Commission — Reasoned opinion addressed by the Commission to the Member State concerned — Submission based on the illegality of this opinion — Inadmissibility — Allegation that the Commission has intervened in a sphere reserved to the Member State concerned — Lack of a legal basis for a binding measure — Review by the Court — Aid granted by States — Rate of preferential re-discount for exports — Granted for national products exported — Nature of the aid — Unilateral actions authorised by the Treaty as a precaution — Necessity for rapid intervention by the Community institutions — Economic policy — Balance of payments — Sudden crisis — Protective measures — Nature of unilateral action — Obligations of the Member State concerned — Adverse effect upon the conditions of competition — Action by a Member State of the ECSC — Damaging effect — Aid to undertakings in the coal and steel sector — Concept — Authorisation by the Commission	
1971			
6.7.1971	59/70	*The Netherlands* v *Commission*	[1971] I-639
		Action for annulment — Aid to the iron and steel industry — Failure to act on the part of the Commission — Raising the matter — Observance of reasonable period — ECSC — General provisions — Obligations of Member States — Infringement by a Member State of the procedures laid down by the Treaty — Limitation in time	

Date	Case	Parties Decision reference Keywords	ECR page reference
1982			
7.7.1982	119/81	*Klöckner-Werke* v *Commission*	[1982] I-2627
		General Decision 2794/80, Article 4 — Communication by the Commission of 6.4.1981 (unpublished). Action for annulment — Measures adopted by the institutions — Elaboration procedure — ECSC system of production quotas — Assent of the Council — Essential procedural requirement — Purpose — Guarantee of a minimal level of employment in the various undertakings — Excluded — Distortions of competition due to State aid — Taking into consideration — Conditions — Correction — Excluded — Taking into consideration of external trade — Discretion of the Commission — Conditions for exercise — Production intended for export to non-member countries — Compulsory exemption from the system of quotas — System of steel production quotas — Determination on an equitable basis — Taking into consideration of undertakings' production — Whether permissible — Taking into consideration of undertakings' reference production figures — Adjustment — Criteria — Actual production capacity during the reference period	
1984			
11.7.1984	222/83	*Commune de Differdange and others* v *Commission* Decision 83/397/EEC/ECSC, 29.6.1983, OJ L 227, p. 29.	[1984] I-2889
		Action for annulment — Aid to the steel industry — Application of a measure relating simultaneously and indivisibly to the spheres of more than one Treaty — Admissibility with regard to one of those Treaties — Sufficient requirement — Application made by a local authority — Not admissible — Natural or legal persons — Measures of direct and individual concern to them — Commission decision addressed to a Member State and requiring, in return for the right to grant aid, the adoption of measures to reduce production capacity in an industrial sector — Decision not of direct and individual concern to the municipalities in which the factories of the undertaking affected are located	

Date	Case	Parties Decision reference Keywords	ECR page reference
1985			
19.9.1985	172/83 226/83	*Hoogovens Groep BU* v *Commission* General Decision 2320/81/ECSC, 7.8.1981, OJ L 228, p. 14; Decisions 83/396/ECSC and 83/398/ECSC, 29.6.1983, OJ L 227, pp. 24 and 33. Action for annulment — Aid to the steel industry — Interest in bringing an action — Compliance with the contested decision — No effect — Application challenging an individual decision under the ECSC Treaty not yet notified or published — Admissible — Identical application lodged after publication of the decision — Inadmissible — Application brought by an undertaking against an individual decision under the ECSC Treaty which is not addressed to it — Decision permitting benefits to be granted to its competitors — Measures adopted by the institutions — Duty to state reasons — Scope — Commission decision subjecting the grant of State aid to a reduction in production capacity — Amount of the reduction fixed on an erroneous basis — Illegal	[1985] I-2831
3.10.1985	214/83	*Germany* v *Commission* General Decision 2320/81, Article 8; Decisions 83/391/EEC, 83/393/ECSC, 83/396/ECSC and 83/399/ECSC, 29.6.1983, OJ L 227, pp. 1, 14, 24 and 36. Action for annulment — Aid to the steel industry — Authorisation by the Commission — Conditions — Link between the restructuring of the steel industry and the grant of aid — Fixed ratio between the size of the capacity cuts imposed by the Commission and the amount of aid — None — Factors to be taken into account — Notification of aid plans in due time— Failure to notify by the prescribed date — Effects — Meaning of the term 'plans' — Authorisation of aid exceeding the amount notified by the prescribed date — Permissibility — Conditions	[1985] I-3053

Date	Case	Parties Decision reference Keywords	ECR page reference
1987			
24.2.1987	304/85	*Acciaierie e Ferriere Lombarde Falck* v *Commission* General Decision 2320/81/ECSC, 7.8.1981, OJ L 228, p. 14; General Decision 1018/85/ECSC, 19.4.1985, OJ L 110, p. 5; Commission Decision of 1.8.1985 (unpublished). Action for annulment — Aid to the steel industry — Approval by the Commission — Conditions — Notification of aid proposals in good time — Definition of 'proposals' — Authorisation of aid different in nature from that notified within the time limit — Not permissible — No manifest discrimination between the public and private sectors	[1987] I-871
1990			
6.12.1990	180/88	*Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* General Decision 2320/81/ECSC, 7.8.1981, OJ L 228, p. 14; General Decision 1018/85/ECSC, 19.4.1985, OJ L 110, p. 5; Commission Decision SG(88)D/6179, 26.5.1988. Action for annulment — Aid for the iron and steel industry — Review of legality — Time limits — Point from which time starts to run — Decision neither published no notified to the applicant — Precise knowledge of the content of and reasons for the decision — Obligation to request the whole text of the decision within a reasonable time once its existence is known — Action brought by an association of undertakings against an individual ECSC decision of which it is not the addressee — Decision authorising the payment of State aid to undertakings competing with the association's members	[1990] I-4413
1993			
5.3.1993	C-102/92R*	*Ferriere Acciaierie Sarde* v *Commission* Decision 91/547/ECSC, 5.6.1991, OJ L 298, p. 1. Action for annulment — Commission decision ordering recovery of aid — Inadmissibility — Time limits— Date at which time limit begins to run — Act not notified to the applicant — Obligation to ask for the full text of the act within reasonable time of learning of its existence	[1993] I-801

Date	Case	Parties Decision reference Keywords	ECR page reference
1994			
24.2.1994	99/92	*Terni and Italsider* v *Cassa conguagli per il settore elettrico* Decision 83/396/ECSC, 29.6.1983, OJ L 227, p. 24. Preliminary ruling — Interpretation — Aid for the steel industry — Authorisation by the Commission — Interpretation of an authorisation for the purposes of determining the beneficiaries of the aid authorised — Separate aid for undertakings in the public sector and those in the private sector, but authorised on the basis of the same criteria — No discrimination	[1994] I-541
24.2.1994	100/92	*Fonderia A.* v *Cassa conguagli per il settore elettrico* Decision 83/396/ECSC, 29.6.1983, OJ L 227, p. 24. Preliminary ruling — Interpretation — Aid for the steel industry — Authorisation by the Commission — Interpretation of an authorisation for the purposes of determining the period covered by the authorisation	[1994] I-561
9.3.1994	188/92	*TWD Textilwerke Deggendorf* v *Federal Minister for Economic Affairs* Decision 86/509/EC, 21.5.1986, OJ L 300, p. 34. Reference for a preliminary ruling concerning both interpretation and validity — State aid — Commission decision finding aid to be incompatible with the common market and ordering its recovery — Decision not having been challenged under the second paragraph of Article 173 of the Treaty by the recipient of the aid who had been notified in due time — Definitive nature of the decision *vis-à-vis* the recipient of the aid to which it relates — Challenge to the validity of the decision before the national court in an action brought against the national measures taken to implement it — Challenge to be dismissed by the national court	[1994] I-833

Date	Case	Parties Decision reference Keywords	ECR page reference
15.7.1994	T-239/94 R	*Association des Aciéries Européennes Indépendantes (EISA)* v *Commission* Decision 94/256/ECSC, 12.4.1994, OJ L 112, p. 45; Decision 94/257/ECSC, 12.4.1994, OJ L 112, p. 52; Decision 94/258/ECSC, 12.4.1994, OJ L 112, p. 58; Decision 94/259/ECSC, 12.4.1994, OJ L 112, p. 64; Decision 94/260/ECSC, 12.4.1994, OJ L 112, p. 71; Decision 94/261/ECSC, 12.4.1994, OJ L 112, p. 77. Application for interim measures — Suspension of the operation of decisions authorising the grant of aid to steel undertakings — Conditions for granting — Serious and irreparable damage — Materialisation of the damage dependent on future and uncertain events — Damage of a general nature to the structure of competition — No link with the personal situation of the applicant or its associates — Balancing of all the interests involved	[1994] II-703
1996			
3.5.1996	C-399/95R*	*Germany* v *Commission*	[1996] I-2441
21.3.1997	C-95/97	*Région wallonne* v *Commission* Decision 'ECSC steel — Forges de Clabecq' of 18.12.1996, letter of 23.1.1997. Action for annulment — Procedure — Division of jurisdiction between the Court of Justice and the Court of First Instance — Actions brought by Member States — Definition — Action brought before the Court of Justice by a regional authority of a federal State — Manifest lack of jurisdiction — Referral to the Court of First Instance	[1997] I-1787
29.5.1997*		*British Steel* v *Commission*	[1997] II-835
25.9.1997	T-150/95	*UK Steel Association (BISPA)* v *Commission Luxembourg and Arbed* Decision 94/C400/02. Action for annulment — State aid — ECSC Treaty — Fifth Steel Aid Code — Community guidelines on aid for environmental protection	
29.9.1997	T-4/97	*Roberto D'Orazio and Pierre Hublau* v *Commission* Decision 97/271/ECSC, 18.12.1997, OJ L 106, p. 30. Action for annulment — Aid to the steel sector — Article 33 of the ECSC Treaty — Inadmissibility	

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29.9.1997	T-70/97	*Région wallonne* v *Commission* Decision 97/271/ECSC, 18.12.1997, OJ L 106, p. 30. Action for annulment — Aid to the steel sector — Article 33 of the ECSC Treaty — Inadmissibility	
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