

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

(95/C 312/07)

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 jeopardized 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

⁽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.
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 p. 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 et 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.

of competition policy in the Community's public interest. National courts are responsible for the 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 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. authorized.
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.

⁽²⁾ With the exception of 'existing' aid. Such aid may be implemented until the Commission has decided that it is incompatible with the common market: see Case C-387/92, *Banco de Crédito Industrial, now Banco Exterior de España 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'.

⁽⁶⁾ The Court of Justice held in Case 290/83, *Commission v. France* (1985) ECR p. 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 No 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).

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 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

⁽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 No C 94, 3. 4. 1993, p. 13); Case C-46/93, *Brasserie du Pêcheur SA v. Germany* (OJ No C 92, 2. 4. 1993, p. 4); Case C-312/93, *SCS Peterbroeck, Van Campenhout & Cie v. Belgian State* (OJ No 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 No C 338, 15. 12. 1993, p. 10).

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

⁽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.

- 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 authorized 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 authorization of a given scheme. Member States must notify aid which they wish to grant outside the framework of an authorized 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⁾.
 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 realizes 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.

⁽¹⁵⁾ See point 3.2 of the Community guidelines on State aid for SMEs (OJ No 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⁾ 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.

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, 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 characterization 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 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.
- ⁽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 No 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.

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.

Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case No IV/34.607 — Banque Nationale de Paris — Dresdner Bank

(95/C 312/08)

(Text with EEA relevance)

THE FACTS

1. The notified cooperation agreement

1. The notification

The cooperation agreement was formally notified to the Commission of the European Communities on 27 January 1993 in accordance with Articles 2 and 4 of Council Regulation No 17⁽¹⁾. It provides for full and, in principle, exclusive cooperation worldwide between Banque Nationale de Paris (BNP) and Dresdner Bank (DB) in the banking sector. It is of indefinite duration and was approved at the annual general meetings of the two banks.

2. The aims of the cooperation

- The two banks wish to meet the growing challenge in the banking sector that is posed

by new competitors such as foreign banks, insurance companies, companies with their own in-house banks, and also the credit card companies that are offering an ever-expanding range of financial services. To that end, the two banks plan to achieve synergies in order to reduce costs, chiefly through very close cooperation in logistics and certain international activities.

- The two banks wish to meet the challenges of the single market and the globalization of markets where customers are increasingly requiring international financial services. They therefore plan to strengthen their presence in all countries other than France and Germany (third countries) in order both to compete more strongly with foreign banks and to offer their customers in France and Germany a

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.