



State Aid

Manual of Procedures

Internal DG Competition
working documents
on procedures for
the application of
Articles 107 and 108 TFEU

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application of Articles 107 and 108 TFEU**

EU Competition law

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DG Competition's State aid Manual of Procedures is an internal working tool intended to give practical guidance to staff on how to conduct an investigation applying Articles 107 and 108 TFEU. The State aid Manual of Procedures is not a legally binding document and cannot in any way substitute for the legal requirements laid down in Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the Treaty and Commission Regulation (EC) 794/2004 of 21 April 2004, as amended.

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Contents

Section 1	Introduction
Section 2	Existing aid
Section 3	Unlawful aid
Section 4	Pre-notification
Section 5	Notification
Section 6	Formal investigation procedure
Section 7	Complaint
Section 8	Simplified Procedure
Section 9	Recovery
Section 10	Monitoring
Section 11	Publication and copies, confidentiality, website
Section 12	ISIS Web
Section 13	Handling of sensitive information
Section 14	Interservice consultation
Section 15	Formal adoption of Commission decisions- Oral procedure
Section 16	Formal adoption of Commission decisions- Written procedure
Section 17	Formal adoption of Commission decisions- Empowerment
Section 18	Formal adoption of Commission decisions- Corrigendum
Section 19	Adoption of legislation
Section 20	Litigation

Notice

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The State aid Manual of Procedures is not a legally binding document and cannot in any way substitute for the legal requirements laid down in Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the Treaty, Commission Regulation (EC) 794/2004 of 21 April 2004 and subsequent Regulations (Commission Regulation (EC) No 271/2008 of 30 January 2008 and Commission Regulation (EC) No 1147/2008 of 31 October 2008)¹. The procedures set out in this Manual may have to be adapted to the circumstances of the case at hand or the necessity to set priorities. It is oriented towards the practical needs of case teams.

DG Competition's State aid Manual of Procedures is an internal working tool intended to give practical guidance to staff on how to conduct an investigation applying Articles 107 and 108 TFEU. This manual is meant to provide practical guidance for the cases which the Directorate General for Competition is competent only. The practical guidance given in the Manual does not claim to be complete or exhaustive. The content of the Manual has not been adopted by the Commission. It is a practical working tool, which evolves through updates made on a regular basis to reflect new experience gained in applying the competition rules of the Treaty, and the Regulations, notices and other guidance adopted thereunder. In case of divergences between these rules and the State aid Manual of Procedures, the former apply. Staff has been instructed that, in case of doubt, they should always seek instructions from their hierarchy regarding the precise course of action in a particular situation.

The main chapters of the State aid Manual of Procedures are being made public in order to provide greater transparency about the Commission's procedures in applying the competition rules.

The fact that the Manual of Procedure is in the public domain does not change its character as purely internal guidance to staff. The published Manual of Procedure does not create or alter any rights or obligations arising under the competition rules of the Treaty. Developments since this version of the State aid Manual of Procedures was published (such as new case law) may therefore not yet be reflected.

Brussels, 2013

¹ Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the Treaty, OJ L83, 27.03.1999, p.1.

Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) N° 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L140, 30.04.2004, p.1-134

Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Official Journal L 82, 25.03.2008, p.1

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List of abbreviations:

AGRI	– Directorate-General for Agriculture and Rural Development
COMP	– Directorate General for Competition
CPI	– Communications Policy and Interinstitutional relations unit in COMP
DDG State aid	– Deputy Director General in charge of State aid in COMP
DGT	– Directorate-General for Translation
ECON	– Economic and Monetary Affairs Committee of the European Parliament
ENTR	– Directorate-General for Enterprise and Industry
EP	– European Parliament
HoU	– Head of Unit
LIP	– Large investment projects
LS	– Legal Service of the EU Commission
MARE	– Directorate-General for Maritime Affairs and Fisheries
PV	– Procès Verbal, minutes from the Commission meeting
MS	– Member State
OP	– Publications Office of the EU
SAMM	– State aid Management meeting
SG	– Secretariat General of the EU Commission
TFEU	– Treaty on the Functioning of the EU

SECTION 1 INTRODUCTION

<u>Section 1</u>	<u>Introduction.....</u>	<u>1</u>
<u>1.</u>	<u>Summary of the State aid rules</u>	<u>3</u>
1.1.	Compulsory notification	3
1.2.	Principle of incompatibility	3
1.3.	Exemptions	4
<u>2.</u>	<u>Adoption of decisions and legal acts</u>	<u>5</u>
2.1.	Commission decisions	5
2.2.	Council decisions	6
<u>3.</u>	<u>The role of the Community Courts</u>	<u>7</u>
3.1.	Judicial review	7
3.2.	Action for failure to act	9
3.3.	Legal proceedings	9
<u>4.</u>	<u>Formal requirements of Commission decisions</u>	<u>9</u>
4.1.	Standard forms	9
4.2.	Linguistic requirements	10
4.3.	Corrigendum and corrections	11
<u>5.</u>	<u>Press releases.....</u>	<u>12</u>

<u>6.</u>	<u>Confidentiality issues</u>	<u>12</u>
6.1.	Business Secrets	13
6.2.	Confidential Information	14
<u>7.</u>	<u>Access to documents.....</u>	<u>14</u>
<u>8.</u>	<u>ISIS and archives</u>	<u>15</u>
<u>9.</u>	<u>Flowchart – overview.....</u>	<u>16</u>

1. Summary of the State aid rules

1.1. Compulsory notification

- (1) The Commission's State aid control is based on the principle of compulsory prior notification of all new aid measures (schemes or individual aids) to the Commission.¹ The Member State concerned may not put its aid measure into effect until the Commission has reached a decision.²

1.2. Principle of incompatibility

- (2) The basic substantive rules on the control of State aid in the EU are set out in Article 107 of the TFEU which is directly applicable in all Member States. This article provides that State aids are in principle incompatible with the common market. The principle of incompatibility covers measures that meet all the criteria listed in Article 107(1), i.e. they:
- involve a transfer of State resources;
 - entail an economic advantage for undertakings;
 - distort competition by selectively favouring certain beneficiaries; and
 - produce an effect on intra-Community trade.
- (3) Furthermore, one must also demonstrate that the granting of state resources is imputable to the State. Thus for example, the assets of a publicly owned company are indisputably State resources. However, a transfer of resources from that company to another company can only be considered as State resources if it is imputable to the State.³
- (4) Horizontal measures that apply throughout the economy do not constitute State aid as they are not considered selective, even if in practice some beneficiaries or sectors of the economy may receive a proportionally greater advantage.
- (5) The concept of aid in Article 107(1) of the TFEU is an objective concept. The Commission has no margin of discretion to decide that a measure is not aid if it meets the conditions. Nevertheless, the application of the definition of State aid may involve very complex economic assessments, for example in determining whether a capital injection into a company provided by the State was made in accordance with the market economy investor principle or whether it constitutes State aid.

¹ The obligation for compulsory prior notification may of course be removed by a block exemption for certain categories of aid.

² **'Putting into effect'** means not only the actual granting of the aid but the conferment of powers enabling the aid to be granted without further formality.

³ See Case C-482/99 Stardust Marine [2002] ECR I-4397.

1.3. Exemptions

- (6) The principle of incompatibility of State aid with the Treaty is not, however, absolute. Article 107 (2) and (3) contains a number of exemptions under which State aid may be considered acceptable by the Commission.
- (7) Article 107(2) provides that three categories of aid shall be compatible with the common market, namely:
 - (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 Germany⁴
- (8) Because the word 'shall' is used in Article 107(2), these are sometimes referred to as the automatic exemptions, meaning that the Commission has no margin of discretion to decide whether or not to approve the aid. However, this is slightly misleading as the Commission still has to verify that the conditions laid down in the Treaty are met. Thus for example, in a case concerning Article 107(2)(b), the Commission has to verify that the event concerned was indeed a natural disaster or an exceptional occurrence, that the event caused the damage, and that the aid does not exceed what is necessary to make good the damage.
- (9) Article 107(3) contains a series of categories of aid which 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; this is defined in the Community's regional aid guidelines as areas with less than 75% of average Community GDP;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
 - (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
 - (e) such other categories of aid as may be specified by decision of the Council

⁴ See Case C-57/00 P and C-61/00 P, Volkswagen, [2003] ECR, p. I-9975.

acting by a qualified majority on a proposal from the Commission.

- (10) The exemptions laid down in Article 107(3) are discretionary in nature. The Treaty gives the Commission the sole competence to determine whether the conditions for compatibility are fulfilled⁵. In exercising these wide discretionary powers, the Commission balances the necessity and the proportionality of the aid measure in achieving a Community objective versus the distortion of competition brought about by it. To publicise its approach and the actual criteria used in this assessment, the Commission has issued a number of documents based on Article 107(3) in the form of regulations, communications, notices, frameworks, guidelines, and letters to Member States with regard to various categories of aid based on its form, its purpose, the size of the undertakings, their location, or the sector of the economy.
- (11) The procedures by which the Commission examines State aid are dealt with only very summarily in Article 108 of the TFEU. They have mainly developed through the case law of the Court of Justice which was consolidated and codified by Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the Treaty⁶, Commission Regulation (EC) 794/2004 of 21 April 2004⁷ and subsequent Regulations (Commission Regulation (EC) No 271/2008 of 30 January 2008⁸ and Commission Regulation (EC) No 1147/2008 of 31 October 2008⁹) sets out detailed implementing rules as regards the form and content of notifications, time limits and annual reports.

2. Adoption of decisions and legal acts

2.1. Commission decisions

- (12) The manner in which the Commission's work is to be organized is laid down in its Rules of Procedure of 24 February 2010 (C(2010)1200 final)¹⁰ and the implementing rules. Explanations concerning the rules contained in those two basic documents, as well as useful information on their application in practice are accessible on the Secretariat General's intranet site.
- (13) The Court of Justice has ruled that the Commission is bound to respect its own rules

⁵ In exceptional circumstances the Commission can be over-ruled by a unanimous decision of the Council.

⁶ OJ L83, 27.03.1999, p.1.

⁷ Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) N° 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L140, 30.04.2004, p.1-134

⁸ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Official Journal L 82, 25.03.2008, p.1

⁹ Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.10 of its Annex 1, OJ L 313, 22.11.2008, p. 1

¹⁰ OJ L308, 8.12.2000, p.26, as amended by Commission Decision of 24 February 2010, (2010/138/EC, Euratom), OJ L55 of 05.03.2010, p.60.

of procedure. Failure to respect procedural rules may make a decision liable to annulment on that ground alone.

(14) Commission decisions are adopted in one of three ways that is by:

- oral procedure, Article 4(a) Rules of Procedure – the decision is taken by the college of Commissioners. The case is on the Commission's agenda. The oral procedure is the normal procedure for adoption of state aid decisions where the empowerment procedure cannot be used (e.g. Decision to initiate Article 108(2) proceedings and closing of 108(2) proceedings - final decisions, existing aid 108(1) appropriate measure, suspension and recovery injunctions, corrigendum) but also for Regulations, directives, communications, guidelines. For more information see [Section on Oral procedure](#).
- written procedure, Article 3 of the Rules of Procedure, is a means whereby the Commission can take decisions on matters which do not require discussion at its weekly meeting but cannot be dealt with by empowerment. The purpose of the procedure is to relieve the Commission of the need to discuss measures which are not of major political significance - appropriate for non-controversial horizontal texts, such as reports. At present, this procedure is more often used for decisions on state aid files during holiday periods (August and Christmas) - when there are no Commission meetings. Prior agreement of the associated services and Legal Service is required before the written procedure can be launched.

A normal written procedure requires 5 working days: for horizontal texts, versions in the three working languages (English, French and German) are required. However, translations in all languages must be completed before the procedure will be closed. For a state aid decision, the working language (English/French) and the authentic language are accepted as sufficient.

An accelerated written procedure requires 3 working days: one working language (French or English) and the authentic language are necessary. Procedure can only be used in agreement with the President's cabinet.

The purpose of urgent written procedure is to enable urgent measures to be adopted quickly. The time limit may be less than 3 working days after distribution of the text and an acknowledgement must be obtained from the Chefs de cabinet if the time limit is less than 24 hours. Prior agreement from the President's cabinet must be sought by COMP cabinet.

- empowerment procedure, Article 13 of the Rules of Procedure, the Commissioner in charge takes the decision on behalf and in the name of the Commission.

2.2. Council decisions

(15) According to the third sub-paragraph of Article 108(2) of the TFEU, 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 107 or from the regulations provided for in Article 109 (setting out the conditions for the approval a certain types of aid), 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.

- (16) The case law of the Court of Justice allows the Council a very wide margin of discretion in deciding whether or not exceptional circumstances exist. Nevertheless, the procedure is an exceptional one and it must not be abused by the Council¹¹. In particular, the Council cannot intervene after the Commission has adopted a final decision that the aid concerned is incompatible with the common market. Nor can the Council seek to neutralise the effects of a recovery decision by declaring a new aid to be compatible with the common market.
- (17) If you become aware that a Member State is considering an application to the Council pursuant to this paragraph, you should inform your hierarchy and COMP Support unit immediately. Council decisions are rare, and likely to become rarer in EU-27, because of the difficulty of reaching unanimity. Nevertheless they are extremely important. If the Council does take a decision on an aid case, the services have one month to circulate an information note from the Commissioner responsible to the other Members of the Commission, together with a proposal on whether or not the Commission should bring the matter before the Court of Justice.

3. The role of the Community Courts

3.1. Judicial review

- (18) All decisions are legal acts regardless of whether they are in the form of a letter to the Member State or final decision – and are subject to review by the European Court of Justice under Art. 263 of the TFEU.
- (19) All decisions must be **sufficiently reasoned** – Article 296 TFEU. Unless a decision is well motivated, it runs the risk of being annulled by the Court for lack of motivation.
- (20) The sufficiency of the reasoning has to be assessed taking into account the circumstances of the case, including in particular the context of the decision (what has already been stated in the different letters exchanged) and the interest of the addressee of obtaining an explanation (have contentious points during the administrative proceedings been addressed).
- (21) It is not necessary to consider all the points of law and fact put forward by the parties or to refute all the arguments. It is sufficient if the decision mentions (covers) the principal issues of law and of fact in relation to the applicable law in such a way that the essential reasoning may be understood.

¹¹ See C-110/02, 29.06.2004, Commission of the European Communities v Council of the European Union.

- (22) There are cases where a more extensive reasoning is required:
- a decision which breaks new legal ground;
 - where the Commission develops a new policy;
 - where the Commission changes its position (second complaint; adoption of a new decision after a Court decision).
- (23) Previously, actions brought by Member States to annul Commission decisions were heard by the Court of Justice, whereas actions brought by private parties were heard by the Court of First Instance. However following the entry into force of the Treaty of Nice, this has changed. With effect from 1 May 2005, all actions for annulment of State aid decisions are heard before the Court of First Instance with appeal to the Court of Justice being possible only on points of law. This is part of a wider reform of the Community's legal system designed to ensure that so far as possible cases involving factual disputes are heard by the CFI, so that the Court of Justice is free to concentrate on issues of law.¹²
- (24) Since all State aid decisions are addressed to Member States, the Member States always have the legal capacity (*locus standi*) to challenge Commission decisions addressed to them. However, normally third parties have to be able to demonstrate that the decision is of direct and individual concern to them. This will usually be the case of the beneficiary of the aid. It may not always be the case of a third party. The case law on the application of the concept of direct and individual concern is complex, and from the operational point of view it is probably preferable to assume that a third party will have the necessary legal capacity unless advised otherwise by the legal service.
- (25) In short:
- Decisions not to raise objections can be attacked, in particular by a competitor of the beneficiary who is directly and individually concerned. Normally the ground of attack is infringement of an essential procedural requirement, namely that the Commission should have opened the formal investigation procedure before reaching a decision.
 - Decisions to open the formal investigation procedure cannot usually be attacked as they constitute interim steps in an investigation and not a final taking of position by the institution. However, a decision to open the procedure can be attacked if it is claimed to have incorrectly classified existing aid as new aid.
 - Final decisions can be attacked by the Member State, other Member States, beneficiaries and other parties who are directly and individually concerned.
 - Note that an action for annulment does not automatically have suspensive effect, unless the suspension is particularly asked for.

¹² Likewise actions by Member States against Council decisions under Art 108.2 3rd paragraph are heard by the CFI. Inter-institutional disputes are however heard by the ECJ.

3.2. Action for failure to act

- (26) The action for failure to act is an action which obliges the institution to take a position on a matter of legal interest to the party bringing the action. As regards State aid, the action is most commonly brought in respect of complaints about non-notified aid. See [Section on Complaints](#).

3.3. Legal proceedings

- (27) If the Member State concerned fails to conform to the final 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 108(2), applying if appropriate for interim measures under Article 279 of the TFEU.
- (28) If a Member State fails to comply with the judgment of the Court, the Commission may, in accordance with Article 260 institute further proceedings against the Member States concerned which may ultimately lead to the imposition of a penalty payment.
- (29) The Legal Service is competent to bring and to defend legal proceedings on behalf of the Commission. Its competence extends to all cases in which the Commission is in any way involved in legal proceedings, either as applicant or as defendant, before the Court of Justice of the European Communities, the Court of First Instance of the European Communities, an international court or a national court. It also extends to all cases where the Commission has to be represented before an arbitration body.
- (30) A Court Cellule has been created within COMP to improve our cooperation with the Legal Service regarding submissions to the ECJ and the CFI. The Cellule assists case-handlers with their contributions to court cases. While the case-handler in charge of the original file drafts the contribution itself, the Court Cellule provides general support by ensuring consistency with current decisional practice, identifying major issues of substance and policy with broader repercussions and monitoring the coherence of State aid policy expressed in the contributions. The court cellule draft info-flashes and assists case-teams in the preparation of NCOMs related to Court cases follow-up (*e.g.* proposals to appeal a negative CFI ruling).
- (31) The Court Cellule is organised as team of coordinators monitoring pending State aid cases before the European Courts. For each case, the assigned case-handler will work together with a member of the Court Cellule who provides feedback and support.
- (32) Please remember to register all e-mails regarding court cases with the Greffe and send documents from and to the LS also to the special mailbox comp-state-aid-court-cellule@ec.europa.eu.

4. Formal requirements of Commission decisions

4.1. Standard forms

- (33) In the field of State aid there are 16 standard forms, a set of forms for each type of decision, to be used when drafting. The purpose is to ensure that the file contains all

the necessary information, guarantee consistency and legal certainty, make the file reader friendly and avoid duplications. The standard forms also facilitate the work of translation service – even minor deviations should be avoided. All case handlers are obliged to use the standards forms.

- (34) A decision not to raise objections or to initiate the formal investigation procedure, 108(2) takes the form of a Letter to the Member State and is addressed to the Minister of Foreign Affairs of the Member State.
- (35) Closing the 108(2) procedure takes the form of a final Commission decision, which is not addressed to the Minister, but only sent by Secretariat General to the Permanent Representation with a cover sheet (bordereau d'envoi).
- (36) The legal standing of a decision in the form of a letter and that of a final decision is the same.

4.2. Linguistic requirements

- (37) All decisions are prepared in one of the working languages, normally English or French. It is, however, the final decision or the letter in the authentic language(s) which is adopted by the Commission and which is legally binding.
- (38) Four Member States have two official languages:
 - Belgium: French and Dutch
 - Finland: Finnish and Swedish
 - Ireland: English and Gaelic
 - Malta: English and Maltese
- (39) Art. 8 of Regulation 1/1958 states "If a Member State has more than one official language, the language to be used shall, at the request of such state be governed by the general rules of its laws". Belgium and Finland have made such requests.
- (40) Gaelic is an official language of the European Union since 1 January 2007 following an agreement within Coreper (Committee of Permanent Representatives of EU member states) on 13 June 2005 to amend Council Regulation 1/1958¹³ (Art. 2 of Council Reg 920/05). However, there is a derogation until 1 January 2012 from the obligation to draft and publish all acts in Gaelic – this applies to both legislation and decisions. This derogation has been extended for a period of 5 years starting on 1 January 2012 by EU Council Regulation 1257/2010¹⁴. Until the end of this period,

¹³ For practical reasons, the Council decided that only regulations adopted by the European Parliament and the Council under the co-decision procedure will have to be available in Irish. Other legislative acts will be exempted for a transition period of five years to allow time to train and recruit translators. Thereafter, the situation will be reviewed regularly to decide when this exemption should end. This arrangement is broadly similar to the agreement reached with the government of Malta on translation of documents into Maltese.

¹⁴ OJ L343, 29.12.2012, p5

the institutions of the Union are not bound by the obligation to draft and translate all acts, including judgments of the Court of Justice, in the Irish language, with the exception of Regulations adopted jointly by the European Parliament and the Council and answers to letters sent by EU citizens in the Irish language to the EU institutions.

- (41) Maltese had a derogation which lapsed on 1 May 2007, following this state aid decisions, fact sheets and legislation are published in Maltese in the Official Journal. Concerning requests for information, letters of formal notice and reasoned opinions, as Malta has not made a request, as above, notification of texts in English only are considered sufficient.
- (42) Before adoption, a final decision in the authentic language(s) must be revised by the lawyer linguists. The main purpose of the revision is to ensure that the legal terminology is correct. The decision is translated into the other community languages after the revision. Decisions in the form of a letter to the Member State are not revised.
- (43) Horizontal texts such as regulations, directives, frameworks and communications are adopted in all the Community languages after having been revised by the lawyer linguist.
- (44) In particular for certain delicate decisions, it may be good practice to check language versions yourself or with colleagues who master the language, even where they have been reviewed by lawyer-linguists.

4.3. Corrigendum and corrections

- (45) In principle, once a decision has been adopted by the Commission no amendments can be made to the text without a corrigendum which means that a new decision for the amended text has to be prepared and adopted by the Commission (or Commissioner). The corrigendum corrects the previous decision.
- (46) There needs to be a parallelism of the procedure. The same procedure as was used for the adoption of the original decision must be used. Exceptions are:
 - clerical mistakes for which the corrigendum can be adopted using an empowerment to the Secretary General. A clerical mistake is usually an evident, minor, inadvertent negligence in computing a figure, or in writing or typing (such as: faute d'orthographe, de frappe, d'impression, erreur de calcul, blanc dans le texte, texte n'ayant pas de sens). It is important that the mistake has to be evident from the language version that needs to be corrected. So, if for example, translation mistakes are made which are only visible when you compare the two different linguistic versions are not covered by the empowerment decision. It is irrelevant whether or not the decision has been published. The corrigendum letter to the Member State is signed by the Secretary General.
 - translation mistakes for which the corrigendum can be adopted using the empowerment to correct errors, including minor errors, in translations of acts adopted by the Commission.
 - Minor clerical errors such as citing incorrect § or calculation error which does not affect the result, misspelling - may be corrected in the publication by using an

asterisk indicating clerical errors and “Should read...”

- (47) The corrigendum should be the subject of an ISC. The LS and SG have to be consulted as well as all other DGs concerned by the corrigendum itself (so not necessarily the same DGs that were consulted on the original decision). For substantive errors, the ISC-period is the same as for the original text and it is common practice to consult again the services initially consulted. Only SG and Legal Service are consulted for corrigendum on material/clerical errors.
- (48) For more information see [section Corrigendum](#).

5. Press releases

- (49) Do not answer any questions concerning cases: always refer to the spokesman (for questions from the press) or your head of unit (for other requests).
- (50) A Commission press release (note d’information à la presse or ‘IP’) is an official statement for the record. Its primary aim is to satisfy media demand for comprehensive information on a given subject. It is then up to the Commission’s Spokesperson’s Service (‘SPP’, in French Service Porte-Parole) to answer background questions and provide guidance to journalists who wish to place the news in a wider context or get a better ‘feeling’ for the case history, e.g. by establishing contacts with experts at DG Comp.
- (51) The press release should be drafted in the working language English or French unless there is a request for a draft in another language. CPI (the Communications Policy and Interinstitutional relations unit in COMP) should be consulted on the draft press releases. After the approval of the HoU/director the press release should be e-mailed to the spokesman.
- (52) In busy weeks where there are high profile cases decided the spokesperson sometimes staggers the issuing of press releases on files that are not time sensitive and not already in the public domain. Some press releases on lower profile cases are therefore delayed to avoid being in the shadow of the former. The Spokesperson’s office provides DG Comp with a list when they intend to issue which press releases. The case handler is on call that day in case the Spokesperson needs to ask questions. It is of course not necessary to postpone meetings when on call – s/he needs only to be contactable and in a position to call the Spokesperson back as soon as possible.

6. Confidentiality issues

- (53) The Member State has, in accordance with Article 24 and 25 of the Procedural Regulation, the right to request that certain information is not disclosed to third parties.
- (54) In particular, according to Article 25, when notifying a decision to the Member State concerned, the Commission must give the latter the opportunity to indicate which information it considers to be covered by the obligation of professional secrecy. In the event that the Member State does reply requesting the confidential treatment of

certain information, you should follow the guidance given in the [Commission Communication C \(2003\) 4582 of 1 December 2003 on professional secrecy in State aid decisions](#)¹⁵.

- (55) With effect from the entry into force of Regulation 794/2004, Member States are asked by question 9 in the new notification form whether or not the notification contains confidential information. Also for requests for additional information, the Member State should be asked systematically whether any of the information is confidential. In many cases this could help to avoid going back to the Member State at a later stage of the procedure. In principle, if the decision relies on the information contained in the notification form, and the Member State has not indicated that anything is confidential, publication can proceed immediately. The same would apply where the Commission agrees with the request for confidentiality. However, so far it is still practice, before any decision (not to raise objections, to open the procedure, final decisions) is published in the Official Journal or on Internet or sent to third parties or a beneficiary, to ask the Member State (again) to indicate within a period of 15 working days whether the decision contains any confidential information. If possible, this step should be avoided.
- (56) The following paragraph is used to ask the Member State about confidentiality: “If this letter contains confidential information which should not be published, please inform the Commission within 15 working days from the date of receipt. If the Commission does not receive a reasoned request by the stipulated deadline, you will be deemed to agree to publication of the full text. Your request should be sent by registered letter or fax to: ...”
- (57) The Commission's main task is to reconcile two opposing obligations, that of safeguarding the necessity to motivate its decisions under art. 296 of the TFEU and therefore ensuring that its decision contain all the essential elements on which they are based (and this has to be so not only vis-à-vis the Member State, but also third parties who may have a right to challenge a decision or asked to comment in the case of an 108(2) proceeding), and that of protecting confidential information concerning Member States and the beneficiaries of the aid granted/to be granted by Member States.
- (58) The general principle is that, requests for confidential treatment can only be granted where it is strictly necessary to protect business secrets or other confidential information. In particular, besides the basic obligation to motivate its decisions, the Commission has to take into account the need for effective application of the competition rules and for transparency of its competition policy, and therefore an overriding interest has to be recognised in making public the full substance of its decisions.

6.1. Business Secrets

- (59) In principle business secrets can only refer to the beneficiary of the aid. There is no exhaustive list indicating what can be considered as business secret/other

¹⁵ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6-9

confidential information. The practice however shows that certain information are constantly considered as business secrets. They are generally referred to as strategic information relating to an essential interest and/or on the operation or development of a business. Typical examples are:

- methods of assessing manufacturing and distribution costs,
- production secrets and processes,
- supply sources,
- quantities produced and sold,
- market shares,
- customer and distributor lists,
- marketing plans,
- cost price structure,
- sales policy,
- information on the internal organisation of the firm.
- Turnover is normally not considered a business secret, to the extent that it is published in the annual accounts or otherwise known on the market; requests for confidentiality concerning turnover which are not in the public domain would have to be motivated and evaluated on a case by case basis.

6.2. Confidential Information

- (60) In antitrust/merger cases, confidential information includes for example certain types of information communicated to the Commission on condition that confidentiality is observed (like for example a market study commissioned by the firm which is party to the procedure and forming part of its property). Military secrets also belong to this category. A similar approach is retained for State aid decisions, although recognising that there might be in this field some form of confidential information which would not necessarily be present in anti-trust/merger procedures, referring specifically to secrets of the State or other confidential information relating to its internal organisational activity.

7. Access to documents

- (61) [Regulation 1049/2001](#) entered into force on 3/03/2001¹⁶. It guarantees the greatest possible access to internal Commission documents. Any citizen can ask for any internal document. Access can be refused only on the basis of the exceptions allowed by the Regulation. It is the opinion of DG COMP that the regulation does not

¹⁶ OJ L145, 31.5.2001, p. 43

allow generalised access to the documents in a state aid file. This is a controversial question and several issues remain open on which the position may evolve rapidly.

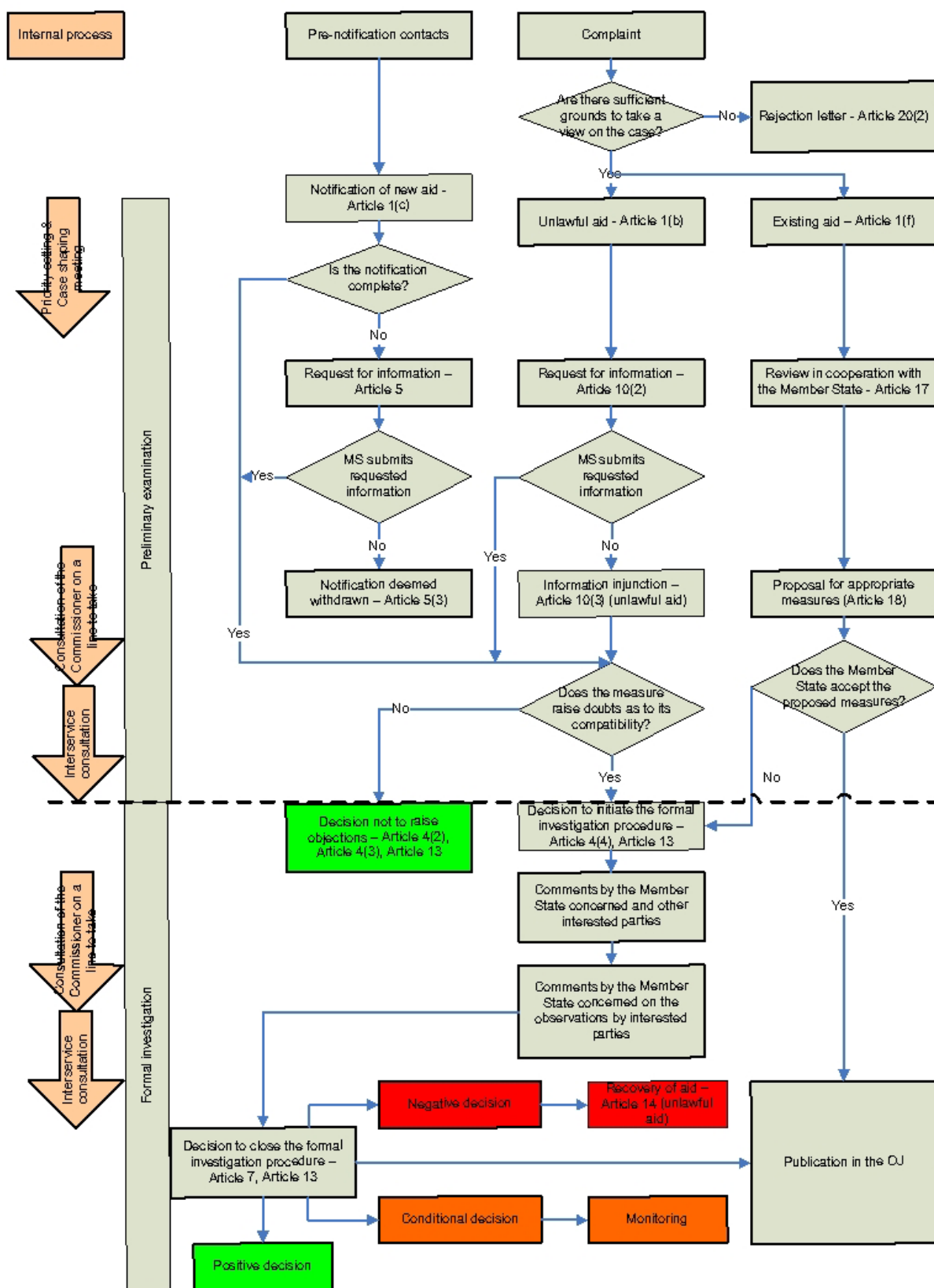
- (62) Access is generally refused for cases where the investigation is not yet closed (which would only be the case after adoption of a decision by the Commission + lapse of time to appeal), in order not to disrupt the investigation. Also for documents originating from Member States, approval to disclose must first be obtained from the Member State concerned.
- (63) Applications for access to documents must be made in writing, in one of the official languages of the Community, but can take the form of a letter, an e-mail or a fax. Please note that it is not required that the request makes an explicit reference to Regulation n°1049/2001 for it to be treated under the rules set out in that regulation.
- (64) The competent service (the service which holds the documents requested) must reply to applications. Deadlines are short: 15 working days. Failure to do so can result in legal proceedings against the Commission.
- (65) An access to documents correspondent for each DG works in collaboration with the Secretariat General to attribute and monitor incoming requests and to monitor replies. However, requests may also arrive directly in the services. The [access to documents correspondent](#), should be kept informed on developments and should receive copies of replies.
- (66) Negative or partly negative replies for written requests for access to documents should, in principle, always be dealt with in accordance with [Regulation 1049/2001](#). GESTDEM registration is required to that effect.
- (67) Negative, or partly negative replies to access to documents requests should be signed by the Director-General, whilst the Director may sign positive replies.

8. ISIS and archives

- (68) ISIS – Integrated State aid Information System – is a multi-DG information system allowing the encoding of the data by the Secretariat-General (SG), the DGs COMP, AGRI, MARE as well as the follow-up and the management of State aid procedures. For more information see [Section ISIS](#).
- (69) Archives:
 - Electronic archives -I-Forum: official documents (Read Only)
 - Physical files. Files on paper are kept in the archives. Permanence ensured.

9. Flowchart – overview

State aid control: Article 107 and Article 108 TFEU proceedings (Council regulation No 659/1999 of 22 March 1999)



SECTION 2 EXISTING AID

<u>Section 2</u>	<u>Existing aid.....</u>	<u>1</u>
<u>1.</u>	<u>New or existing aid?</u>	<u>2</u>
<u>2.</u>	<u>Appropriate measure Article 108(1) of the TFEU</u>	<u>3</u>
<u>3.</u>	<u>Steps</u>	<u>3</u>
3.1.	Article 17 letter	3
3.2.	Appropriate measures	4
3.3.	Acceptance by the Member state - Article 19(1) of the Procedural Regulation	5
3.4.	Non acceptance or no reply by the Member state – Article 19(2) of the Procedural Regulation	5
<u>4.</u>	<u>Flowchart – overview.....</u>	<u>7</u>

Summary

<i>Adopted by</i>	<i>oral procedure</i>
<i>ISC-period</i>	<i>10 working days</i>
<i>Marking:</i>	<i>See Section on the handling of sensitive information.</i>

1. New or existing aid?

- (1) A definition of existing aid can be found in Article 1(b) of Procedural Regulation 659/1999¹ (beware of the amendments which have been introduced following enlargement²).
- (2) Where the Member State alters an existing aid scheme, the latter is transformed into new aid that must be notified. The normal procedure for notified aid applies.
- (3) However, in accordance with Article 4 of the Implementing regulation 794/2004, modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market as well as an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.
- (4) The Commission, in cooperation with the Member State, keeps under constant review all aid schemes currently operating in accordance with Article 108(1) of the TFEU and Article 17 of the Procedural Regulation. The Member State is, obliged to submit annual reports on all existing aid schemes – Procedural Regulation 659/1999 Article 21(1).
- (5) Normally an opening of the formal investigation procedure does not have legal consequences – it is merely an expression of doubts. However, in certain cases an opening can have legal consequences, e.g. when the Commission had classified an aid measure as new aid and initiated the procedure under Article 108(2), whereas the Member State concerned had maintained that it was an existing aid³. In such cases, the opening decision can be attacked. The opening of the formal examination procedure implied that the Commission did not intend to examine the aid in the context of the procedure for existing aid pursuant to Art. 108(1) EC and that the aid had been unlawfully implemented. Such a decision alters the legal position of the

¹ OJ L83, 27.03.1999, p.1.

Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) N° 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L140, 30.04.2004, p.1-134

Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Official Journal L 82, 25.03.2008, p.1

Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.10 of its Annex 1, OJ L 313, 22.11.2008, p. 1

² Amendment of Article 1(b)(i) of Council Regulation no 659/99 by Act of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Annex II, 5 (6) OJ L 236, 23.9.2003, p.44; a similar amendment has entered into force for Romania and Bulgaria, OJ C 363 of 20.12.2006, p. 27.

³ Judgement of the Court of 9 October 2001, Italy / Commission, Case C-400/99; See also T-195/2001 and T 207/2001, Gibraltar exempt companies, 30.4.2002.

measure concerned and of the beneficiaries, since it creates at the very least a significant element of doubt as to the legality of the measure, which must lead the Member State to suspend payment. It might also be invoked before a national court called upon to draw all the consequences arising from the infringement of the last sentence of Art. 108(3) EC.

- (6) When the Member State claims that the unlawful measure is covered by an existing aid scheme but does not supply the Commission with sufficient information to verify the claim, before initiating the 108(2) proceedings, the Commission must issue an information injunction to establish the legality of the measure: existing or unlawful. This injunction was formerly called an Italgrani injunction⁴.

2. Appropriate measure Article 108(1) of the TFEU

- (7) It is important to realise that the appropriate measures procedure is a forward-looking one. There is no recovery of aid already granted. The Member State is only bound to change its aid scheme when it accepts a proposal from the Commission, or if it does not accept the proposal, as from the date fixed in a final Commission decision after the opening of the Article 108(2) procedure. The procedure also only applies to 'systems of aid', i.e. aid schemes, as defined by Article 1 of Regulation 659/99, and not individual aid. However, it is of course possible to have an aid scheme with a single beneficiary, who receives repeated payments of aid over time (for example a scheme which defines the parameters to compensate for the costs of providing a service of general economic interest), in which case the appropriate measures procedure will apply.
- (8) The purpose of the existing aid procedure is to provide a means of dealing with the various types of existing aid. Article 108(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 and to review aid schemes or provisions which were authorized in the past but which may no longer be compatible with the common market under the conditions currently prevailing.
- (9) The procedure is applied not only to review individual schemes but also in order to ensure compliance of schemes in all Member States when introducing new or amended legislation or for particular sectors.

3. Steps

3.1. Article 17 letter

- (10) The Commission may start its review with a request for information – Procedural Regulation 659/1999 17(1). The Member State is obliged to co-operate with the Commission. The Member State has 20 working days to reply. The initial request for information could be followed by a request for additional information. However, the latter should only be carried out when absolutely necessary. In some cases it might

⁴ C-47/91 of 30.6.1992 Italy v Commission.

be necessary to send a reminder giving the Member State 10 working days to reply.

- (11) The Commission informs the Member State of its preliminary view, by a service letter (“Article 17 letter”), that the scheme (“might not be”) is no longer compatible and asks Member State for comments within 1 month in accordance with Article 17(2) of the Procedural Regulation.
- (12) The procedure in this first phase is **strictly bilateral** between the Commission and the Member State. The Commission can already at this stage ask the Member State for formal commitments to abandon/amend the scheme without waiting for formal appropriate measure.
- (13) The Commission examines the comments from the Member State and decides not to proceed with the case or to propose formal appropriate measures. In the former case the Member State is informed by a service letter that no further action will be taken since:
 - the preliminary doubts regarding the compatibility of the scheme no longer exist;
 - the Member State committed itself to phase out/amend the scheme within a certain time.

3.2. Appropriate measures

- (14) If the Commission considers that an existing aid is incompatible with the common market it must first propose appropriate measures to the Member State concerned. If the Member State does not accept the appropriate measures, the Commission must then open the procedure. Since the proposal for appropriate measures must in any case be approved by the Commission, the proposal could be accompanied by a request for an empowerment empowering the Commissioner either to accept the reply from the Member State, or, if no satisfactory reply is received, to initiate 108(2) proceedings.
- (15) An *ad hoc* empowerment is also useful when a procedure consists of several routine stages as it avoids the need to return to the full Commission through the oral procedure at each stage of the process. This is done by including the request for the *ad hoc* empowerment in the Communication to the Commission. (See [Section on empowerment](#))
- (16) Should the Commission, in light of the information supplied by the Member State, find that the scheme is no longer compatible, it issues a formal recommendation in accordance with Article 18 of the [Procedural Regulation 659/1999](#) wherein it proposes:
 - substantive amendments of the scheme;
 - introduction of procedural requirements to bring it in line with current legislation and practice;
 - abolition of the scheme.
- (17) The Commission must motivate and justify why the scheme is no longer compatible.

In addition, the Commission must warn/inform the Member State of the consequences of no reply or non-acceptance, namely that it may decide to open Article 108(2) proceedings.

- (18) The appropriate measures only become binding after the Member State has accepted them or, in the case of non-acceptance, after the Commission has taken a final decision following an 108(2) proceeding. The Commission cannot require reimbursement in the case of a negative decision for an existing aid scheme.
- (19) There are two deadlines:
 - Deadline 1 – the Member State is asked to reply within 2 months
 - Deadline 2 – time limit to implement, given the nature of the appropriate measures. The implementation can sometimes require a long period if for example the measures require new legislation in the Member State. However, despite varying circumstances the indicative time limit is normally maximum 18 months.

3.3. Acceptance by the Member state - Article 19(1) of the Procedural Regulation

- (20) Where the Member State accepts the proposed measure it is bound by its acceptance to implement the appropriate measures. Although not stated in Article 19(1) the Commission requests written confirmation of the unconditional acceptance within 2 months – in urgent cases within one month. If there are any conditions attached to the acceptance, the Commission must take a new decision.
- (21) The Commission sends an acknowledgement of receipt and records the Member States acceptance and publishes a summary notice.
- (22) Should the Member State not implement in accordance with its acceptance, the scheme/measure becomes unlawful aid after the date set in the appropriate measures and is subject to recovery.

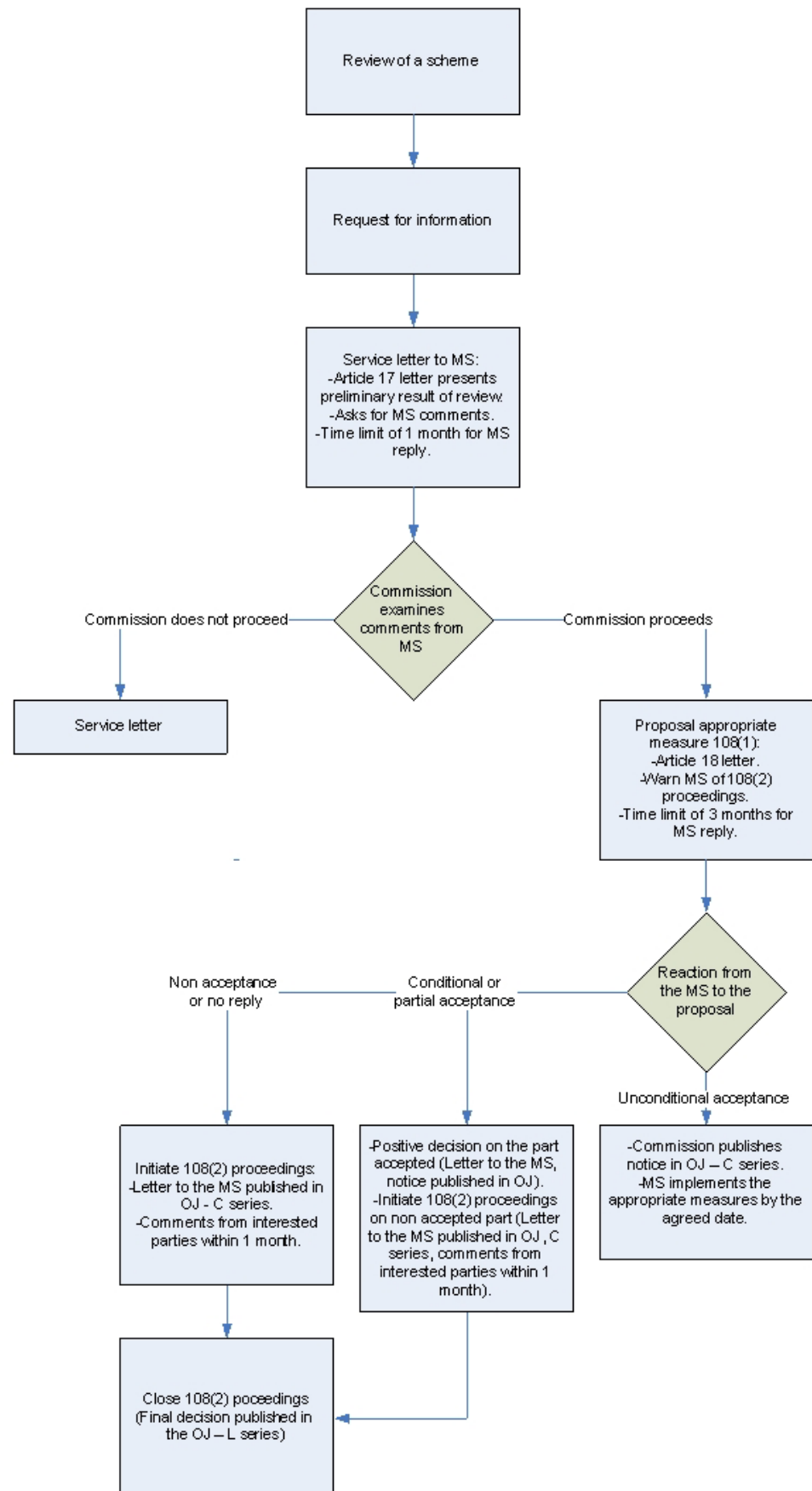
3.4. Non acceptance or no reply by the Member state – Article 19(2) of the Procedural Regulation

- (23) In accordance with Article 108(2) of the TFEU, the Commission is only entitled to open the procedure in respect of new aid. Where aid is classified as existing aid, the Commission is obliged to first make a proposal for appropriate measures to the Member State concerned. This classification is of more than procedural importance. In cases where new aid has been put into effect unlawfully and is subsequently found to be incompatible with the common market, the Commission is normally required to order recovery pursuant to Article 14 of Council Regulation (EC) 659/1999. However, recovery cannot be ordered in the case of existing aid.
- (24) If the Member State does not accept the proposals and the Commission, after having taken into account the arguments of the Member State, still finds that those measures proposed are necessary, it initiates 108(2) proceedings. In case of conditional acceptance by the Member State, reservations or limitation of acceptance to a part of the appropriate measures, the Commission must initiate

108(2) proceedings on the measures not accepted by the Member State. This procedure does not have suspensive effect.

- (25) Should the Commission find the scheme to be incompatible with the common market, it will require the Member state to either abolish it or to amend it within a stated period of time (See Closing the 108(2) proceedings).

4. Flowchart – overview



SECTION 3 UNLAWFUL AID

<u>Section 3</u>	<u>Unlawful aid.....</u>	<u>1</u>
<u>1.</u>	<u>Registration of an NN file</u>	<u>2</u>
<u>2.</u>	<u>Procedural differences with notified aid.....</u>	<u>2</u>
<u>3.</u>	<u>Injunctions</u>	<u>3</u>
<u>4.</u>	<u>Steps</u>	<u>4</u>
<u>5.</u>	<u>Application in time (<i>consecutio legis</i>)</u>	<u>5</u>
<u>6.</u>	<u>Misuse of Aid.....</u>	<u>6</u>
<u>7.</u>	<u>Flowchart – overview.....</u>	<u>7</u>

Summary

<i>Deadline:</i>	<i>n/a</i>
<i>Adopted by:</i>	<i>oral procedure or empowerment</i>
<i>ISC-period:</i>	<i>10 working days</i>
<i>Case no:</i>	<i>SA.(NN/year)</i>
<i>Marking:</i>	<i>See Section on the handling of sensitive information.</i>
<i>Misc.:</i>	<i>The Commission has the power to issue injunctions. If the outcome of an 108(2) proceeding is a negative decision the aid must be recovered.</i>

1. Registration of an NN file

- (1) The Commission is bound under the [Procedural Regulation 659/1999](#) to examine without delay any information, from whatever source, concerning alleged unlawful aid. Given the variety of sources, precision and quality of the information we receive, it is difficult to indicate precisely in a manual what that obligation implies in each case. However, the actions – or inaction (failure to act) – of the Commission in treating the information can become a matter for the Court.
- (2) There are three main sources of unlawful aid cases:
- (3) Cases originating in the CP Register as complaints or ex officio cases.
- (4) Cases originating in the X registers where the measure has been reported under the block exemption regulations, but it is found that the aid does not fulfill all the conditions laid down.
- (5) Notified (N) cases which are transferred to the register of unlawful aid because the aid has already been put into effect when it is notified (belated notification) or it is put into effect after being notified but before the Commission reached a decision (e.g. the legislation is not at the drafting stage and/or does not contain the standstill clause). Only in exceptional cases, and with the agreement of the Head of Unit, is a case registered directly in the NN Register. **Transfer from the initial register to the NN register should occur only following consultation of the Head of Unit, when it is sure that a formal Commission decision will need to be taken on the case.**

2. Procedural differences with notified aid

- (6) The main differences between the treatment of notified and unlawful aid result from the fact that the aid has already been put into effect. Thus the same strict time limits do not apply, and the Commission has additional means at its disposal through the use of injunctions in case Member States do not cooperate. In particular, after it has issued an information injunction to the Member State, the Commission is entitled to reach a decision on the basis of the information available to it. In case of appeal, the Member State cannot rely on other information than what has been transmitted to the Commission.
- (7) No formal time limit applies to the duration of the initial examination phase, or to the duration of the 108(2) proceedings as per Article 7(6) Procedural Regulation 699/1999. Nevertheless, the case law implies that the Commission should either take a decision in a reasonable delay or open proceedings.
- (8) Since unlawfulness refers to procedural issues only (non-notification), it is still possible that the measure may be assessed as compatible and the aid therefore be approved. At Community level, the effects of the qualification of aid as unlawful or illegal are therefore limited.

- (9) The qualification as unlawful (or illegal) aid may however have important consequences under national law. In particular, national courts are in principle required to suspend the payment of unlawful aid, or even order its recovery. Moreover, a tax which is indissolubly linked with an unlawful aid measure may also be illegal. See [Commission notice on the enforcement of SA law by national Courts](#)¹.

3. Injunctions

- (10) For unlawful aid the Commission has the power of issuing injunctions - to:
- (11) order the Member State to supply full particulars of suspected illegal aid by issuing an information injunction in accordance with the [Procedural Regulation 659/1999](#) Article 10(3).
- (12) prevent or stop the payment of aid pending the conclusion of Article 108(2) proceedings (suspension injunction² in accordance with [Procedural Regulation 659/1999](#) Article 11(1)). Examples: NN 11/2004 Greece – Tax-exempt reserve fund, NN 59/2007 Romania – Privatisation of Automobile Craiova, C 41/2007 Romania – Privatisation of Tractorul.
- (13) provisionally recover any unlawful aid (provided that: there are no doubts about the aid character, there is an urgency to act and risk of substantial and irreparable damage to a competitor) (recovery injunction in accordance with [Procedural Regulation 659/1999](#) Article 11(2)).³
- (14) In practice, nearly exclusively the information injunction is used. The Member State is requested to supply the Commission with all such documentation, information and data as are necessary to enable the Commission to assess whether the aid is compatible or has been granted in accordance with an approved scheme.
- (15) An injunction is a procedural measure – it does not prejudice the compatibility.
- (16) The decision to issue an injunction is always in the form of a letter to the Member State. An injunction is bi-lateral and is therefore not published unless in conjunction with a decision to open the formal investigation pursuant to Article 108(2) TFEU. In some cases, depending on their sensitivity and importance, a press release might be issued. The latter is decided by the cabinet together with the spokesman. However, the EFTA Surveillance Authority is informed by means of a copy of the letter.
- (17) When the Member State claims that the unlawful measure is covered by an existing aid scheme but does not supply the Commission with sufficient information to verify the claim, before initiating the 108(2) proceedings, the Commission must issue an information injunction to establish the legality of the measure: existing or unlawful.

¹ OJ C85, 9.4.2009, p.1

² Before the Procedural Regulation this type of injunction was referred to as the Boussac injunction C-301/87 ; 14 February 1990.

³ Not used so far.

This injunction was formerly called an Italgrani injunction⁴.

- (18) The situation covered by Article 10(3) of the [Procedural Regulation 659/1999](#) goes further than the so-called Italgrani injunction which is restricted to situations where an individual aid is allegedly covered by an approved aid scheme. However, there are some differences. Article 10 is more explicit on the procedural steps to be taken whereas the Italgrani does not foresee such steps. The biggest difference lays in the obligatory character of the Italgrani injunction, which must be issued before the initiation of the formal investigation procedure. Article 10(3) does not say that the Commission must issue an information injunction before it can initiate the formal investigation procedure pursuant to Article 13(1) of the procedural Regulation. In practice, the information injunction is often issued at the same time as the opening and furthermore, that it is for the Commission to decide on whether or not to issue an information injunction.

4. Steps

- (19) Apart from the absence of a time limit, the recovery and the power of injunction, the examination of unlawful aid is essentially similar to that for notified aid.
- The Commission requests information/comments from the Member State to be supplied within 20 working days.
 - The Member State provides the necessary information. If there are no doubts about the compatibility of the aid, a decision not to raise objections can be adopted. The aid however, remains unlawful which may have consequences under national law. If there are doubts about the compatibility of the aid, a decision to open the formal investigation procedure should be adopted (see [Section formal investigation procedure](#)).
 - If the Member State has failed to provide the Commission with the information requested, a reminder is sent⁵, whereby the Member State is given 15 working days to supply the information and it is warned that non-compliance might lead to an information injunction (Article 10(3)).
 - If, the Member State **does not provide part or all of the requested information**, or indicates that it does **not** consider the measure **to be aid**, the Commission may issue an information injunction and give the Member State an appropriate period to respond, usually **one month**

In the decision to issue an information injunction the Commission explains which information is needed to conclude the examination of the file, invites the Member State to provide it and lists precisely the points which are still unclear.

The information injunction may be adopted through empowerment.⁶ A decision to

⁴ C-47/91 of 30.6.1992 Italy v Commission.

⁵ This is a necessary condition for issuing information injunction.

⁶ In accordance with the Commission's decision of 19 June 2002 (COM PV (200)1572).

issue an injunction is not published. However, any interested party has the right to obtain a copy of the decision – [Procedural Regulation 659/1999](#) Article 20(3).

- Despite the information injunction the Member State fails to provide the information necessary to enable the Commission to assess the measure; the Commission open formal investigation pursuant to Article 108(2) procedures because it is having serious difficulty in obtaining the relevant information and/or there remains serious doubts about the compatibility of the measure with State aid law. The Commission decides on the basis of the information available.
- (20) When the Commission does not have enough information to prepare a well-reasoned opening, a separate information injunction may be useful. More often, for reasons of economy of procedure, the information injunction is combined with the opening of the formal investigation procedure. The use of an information injunction guarantees that the Commission has used all means available and fully respected the rights of defence of Member State to submit its comments on a case, thus enabling the adoption of a decision “on the basis of the information available”. In case of failure to reply, the Member State cannot complain that information has not been taken into account. Therefore an information injunction is generally necessary before the Commission adopts a final negative decision on unlawful aid.
- (21) The Commission has the power to issue recovery and suspension injunctions, however, so far there has been few cases where this has been deemed necessary.⁷ If the Member State fails to comply with a suspension or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice directly and apply for a declaration that the failure to comply constitutes an infringement of the Treaty. See [Procedural Regulation 659/1999](#) Article 12.

5. Application in time (*consecutio legis*)

- (22) The general rule is that where the guidelines or regulations contain rules regarding their application in time, these will prevail.
- (23) In the absence of specific rules, the following applies:
- (24) ☒ For notified aid, the applicable rule is always the rule at the time of the decision (see *Commission v Freistaat Sachsen* and the judgment of 9 June 2011 in Joined Cases C 465/09 P to C 470/09 P *Diputación Foral de Vizcaya and Others v Commission*, not published in the ECR. Orders of the Court of Justice of 22 March 2012 in Case C 167/11 P *Cantiere navale De Poli v Commission*⁸, not published in

⁷ ^ See NN 59/2007- Romania, Privatisation of Automobile Craiova, where a suspension injunction was coupled with a decision to open the formal investigation procedure; NN 11/2004 – Greece, Tax-exempt reserve fund; C 41/2007 – Romania, Privatisation of Tractorul.

⁸ Point 51 of C-167/11 P : *Il convient, en effet, de relever qu’il ressort, d’une part, de la jurisprudence que les règles applicables pour examiner si une aide d’État est compatible avec le marché commun sont celles qui sont en vigueur au moment où la Commission se prononce (voir, en ce sens, arrêt du 11 décembre 2008, Commission/Freistaat Sachsen, C 334/07 P, Rec. p. I 9465, points 50 à 53 et jurisprudence citée).*

the ECR, and Case C 200/11 P Italy v Commission, not published in the ECR.)

- (25) ☒ For unlawful aid, the situation is less clear. The Commission adopted on 7 May 2002, a [notice on the determination of the applicable rules for the assessment of unlawful aid](#)⁹ – the text reads as follows:
- “A number of instruments approved by the Commission over the years contain a provision to the effect that unlawful State aid, i.e. aid put into effect in contravention of Article 108(3) of the TFEU, shall be assessed in accordance with the texts in force at the time when the aid was granted. This is for example the case for the Community guidelines on State aid for environmental protection¹⁰ and the multisectoral framework on regional aid for large investment projects¹¹.
- (26) The Commission notice also states that: "... Therefore, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. The present notice is without prejudice to the interpretation of Council and Commission regulations in the field of State aid"
- (27) In paragraphs 125 and 127 of the Vizcaya-judgment (C-465/09P to 470/09P), the European Court seems to suggest that the rule applicable at the time of the decision should equally apply to cases of unlawful aid¹². The General Court (CELF T-348/04, see paragraphs 56-61 and Danske Statsbaner T-92/11) suggests that the rules applicable at the time of granting apply.
- (28) If you are confronted with such a case, please consult with the case support unit on the best way forward.

6. Misuse of Aid

- (29) This is governed by Article 16 of the Procedural Regulation. Aid is or has been used by the beneficiary in contravention with the decision. The procedures for misuse of aid are similar to those of an unlawful aid.

⁹ OJ C 119 of 22 May 2002, p. 22.

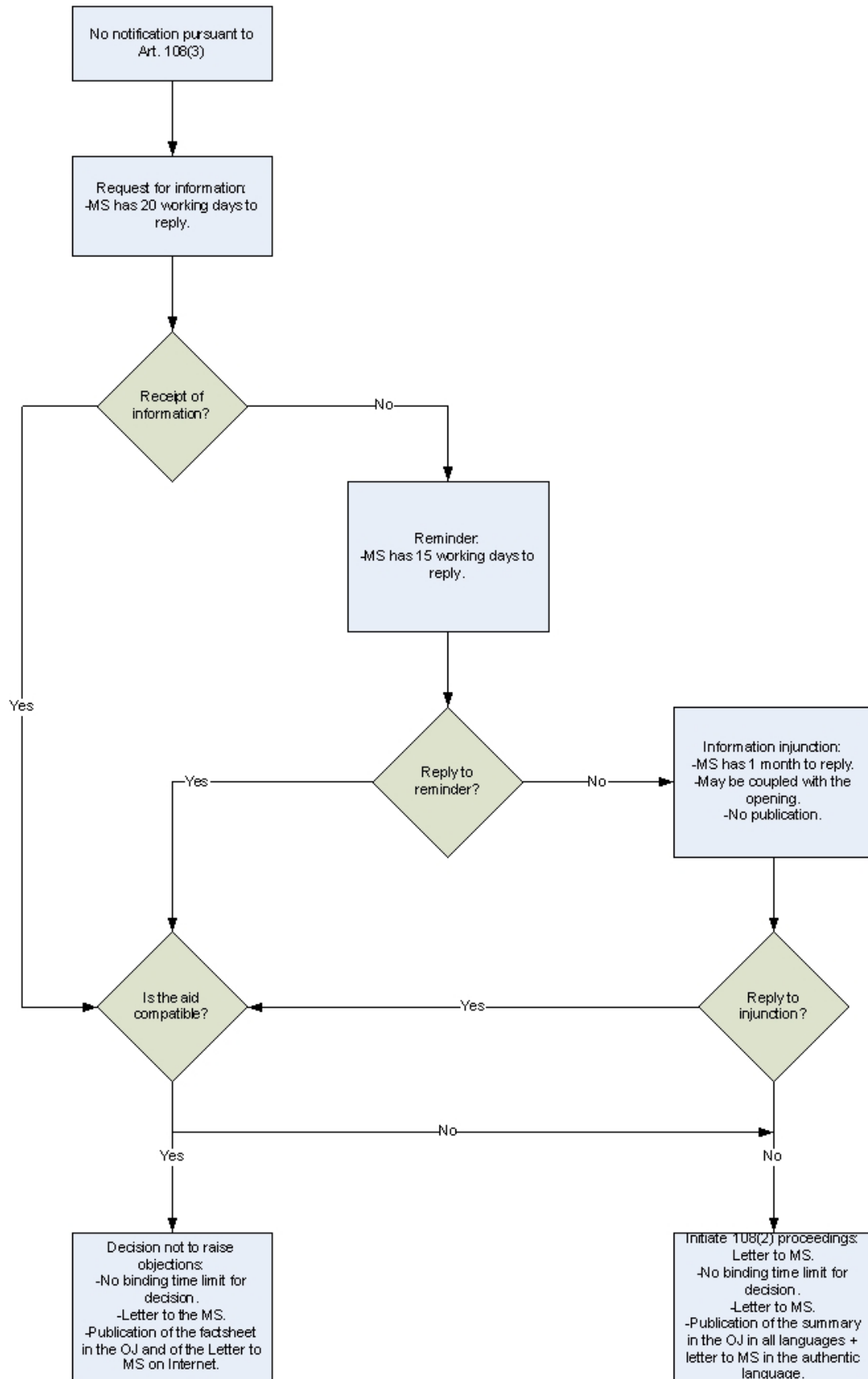
¹⁰ OJ C 37, 3.2.2001, p. 3.

¹¹ OJ C 70, 19.3.2002, p. 8.

¹² Par 125: *À cet égard, il importe de constater que l'application des lignes directrices de 1998 à l'encontre des régimes fiscaux litigieux adoptés en 1993 ne constitue pas une situation acquise antérieurement, mais relève d'une situation en cours qui, bien que née avant l'entrée en vigueur de celles-ci, est régie par lesdites lignes directrices à compter de leur entrée en vigueur, conformément au principe selon lequel les règles nouvelles s'appliquent immédiatement aux situations en cours (voir arrêt du 29 janvier 2002, Pokrzeptowicz-Meyer, C-162/00, Rec. p. I-1049, point 51).*

Par 126 *L'application efficace des règles de l'Union exige que la Commission puisse à tout moment adapter son appréciation aux besoins de cette politique (voir, par analogie, arrêts du 7 juin 1983, Musique Diffusion française e.a./Commission, 100/80 à 103/80, Rec. p. 1825, point 109, ainsi que Dansk Rørindustri e.a./Commission, précité, point 227).*

7. Flowchart – overview



SECTION 4 PRE-NOTIFICATION

<u>Section 4</u>	<u>Pre-notification</u>	<u>1</u>
<u>1.</u>	<u>Purpose of the pre-notification phase</u>	<u>2</u>
<u>2.</u>	<u>Scope</u>	<u>2</u>
<u>3.</u>	<u>Steps</u>	<u>3</u>
<u>4.</u>	<u>Timing</u>	<u>3</u>
<u>5.</u>	<u>Potential outcomes</u>	<u>4</u>
5.1.	Informal preliminary assessment	4
5.2.	Mutually Agreed Planning	5

1. Purpose of the pre-notification phase

- (1) Pre-notification contacts (“the PN-phase”) are an extremely useful instrument which ensures that notifications are of the right quality since it helps identifying more clearly the information that the Member State must submit for notification. In addition, PN-contacts limit the need to later clarify matters via formal information requests and can thus considerably speed up the process of dealing with the formal notification, once received.
- (2) The PN-phase offers the possibility to discuss and provide guidance to the Member States about:
 - legal issues (e.g. early warning about projects which could not be accepted under Article 107 at an early stage; availability of other legal bases, relevant precedents);
 - economic analysis (definition and description of the market concerned, identification of market failure, demonstration of the incentive effect);
 - scope of information to be submitted in the notification phase so as to ensure that the notification form will be complete from the outset;
 - identification of key issues, competition concerns and where appropriate need for external expertise at a very early stage;
 - constructive proposals for amending the aid proposal to render it compatible.
- (3) The PN phase should be held in strict confidence, unless the Member State decides to waive the confidentiality of this phase.

2. Scope

- (4) Pre-notification contacts (not necessarily meetings) should be encouraged for all State Aid cases, even in seemingly non-problematic cases, whenever a Member State calls for informal guidance.
- (5) A PN phase should be strongly recommended for cases where there are particular problems, novelties or specific features, which would justify an informal prior discussion with the Commission services.
- (6) PN contacts are mandatory for cases subject to Simplified Procedure (see [Section on Simplified Procedure](#)).
- (7) A Member State not having availed itself of the possibility of using a PN-phase will face the normal consequences of notifying a poorly structured project, e.g. notification being deemed withdrawn after one reminder when additional information is not submitted on time or opening of a formal investigation whenever the necessary conditions are met, generally after only two rounds of information requests. A good notification will of course be assessed in the normal manner, even if there have been no PN contacts.

3. Steps

- (8) Pre-notification contacts (E-mails, conference calls) are in principle to be favoured rather than meetings in the interest of both the Member State and the Commission.
- (9) Pre-notification contacts should, in principle, only take place on the basis of a written draft notification form [the same applies in the context of the Simplified Procedure]. To make sure that the best outcome can be derived from pre-notification meetings/contacts, Member States should systematically be asked to provide the Case team with the information necessary for its assessment, by using a draft notification form, at the latest two weeks before the meeting/contact. The draft notification form must be sent via secured E-mail (preferably SANI, otherwise PKI) to the Greffe and will be registered in ISIS as a PN.
- (10) If a meeting is called, the Case team would send a short “agenda” (by e-mail) indicating which matters would be discussed and what aspects have eventually given rise to questions, a few days before the meeting.
- (11) Pre-notification discussions should be held in the presence of the granting authorities and/or national authorities or the Member State’s Permanent Representation. Depending on the circumstances of the case, it can be very useful to involve the aid recipient, particularly for cases with major technical, financial and project-related implications. In such cases, only the beneficiary will be able to answer the necessary specific questions directly, thereby ensuring that the authorities and the Case team are not kept waiting for an answer and do not need to get back to the beneficiary, with time and perhaps certain nuances being lost. The Case team should thus strongly encourage the Member State concerned to take the aid recipient along to the PN-contact/meeting.
- (12) Internally, it may in some cases be necessary to involve the CET and the Coordination Unit, experts from other DGs, as well as the Legal Service, so that the Case team could deliver a preliminary assessment of the project as complete and accurate as possible. Involvement of the CET, LS or the Coordination Unit to the PN contact/meeting does not necessarily mean that attendance of members of these teams to the PN contacts/meeting is compulsory; their involvement may be achieved through information and informal consultation.

4. Timing

- (13) At least in standard cases, the PN-phase should remain reasonably short, aimed at preparing a complete notification. As a general rule, for a given standard case, the PN-phase should not last more than 2 months, ideally followed by the complete notification (or confirmation that no notification will follow), even though it is of course up to the Member State if it will notify the project and when.
- (14) For cases subject to Simplified Procedure, see [Section on the Simplified Procedure](#), paragraph relating to the timing of the PN phase.
- (15) The timing and format of the pre-notification contacts is, however, linked to the complexity of the individual case in question. In more complex cases, an extended

PN-phase may be appropriate. For R&D cases for instance, pre-notifications contacts may last several months. In such cases, however, the Case team and the Member State authorities concerned should embark in a Mutually Agreed Planning (see (19)).

- (16) In order not to drag the PN-phase out indefinitely, the case-team may in certain cases have to declare the PN-phase closed. This may notably be necessary in cases where serious issues have arisen, when the Member State fails to cooperate, does not withdraw the draft notification nor amend its initial project in the way set out by the Commission services, or in case of very premature PN-contacts (where the Member State has not really made up its mind as to which project it actually wants to carry out). In such cases, the Member State should be encouraged to either abandon the project, or come back with an amended or complete draft notification form. This may be done orally by the Case team in a first step. In a second step, an e-mail may be sent.

5. Potential outcomes

5.1. Informal preliminary assessment

- (17) Except in particularly novel or complex cases, the Commission services should endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the PN phase, and within 5 working days after the pre-notification contact in cases subject to Simplified procedure (See [Section on Simplified Procedure](#)). This non-binding assessment is not an official position of the Commission, but informal¹ guidance from the Commission services on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the Common Market. In particularly complex cases, the Commission services may also provide written guidance by e-mail, at the Member State's request, on the completeness of the draft notification or the information still to be provided. The following disclaimer should be added: "This position is not a definitive position of the European Commission itself, but only a preliminary view of the services of DG Competition, based on the information available at this stage and pending any additional comments your authorities or any third party might bring forward in the course of the notification procedure."
- (18) If, after PN-contacts, DG COMP's preliminary assessment of the project is positive, no further request for information should be necessary once the case is notified and the Commission would adopt a decision within two months from receipt of the notification in normal procedure, and one month within Simplified Procedure (See [Section on Simplified Procedure](#)).

¹ This may take the form of an e-mail with the State aid Registry in copy.

5.2. Mutually Agreed Planning

- (19) The PN phase is also the main occasion at which a Member State may request the application of the “Mutually Agreed Planning”(MAP). Mutually Agreed Planning is a form of structured cooperation between the Member State and the Case team, based on a joint planning and understanding of the likely course of the investigation and its expected time-frame. In return for the Member State providing all the necessary information in a timely manner and as agreed in Mutually Agreed Planning, the Case team would endeavour to respect a mutually agreed time-frame for the further investigation of the case.
- (20) The MAP is available for Member States as regards particularly novel, technically complex or otherwise sensitive cases (large individual aid or schemes), cases which have to be examined as a matter of absolute urgency or for which the Case team may not be in a position to give the Member State a "preliminary assessment" of the likely outcome of the case after the PN-phase.
- (21) At the end of the PN-phase, and on the basis of a (largely finalised) draft notification form submitted by the Member State through SANI, the Case team and the Member State concerned would then agree on:
- the priority treatment of the case concerned, if possible in return for the Member State accepting the suspension of the investigation of other cases originating from the same Member State, should this be necessary for planning or resource purposes;
 - the information to be provided by the Member State and/or the beneficiary concerned, including studies, external expertise or unilateral information-gathering by the Commission services; and
 - the likely form and duration of the assessment of the case by the Commission services, once notified.
- (22) Mutually Agreed Planning will take place at the end of the pre-notification phase, and be followed by the formal notification. However, the Case team and the Member State concerned may also agree, at the latter's request, on Mutually Agreed Planning for the further treatment of the case at the outset of the formal investigation procedure.

SECTION 5 NOTIFICATION

<u>Section5</u>	<u>Notification</u>	<u>1</u>
<u>1.</u>	<u>The obligation to notify</u>	<u>3</u>
1.1.	Standstill obligation	3
1.2.	Exceptions	3
1.2.1.	Schemes	3
1.2.2.	De minimis and block exempted measures	3
<u>2.</u>	<u>Simplified notification under the Implementing Regulation</u>	<u>6</u>
<u>3.</u>	<u>The Simplified Procedure Notice</u>	<u>7</u>
<u>4.</u>	<u>Formal requirements.....</u>	<u>7</u>
4.1.	Basic requirements	7
4.2.	Alterations before a decision is taken	7
4.3.	Information letter from a Member State.....	7
4.4.	Registration and attribution	8
<u>5.</u>	<u>Timing</u>	<u>8</u>
5.1.	Calculation rules	8
5.2.	The Lorenz procedure.....	9
<u>6.</u>	<u>Steps</u>	<u>9</u>
6.1.	Preliminary examination	9
6.2.	Formal request for additional information.....	10
6.3.	Informal request for additional information	10
6.4.	Requests for extension of time	10
6.5.	Agreed suspension of the preliminary examination	11
6.6.	Notification deemed withdrawn	11
6.7.	State of play contacts	11

7.	<u>Outcome of the preliminary examination.....</u>	12
7.1.	Legal basis for assessing compatibility	12
7.2.	Options to end the preliminary examination	12
7.3.	Commitments.....	14
7.4.	Withdrawal of a notification	14

Summary

<i>Deadline:</i>	<i>2 months from the date the notification is complete</i>
<i>Adopted by:</i>	<i>empowerment, written or oral procedure,</i>
<i>ISC-period:</i>	<i>5 working days</i>
<i>Case no:</i>	<i>SA. number (N/year)</i>

1. The obligation to notify

- (1) The Commission's State aid control is based on the principle of compulsory prior notification to the Commission of all new aid measures. In accordance with [Article 108\(3\) of the TFEU](#), the Commission must be informed in sufficient time to enable it to submit its comments of any plans to grant or alter aid.

1.1. Standstill obligation

- (2) The Member State concerned may not put the notified aid measure into effect until the Commission has reached a decision ("standstill obligation", see also [Article 3 of Regulation 659/1999](#)).
- (3) By 'putting into effect' is meant not only the actual payment of the aid but the moment the right to receive the aid according to the national law arises (C-129/12, point 40) conferment of powers enabling the aid to be granted without further formality. 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, insert a clause whereby the aid granting body can only grant the aid after the Commission has cleared the aid. Without such a clause the measure is considered as unlawful (non-notified) aid. In practice, the file is transferred from the N-Register to the NN-Register, and the general time-limit of two months for the preliminary examination of the measure no longer applies.

1.2. Exceptions

1.2.1. Schemes

- (4) Once a scheme has been authorized by the Commission, individual awards under the scheme of aid below certain thresholds, depending on the guidelines or frameworks applicable, need not be notified.
- (5) Alterations to existing aid, i.e. "any change other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid with the common market", must be notified. However, an increase in the original budget of an existing aid scheme by no more than 20% or a prolongation of an existing authorized aid scheme by up to 6 years shall not be considered an alteration to existing aid ([Article 4 of Regulation 794/2004](#)).

1.2.2. De minimis and block exempted measures

- (6) The Member State does not need to notify aid falling within the scope of the 'de minimis' Regulation [Article 2 of the Commission Regulation 1998/2006](#)¹.
- (7) The Member States are not obliged to notify categories of aid foreseen by the [General](#)

¹ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ L 379 of 28.12.2006, p.5-10

[Block Exemption Regulation](#) (GBER)². The Member States are able to grant aid that meets the conditions laid down in this regulation without prior notification to and approval by the Commission.

- (8) The Member States are required to submit to the Commission a summary description of the aid measure within 20 working days following the implementation of the measure. The Commission assesses whether the formal conditions of the General Block Exemption Regulation have been respected. Summary information forms shall be sent only via the Web application SANI. Only in exceptional circumstances will the Commission accept transmission via PKI. Member States shall exclusively use the forms that are available in all Community languages in the Web application or on the Internet-page of DG Competition for transmission via PKI.
- (9) All forms are either received by the SANI tool or exceptionally by the Greffe. The Greffe attributes an aid SA.number for all measures introduced under the GBER followed by code X and the year. The form is registered in ISIS under this aid SA.number (X/year) and an acknowledgement of receipt is sent to the Member State. Any subsequent correspondence can be made under this reference. The completeness of the summary description and the correctness of the information submitted are checked after registration, in particular whether the web link to the full text of the aid measure is active. After this check, the complete summary information form is translated into all Community languages via the automatic translation tool. All language versions are sent to the Secretariat General for publication in the Official Journal, C-series. A working language version is published on DG COMPs Web site.
- (10) If the form is incomplete or unclear, a request is sent to the Member State by way of a standard letter to deliver the missing information within fifteen working days. If the information does not reach the Commission within the 15 working days, a reminder with a further delay of 10 working days is sent. By the same letter, the Member State is informed that in case no information is received, the Commission reserves the possibility to examine the aid under the rules for non-exempted aid, i.e. the normal proceedings. If there is evidence that the aid may not be in conformity with the underlying exemption regulation, a standard letter is sent informing the Member State of the reasons why the aid does not fulfill the requirements of the relevant regulation and requests observations within 15 days. Telephone contacts with the Member States can and should be used before writing to them. If, after the reminders, the summary description remains incomplete the Member State is informed by means of a letter that the Commission is now examining the aid under the provisions of [Regulation 659/1999](#), i.e. is starting the normal examination applicable to notifiable aid and that full information is requested. In these cases the files with code X are closed and the case transferred to the NN-register or, if the aid has not been implemented yet, to the N-Register.
- (11) When a Member State notifies a measure which seems to fall within the scope of the GBER block exemptions, the case team should draw the attention of the Member State to

² Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3–47

the possibility to use the General Block Exemption Regulation and/or require the Member State to clarify to what extent the measure notified differs from the measures exempted under the General Block Exemption Regulation.

2. Simplified notification under the Implementing Regulation

- (12) [Article 4 of Regulation 794/2004](#) creates a simplified notification procedure for certain types of alteration to existing aid, namely:
- Increases in the original budget of an aid scheme of over 20%;
 - Prolongation of an existing authorized aid scheme by up to 6 years, with or without an increase in the budget;
 - Tightening the criteria for the application of an authorised aid scheme, a reduction of aid intensity, or a reduction of eligible expenses.
- (13) This simplified procedure has also been introduced for certain forms of rescue aid, where the amount of rescue is limited to the operating needs (10 million euro in general) as determined on the basis of the accounts in the preceding year (see point 30 of the 2004 [Community guidelines on State aid for rescuing and restructuring firms in difficulty](#)³).
- (14) The simplified notification procedure shall not be used to notify alterations to aid schemes in respect of which Member States have not submitted annual reports. However, the annual reports for the years in which the aid has been granted may be submitted at the same time as the notification.
- (15) While these changes are notified on a greatly simplified notification form, they are acknowledged and registered in the same way as other notified aid.
- (16) Because of the limited extent of these notifications, it should usually be possible to approve them without further questions to the Member State. A standard format decision can be used for such cases. Such decisions are normally adopted under existing empowerment procedures.
- (17) The Commission has undertaken to use its best endeavours to approve such simplified notifications within one month.
- (18) In exceptional cases, however, it may be necessary to undertake a more detailed assessment of the effects on competition of the changes proposed. In this case, the normal procedure for the assessment of notified aid applies, and a request for additional information should be prepared. This should also explain to the notifying Member State why a more detailed assessment is considered necessary.
- (19) The detailed assessment should only concern the changes proposed by the Member State, but case-handlers should also quickly check that the underlying scheme remains compatible with the terms of the original approval decision and/or the State aid rules. If it is considered necessary to reopen the assessment of the original aid scheme as approved by the Commission, the appropriate measures procedure must be followed (See [Section on Existing aid](#)).

³ Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 01.10.2004, pages 2-17

3. The Simplified Procedure Notice

- (20) See [Section on the Simplified Procedure](#).

4. Formal requirements

4.1. Basic requirements

- (21) Notification of an aid measure is made by the Member State through its Permanent Representation. It is compulsory to submit the notification electronically through the web application State Aid Notification SANI – following [Article 3\(4\) of Regulation 794/2004](#)⁴. Furthermore, the notification forms provided for in the [Regulation 271/2008](#)⁵ are compulsory. Information regarding aid measures not yet implemented that are not submitted according to the notification forms should be sent back to the Member State concerned indicating that the notification should be done according to the applicable rules.
- (22) The supplementary information sheets can be found in Annexes of [Regulations 794/2004, 271/2008, and 1147/2008](#)⁶. They have been drafted specifically for the different guidelines and frameworks in force.
- (23) Where the Member State has completed the General Part of the form, but has failed to complete one or more of the Supplementary Information sheets which are necessary to assess the aid, the whole form should not be returned. Instead the Member State should be asked to provide the missing sheets in the request for information.

4.2. Alterations before a decision is taken

- (24) If the Member State subsequently alters the original notification before a decision is taken, it must notify the alteration. The notification of the alteration is regarded as a new notification. The period allowed for taking a decision begins to run afresh from the date the altered proposal is received. However, the aid number attributed to a case remains the same throughout the examination of the file.

4.3. Information letter from a Member State

- (25) In the event a Member State submits an information letter which neither contains information clearly pointing to the existence of State aid nor requests the Commission to analyse a given measure in the light of State aid rules (for instance a simple communication for information purpose), it is very important that the Commission reacts

⁴ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.04.2004, p. 1-134

⁵ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 82, 25.03.2008, p.1

⁶ Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.10 of its Annex 1, OJ L 313, 22.11.2008, p. 1

by replying in writing to the letter that the Commission does not treat the information letter as a notification. It stresses that if the Member State has doubts about the nature of a given measure, the appropriate means to obtain legal certainty is to notify the measure and thus obtain the Commission assessment. By this reply the Commission acts as a diligent administration and cannot be accused of having contributed to create a situation of legal uncertainty.

4.4. Registration and attribution

- (26) The DG Comp State Aid registry is responsible for the allocation of an aid number and the acknowledgement of receipt.
- (27) The Registry attributes the notification to the unit responsible at the latest by the following working day. The State Aid Registration form is attached to the notification – the case handler fills it out and returns it to the Registry. The case number and title is registered in ISIS by the Registry.
- (28) After the registration the unit receives a “case file” from the Registry containing copies of the relevant documents.
- (29) Within 5 working days of assignment, a preliminary assessment form (PAF) has to be completed by the case-handler, and put into ISIS. This is to enable all Units to identify any linkages between the notified aid and other dossiers.

5. Timing

- (30) The Commission has two months to complete the preliminary examination of a new aid. The date of receipt of the notification is the reference date for 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 108(2). The 2-month period begins on the day following receipt of the notification.
- (31) The period can be extended with the consent of both the Commission and the Member State (see 6.4).
- (32) All deadlines, particularly for decisions to open the formal investigation procedure, must be strictly respected. A delay of just one day may lead to an annulment of the decision by the Court and the aid being deemed to be authorized.

5.1. Calculation rules

- (33) [Council Regulation 1182/71](#)⁷ lays down how to count time limits:
 - For a period expressed in months: one must take the same day in the relevant month or the last day of the month;
 - If a period is expressed in working days, public holidays, Saturdays and Sundays are excluded.

⁷ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

- (34) The following examples help to understand the calculation of time limits:
- A two-months period starting on 25/10/2004 would end on 25/12/2004;
 - Plus 15 working days (a period expressed in working days, so public holidays are excluded) means that the period starts for instance on 3/1/2005 until 21/1/2005.
 - A two-month period starting on 31/7 would end on 30/9.

5.2. The Lorenz procedure

- (35) If the Commission fails to take a decision within the two months period, the aid is deemed to be authorized. The Member State may implement the measure after giving the Commission prior notice thereof, unless the Commission takes a decision within 15 working days of receipt of the notice - [Article 4\(6\) of Procedural Regulation 659/1999](#), also referred to as the *Lorenz*-procedure⁸. This is a default procedure which protects the Member State which has diligently notified against the Commission inaction. For the sake of good administration the Lorenz procedure should be avoided and the Commission should take explicit decisions in State aid matters.

6. Steps

6.1. Preliminary examination

- (36) Examination of a notification takes place during two phases, a preliminary examination phase, which is followed, if necessary by a formal investigation procedure under [Article 108\(2\)](#). Before taking a decision to clear aid without opening Article 108(2) proceedings, the Commission is under no obligation to inform other Member States, interested parties and complainants, except in cases subject to Simplified Procedure (See [Section Simplified Procedure](#)).
- (37) In principle, the information provided by the Member State in the notification using the notification form and supplementary information sheet should be exhaustive, to allow the case-handler to draft a decision without the need of any further information. Unless otherwise agreed in Mutually Agreed Planning (see Sections [Pre-notification](#) and [Formal investigation procedure](#)), no requests for information should normally be necessary for cases notified after successful PN contacts. No requests for information are possible as long as a case is subject to Simplified Procedure (See [Section Simplified Procedure](#)).
- (38) If the notification turns out to be incomplete, there are two ways for the Case team to request complements from the Member State:
- a formal request for information and
 - informal requests for information.
- (39) Except if agreed otherwise in the context of Mutually Agreed Planning (see Sections [Pre-notification](#) and [Formal investigation procedure](#)) Information requests to interested parties should be carried out only after the opening of a formal investigation procedure.

⁸ Case 120/73, Gebrüder Lorenz GmbH v Federal Republic of Germany et Land de Rhénanie-Palatinat (Lorenz) [1973] ECR 1741

6.2. Formal request for additional information

- (40) The case team should endeavor to group requests for information during the preliminary examination phase. To that end, it is suggested that case teams start drafting the decision as soon as they receive the notification in order to identify missing information at an early stage. This means that, in complex cases, the Case team should involve other COMP services (CET, State aid case support unit, State aid Policy unit) as early as possible in the examination. In principle, there will be only one comprehensive information request during the preliminary examination phase, normally to be sent within 4-6 weeks after the date of notification. One further request could be made in exceptional, duly justified cases. The Member State is asked to reply within 20 working days.
- (41) The Member State should channel its replies through the Permanent Representation (using PKI). A new deadline of 2 months runs from receipt of the additional information. Upon receipt of the additional information, an acknowledgement of receipt is sent to the Member State by the Registry.
- (42) When necessary, the Case team should find an agreement with the Member State to extend the the two-month deadline, as foreseen by [Article 4\(5\) of the Procedural Regulation 659/1999](#). Where appropriate, shorter time limits may be fixed as well..

6.3. Informal request for additional information

- (43) It is for the case team in consultation with the Head of Unit to decide whether an informal request for information may be useful in the case at hand.
- (44) For informal requests for information, a standard letter can be used. The transmission can be done via e-mail with the State aid registry in copy. A specific event exists in ISIS, called “IREQ – Informal Request for Information”, which should be used by the Registry (instead of the normal event “Request for Information”).
- (45) If a reply is received within 5 working days, the information received is registered but will not give rise to a change of the original deadline. The original two months deadline remains valid. The corresponding event in ISIS is called “informal submission of information”.
- (46) If no reply is received within 5 working days, the informal request for information is “converted” into a formal request for information. To do this, the case team has to inform the Registry. A standard letter will be sent out to the Member State, indicating that since no reply has been received, the notification is considered incomplete and that the notification now follows normal procedure.
- (47) Upon receipt of the additional information an acknowledgement of receipt is sent to the Member State by the Registry.

6.4. Requests for extension of time

- (48) In principle, if a Member State needs more time to assemble the information requested, it should request an extension of time. The Commission may also request an extension of time from the Member State. Any request for extension of a time limit must be made in writing, at least two days before the expiry of the time limit and must be duly substantiated.

- (49) In the case of notified aid, a reasonable request to extend the time limit for a response should normally be accepted, since the Member State has notified the aid and is complying with the suspension obligation. If the Member State fails to provide the information within the extended deadline, the notification will be deemed to be withdrawn.⁹
- (50) If the request for an extension is unreasonably long (in excess of +/- 2 months), this should either be reduced or the Member State should be invited to withdraw the notification and submit a new notification containing the relevant information.

6.5. Agreed suspension of the preliminary examination

- (51) In exceptional circumstances, the course of the preliminary investigation may be suspended if a Member State so requests to amend its project and bring it in line with State aid rules, or otherwise by common agreement. Suspension may only be granted once, and for a period agreed in advance. To improve transparency and avoid the Commission being accused of abnormally long delays in the N-phase (although the main responsibility lies with the Member State), suspensions should be formalised.
- (52) Once the suspension is agreed with the Member State, the Case team will send a service letter to confirm the suspension of the notification. The letter will include a timeframe at the end of which the suspension period will expire, coupled with a deadline for the Member State to submit a complete and compatible project. Should the Member State fail to submit a complete, compatible project at the end of the suspension period, the Commission's services should send a reminder where the Member State is informed that the notification will be deemed withdrawn if a complete and compatible project is not submitted within 15 working days. If the Member State does not react, the Member State concerned will be informed that the notification is deemed to be withdrawn, or the formal investigation procedure opened without delay in case of serious doubts.
- (53) Suspended notifications should clearly appear as such in ISIS and the time of suspension should not be taken into account when calculating the duration of the N-phase.

6.6. Notification deemed withdrawn

- (54) Should the Member State not reply to a request for information, a reminder is sent where the Member State is informed that the notification will be deemed withdrawn if the complete information is not submitted within 15 working days. After this reminder, should the Member State fail to provide the requested information within the set deadline, the provision contained in Article 5(3) of the [Procedural Regulation 659/1999](#) will systematically be applied, and the Case team informs the Member State by an administrative letter that the notification is deemed withdrawn. The same letter should be sent in case a Member State fails to provide information following a request for time extension (see paragraph (49)) or following an agreed suspension of the preliminary examination (see paragraph (52)).

6.7. State of play contacts

- (55) At their request, notifying Member States will be informed of the state of play of an

⁹ The situation is different for non-notified aid (see Section Unlawful aid).

ongoing preliminary investigation, especially in novel, technically complex or otherwise sensitive cases. The objective of the State of Play contacts is to contribute to the quality and efficiency of the decision-making process and to ensure transparency and communication between DG COMP and the Member State.

- (56) State of play contacts may be conducted in the form of a meeting at the Commission's premises or, preferably, by telephone or videoconference. In case of meetings, in order for the meeting to operate properly, this should be carefully prepared on the basis of an agenda agreed with the Member State in advance. The Member State should also be encouraged to involve the beneficiary in the meeting.

7. Outcome of the preliminary examination

7.1. Legal basis for assessing compatibility

- (57) Starting point is always to assess the legal basis invoked by the Member State under the Treaty (not the national legal basis). If this legal basis applies, there is no need to analyse/assess other exceptions. Should, however, this legal basis not apply, other exceptions may be examined by the Commission ex officio. However, it is up to the Member State and the interested parties to demonstrate that the aid is compatible with the internal market.
- (58) The decision will require a precise reference to a Treaty Article and to the relevant guidelines/frameworks, with OJ reference. Then it is assessed whether the aid is compatible in the light of the legal basis, i.e. whether it meets the conditions for the application of one of the exceptions laid down in [Article 107\(2\) or \(3\)](#) - with reference to the exceptions applied and with specific provisions in the relevant guidelines/frameworks. The exceptions of Article 107(2) have priority over those in 107(3) because in the former case the Commission has no discretionary power. However the Commission still has to verify that the conditions laid down by the Treaty are met.
- (59) If none of the exemptions 107(2) or 107(3) apply, in relevant cases (services of general economic interest, "SGEI"), [Article 106\(2\)](#) may be used as a legal basis.

7.2. Options to end the preliminary examination

- (60) Following the initial exchange between the Commission and the Member State, a discussion should take place with the Head of Unit/Director responsible which would lead to the measure being placed in one of the following categories:
- A- The measure **does not constitute State aid** within the meaning of [Article 107\(1\)](#). There are two options: either the Member State withdraws the notification (see 7.4) or, if the Member State insists on a decision for legal certainty, the Commission adopts a decision not to raise objections. In such a case, the decision will describe the grounds for concluding that there is no aid within the meaning of Article 107(1).
 - B- There are no doubts as to the compatibility of a measure. A decision **not to raise objections** can be envisaged. A second round of questions may only be envisaged in exceptional cases. Minor points should be clarified through informal requests for information (see Chapter 6.3).

- C- There are **doubts** about the compatibility of the measure, which cannot be resolved by further minor clarifications; in this case a decision to open the **formal 108(2) procedure** should be prepared without further questions to the Member State. Opening of the procedure should take place promptly whenever the necessary conditions are met: in particular complex cases and for long preliminary investigation periods where the Case team experiences serious difficulties (more than one request for information, meetings, 2-months preliminary investigation period manifestly exceeded).¹⁰ An opening should in any event be considered after **two** rounds of questions. Where a formal complaint¹¹ is brought forward by an interested party (e.g. competitor) raising doubts against the measure notified, the Commission should open the formal investigation period also to give interested parties the possibility to make their views heard.¹²
 - D- Despite the first round of questions, the Member State has failed to provide the information necessary to enable the Commission to assess the measure; in this case, the Member State should be informed that the information so-far received is inadequate, and that the Commission intends to deem the notification to be withdrawn unless complete and comprehensive information is provided within 15 working days.
- (61) In scenario D, in the light of the [Procedural Regulation 659/1999](#), several responses from the Member State appear possible:
- The Member State fails to respond. The Commission services inform the Member State that the notification is deemed withdrawn.
 - The Member State provides the necessary information, and either (B) or (C) above is applied;
 - The Member State accepts that it cannot provide the information, for example because the details of the scheme are still being worked out, and agrees to withdraw and re-notify at a later date or to suspend the notification;
 - The Member State declines to provide the information, possibly indicating that it considers the notification to be complete. In this case, the Commission should open the formal investigation procedure because it is having serious difficulty in getting the relevant information.
 - The Member State provides only incomplete information; in this case, the Commission should open the formal investigation procedure because it is having serious difficulty in getting the relevant information.

¹⁰ See judgment in Case C-198/91, *Cook v Commission* [1993] ECR I-2487; judgment in Case C-225/91, *Matra v Commission* [1993] ECR I-3203, para 16; judgment in Case C-367/95 P, *Commission v Sytraval* [1998] ECR I-1719, *SIDE v Commission* [1995] ECR II-2501, judgment in Case T-11/95, *BP Chemicals v Commission* [1998] ECR II-1455, *Prayon-Rupel v Commission* [2001] ECR II-867.

¹¹ See section on complaints.

¹² Order in Case T-358/02, *Deutsche Post AG v Commission* [2004] ECR II-1565 and ; judgement in Case T-613/97, *Union française de l'express (UFEX), DHL International SA, Federal express international, SNC, CRIE SA v Commission* [2006] ECR II-1531.

- (62) Note that the Case team may have to draft a note to the Commissioner in order to get an approval on the line to take (see [Section Working together](#)).

7.3. Commitments

- (63) A decision to approve notified aid without opening procedures may not impose conditions.
- (64) Undertakings (commitments) may however be asked from the Member State on certain aspects which are missing in the notification, but are necessary to make the aid compatible – these undertakings should be stated in the decision. Legally, the commitments become part of the notification. The Member State must confirm the commitments in writing through the Permanent Representation. In the absence of such commitments, the Commission initiates the formal investigation procedure

7.4. Withdrawal of a notification

The Member State can, in accordance with Art. 8(1) of the [Procedural Regulation 659/1999](#), withdraw the notification at any time. In a case where no decision has been adopted - only Legal Service and Secretariat General are informed, provided an inter service consultation has been launched. Otherwise, the case is simply administratively closed. The Commission does not take a decision, but only an administrative letter (“service letter”) is sent to the Member State. See also [Section Formal investigation procedure](#), Chapter on the withdrawal following the opening of a formal investigation (Article 108(2) proceedings).

SECTION 6 FORMAL INVESTIGATION PROCEDURE

<u>Section 6</u>	<u>Formal investigation procedure.....</u>	<u>1</u>
<u>1.</u>	<u>When should the Commission open the formal investigation procedure?</u>	<u>3</u>
1.1.	Initiating the formal investigation procedure for notified and non-notified cases	3
1.2.	Initiating the formal investigation procedure for misuse of aid	3
1.3.	Initiating the formal investigation procedure for existing aid cases	4
1.4.	Initiating the formal investigation procedure in case of revocation	5
1.5.	Execution of a Court decision – annulment of a 108(2) decision	5
<u>2.</u>	<u>Decision to initiate the formal investigation procedure.....</u>	<u>5</u>
2.1.	Summary	5
2.2.	Formal adoption	6
<u>3.</u>	<u>Timing</u>	<u>7</u>
3.1.	Mutually Agreed Planning	7
3.2.	Adoption of a final decision	7
3.3.	Suspension of the formal investigation procedure.....	8
3.4.	Extension of the formal investigation.....	8
<u>4.</u>	<u>Steps</u>	<u>9</u>
4.1.	Transmission of Member State's comments	9
4.2.	Interested parties' comments.....	10
4.2.1.	Status of interested parties.....	10
4.2.2.	Transmission of comments from other Member States and interested parties.....	10

4.3.	Informal information gathering	12
4.4.	Request for additional information	12
4.5.	Summary	13
4.6.	Formal requirements	13
4.7.	The assessment and the legal basis	13
4.7.1.	Notified aid	14
4.7.2.	Unlawful aid.....	15
4.7.3.	Existing aid.....	16
4.8.	Final conditional decision.....	16
4.8.1.	Example 1 - C 11/99, SCI, Netherlands.....	16
4.8.2.	Example 2 - C 18/98, Development of colour ink-jet printers, Netherlands.....	17
4.9.	Final negative decision and recovery	17
<u>5.</u>	<u>Flowchart overview</u>	<u>19</u>

1. When should the Commission open the formal investigation procedure?

- (1) According to the case law of the Community Courts the Commission is obliged to open the procedure when it has doubts about the compatibility of an aid, or when it experiences difficulties in determining the compatibility of an aid. The opening of the procedure enables interested third parties to comment. Thus the Commission is not entitled to continue a bilateral dialogue indefinitely with the Member State, excluding the possibility for third parties to intervene¹.
- (2) The test is an objective one. The Commission may not, therefore, decline to initiate the formal investigation procedure relying upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative or political convenience. The decision to open proceedings is without prejudice to the final decision, which may still be to find that the aid is compatible. The purpose of the 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.
- (3) The 108(2) proceeding is applicable in all types of cases: notified, unlawful, existing aid or misuse of aid. Moreover, the Commission can extend an on-going proceeding ("extension of the procedure") where new circumstances that were not mentioned in the original opening arise, or when it appears appropriate for the sake of clarity.

1.1. Initiating the formal investigation procedure for notified and non-notified cases

- (4) The Commission is obliged to open procedures provided for in Article 108(2) whenever it has serious difficulties or doubts in determining the compatibility of the aid with the common market and/or difficulties of a procedural nature in obtaining the necessary information. Indicators of such difficulties:
 - duration of the preliminary phase;
 - number of information requests, meetings with the Member State;
 - complaints.
- (5) Another reason to initiate the formal investigation procedure may arise in cases where the Commission considers that an aid can be authorised only if certain conditions are imposed. However, an opening here can sometimes be avoided if the Member State is willing to give undertakings (See [Section Notification](#)).

1.2. Initiating the formal investigation procedure for misuse of aid

- (6) According to Article 1 of the Procedural Regulation, "misuse of aid" means aid put into effect in contravention of Article 107(3) TFEU.

¹ Case T-73/98, Prayon-Rupel, [1998] ECR II-867, paragraphs 42 to 47.

- (7) In accordance with Article 16 of the [Procedural Regulation](#), the Commission can open the formal investigation procedure provided for in Article 108(2) whenever it finds that authorized aid is being misused.

1.3. Initiating the formal investigation procedure for existing aid cases

- (8) A definition of existing aid can be found in Article 1(b) of [Procedural Regulation](#)². Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, the Commission must follow a number of procedural steps ([see Section on Existing aid](#)):
- The Commission informs the Member State of its preliminary view, by a **service letter (“Article 17 letter”)**, that the scheme (“might not be”) is no longer compatible and asks Member State for comments within 1 month - [Procedural Regulation](#) Article 17(2).
 - The Commission examines the comments from the Member State and if it considers that an existing aid is incompatible with the common market, it must first propose appropriate measures to the Member State concerned (Article 18 Letter). Since the proposal for appropriate measures must in any case be approved by the Commission, the proposal could be accompanied by a request for empowering the Commissioner either to accept the reply from the Member State, or, if no satisfactory reply is received, to initiate the formal investigation procedure.
 - If the Member State does not accept the appropriate measures, the Commission must then initiate the formal investigation procedure.
- (9) Normally the initiation of the formal investigation procedure does not have legal consequences – it is merely an expression of doubts. However, in certain cases an opening can have legal consequences, e.g. when the Commission had classified an aid measure as new aid and initiated the procedure under Article 108(2), whereas the Member State concerned had maintained that it was an existing aid³ or not a state aid within the meaning of Article 107(1).
- (10) In such cases, the opening decision can be attacked. The opening of the formal examination procedure implied that the Commission did not intend to examine the aid in the context of the procedure for existing aid pursuant to Art. 108 (1) TFEU and that from its point of view the aid had been unlawfully implemented. Such a decision alters the legal position of the measure concerned and of the beneficiaries, since it creates at the very least a significant element of doubt as to the legality of the measure, which must lead the Member State to suspend payment. It might also be invoked before a national court called upon to draw all the consequences arising

² Beware of the amendments which have been introduced following enlargement: Amendment of Article 1(b)(i) of Council Regulation no 659/99 by Act of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Annex II, 5 (6) OJ L 236, 23.9.2003, p.44; a similar amendment has entered into force for Romania and Bulgaria.

³ Judgement of the Court of 9 October 2001, Italy / Commission (Tirrenia), Case C-400/99; See also T-195/2001 and T 207/2001, Gibraltar exempt companies, 30.4.2002.

from the infringement of the last sentence of Art. 108 (3) TFEU.

1.4. Initiating the formal investigation procedure in case of revocation

- (11) According to Article 9 of the [Procedural Regulation](#), “The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article (2), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1), Articles 13, 14 and 15 shall apply *mutatis mutandis*.”
- (12) “Aide en faveur de l’entreprise Verlipack” is an example of a case where the Commission revoked its decision not to raise objections. Following complaints and press articles containing new information led the Commission to initiate 108(2) proceedings. The investigation resulted in a negative decision. The final decision is a new decision and it revokes the decision not to raise objections.⁴
- (13) In the case of “Lintra” (aid to privatisation and restructuring) the Commission initiated 108(2) proceedings but came to the conclusion that “even though the Commission had partly incorrect information at the time of its decision, the information would not have been a determining factor in the decision”.⁵

1.5. Execution of a Court decision – annulment of a 108(2) decision

- (14) Following a ruling by the Court where the Commission decision is annulled and where the Court points to certain aspects which have not been covered or taken into account, the Commission either re-opens the procedure or takes a new decision without re-opening the procedure. The purpose of the re-opening is to re-examine these aspects and give interested parties the opportunity to comment.

2. Decision to initiate the formal investigation procedure

2.1. Summary

<i>Adopted by:</i>	<i>oral procedure or written procedure</i>
<i>ISC-period:</i>	<i>notified aid 5 working days; unlawful/existing aid 10 working days</i>
<i>Misc.:</i>	<i>A note to the Commissioner must always be drafted before initiating the</i>
<i>formal</i>	<i>investigation</i>
	<i>procedure</i>

⁴ NN 178/97, no objections, 16 Sept. 1998, OJ C 29; 108(2) proceeding, OJ C 288, p. 24, 9 Oct. 1999; Final decision, OJ L 320, p. 28, 5 Dec. 2000.

⁵ See N 49/95, no objections, OJ C 168, 03 June 1996. The 108(2) proceeding C 41/99, OJ C 238, p.4, 21 Aug.1999. Final partially negative decision OJ L 236, p.3, 5 Sept.2001, though partially annulled T-111/01 & T-133/01, Saxonia.

2.2. Formal adoption

- (15) Sec Gen standard forms n°1, 6, 7 and 8 must be used for the formal adoption of the decision.
- (16) The decision to initiate the procedure serves a dual purpose: it is intended both to protect the rights of interested parties and to enable the Commission to be fully informed of all of the facts of the case before adopting its decision.
- (17) The decision to initiate the procedure should:
- summarise the issues of fact and law - avoid unnecessary factual details
 - include a preliminary assessment of the Commission as to the aid character of the measure and set out the doubts of the Commission. Unnecessarily detailed assessments should be avoided, as should the adoption of definitive positions. At this stage, the objective is to explain briefly and clearly why the Commission has doubts and to seek comments from interested parties. At this stage, the Commission is only expressing doubts, over-assertive drafting should be avoided.
- (18) The text of the meaningful summary is adopted by the Commission at the same time as the actual decision – the letter to the Member State. It is intended to be a short summary of the grounds on which the Commission has decided to open the procedure. As shown below, the legal formalities are set right in the beginning - therefore there is no need to repeat these in the actual summary.
- “ By means of the letter dated [date to be inserted by originating department] reproduced in the authentic language on the pages following this summary, the Commission notified [name of Member State] of its decision to initiate the procedure laid down in Article 108(2) of the TFEU Treaty concerning [part of]* the abovementioned aid/measure.
 - [The Commission decided not to raise any objections to certain other aid/measure, as described in the letter following this summary.]*
 - Interested parties may submit their comments [on the aid/measure in respect of which the Commission is initiating the procedure]* within one month of the date of publication of this summary and the following letter, to: “
- (19) The meaningful summary should follow the “tone” of press releases – brief and to the point and it should in principle be no more than one page.
- (20) The following are examples of good meaningful summaries:
- C 21/06 Regional aid to shipyard Slovenské lodenice Komárno - OJ 194 p. 30, 18.08.2006
 - C 35/06 Sale of land below the market price - OJ 204 p.5, 26.08.2006
 - C 6/06 Volkswerft Stralsund - OJ 90 p. 36, 13.04.2006
 - C 5/06 Investment aid to Rolandswerft - OJ 135 p. 9, 9.06.2006

- C 4/06 Aid to Djebel S.A - OJ 91 p. 25, 19.04.2006
- C 3/06 Exempt 1929 Holding Companies and Milliardaire Holding Companies - OJ 78 p.2, 31.03.2006
- C8/2008 Ciudad de la luz studios - OJ 134, p. 21–39, 31.5.2008

(21) For the publication of the opening decision and of the meaningful summary, see [section on Publication](#).

3. Timing

3.1. Mutually Agreed Planning

- (22) A Mutually Agreed Planning procedure will be offered at Member State's request, at the very start of the C-phase, as soon as the decision has been adopted, in order to discuss:
- the Commission's doubts,
 - the information/remedies needed, and
 - the likely duration and outcome of the procedure.
- (23) Its objective is to dispel any misunderstandings on the Member State's part as regards the information still required by the Commission in technically complex cases, and more generally to show Commission good will in difficult/controversial cases which might well lead to negative decisions.
- (24) The MAP can also be used to pass clear messages to the Member State on the likely outcome of the procedure (eg. to motivate notifying authorities to withdraw the project or significantly amend it), or as a "negotiating space" to obtain timed Member State commitments in cases open to conditional decisions (eg. restructuring cases).

3.2. Adoption of a final decision

- (25) Formal investigation procedure relating to a notified or an existing aid is to be closed within 18 months: In accordance with Article 7(6) of [Procedural Regulation](#), the Commission will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. Once the 18 months limit has expired the Member State can request the Commission to take a decision within 2 months on the basis of the information available to it. The 18-month time limit may be extended by common agreement between the Commission and the Member State concerned. An extension of the duration of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues. There is no deadline for unlawful aid – see Article 13 of the [Procedural Regulation](#).
- (26) In principle, draft decisions should be sent into ISC within 3 months from the last information submission or expiry of the final deadline. The decision should be adopted not later than 4 months after the last information submitted by the Member State or the expiry of the deadline in case the Member State has not sent any comments.

3.3. Suspension of the formal investigation procedure

- (27) There may be circumstances in which the Commission may need to request a suspension of the procedure at the Member State's request, or could agree to it. This could in particular be the case if:
- The Commission does not yet have an established line on a novel project or legal issue. In this case, an NCOM should be prepared within 2 months from the last submission of information. In such situations, the Member State should be informed of the likely time still required by the Commission services to decide on the course to take – ideally via “state of play contacts” (or meetings). In more difficult cases, formal suspension requests could also be considered. Should the Member State refuse the suspension request, immediate preparation of a Decision would (have to) be the consequence.
 - There is a pending Court case which may affect the assessment of the C-case. Under these circumstances, the case-team would write a letter to the Member State proposing the suspension of the investigation until the Court judgment. If the Member State agrees to suspend the procedure, this should be signalled in ISIS. Should the Member State disagree (probably unlikely), the Commission would immediately prepare a decision following the same line as in the decision subject to Court review.
 - The Commission could exceptionally accept requests by Member States to suspend the investigation in C-phase in order to amend their project to bring it in line with State aid rules. While this possibility should clearly remain the exception (normally, a Member State in such situation should be encouraged to withdraw its project and re-notify it, once amended), such formal suspensions (with deadlines) would seem particularly useful in large complex restructuring cases (e.g. to allow the Member State to complete the restructuring plan of the company or develop appropriate compensatory measures). However, a formal suspension request by the Member State (i.e. a letter) is required, the request would be granted only once, and a clear end date or deadline is to be mentioned.

3.4. Extension of the formal investigation

- (28) When assessing whether to extend the proceedings, this should be done with a view to the effect on interested parties. An alternative is to open new proceedings if the new measures are not directly linked to the measures covered by the original opening.
- (29) For example, should the new information reveal misuse of aid, the Commission either initiates a separate 108(2) proceeding or extends the on-going proceeding – See [Procedural Regulation 659/1999](#) Article 16.
- (30) The Commission may have obtained the information from any source – for example:
- Comments during the 108(2) procedure from 3rd parties (N and NN);
 - Information injunction in an NN-case;
 - Complaint(s) received during the 108(2) proceeding but not in a reply to the opening;

- The Commission itself finds new information in the media.

4. Steps

4.1. Transmission of Member State's comments

- (31) From the date of the notification of the opening decision to the Permanent representation of the Member State, the Member State has one month to submit its comments.
- (32) If no comment has been received after the expiry of the one month deadline, the Commission services / case-team should immediately send a reminder to the Member State granting one additional month. This would also indicate that (i) no further delay will be accepted and (ii) the Commission will thereafter take a Decision on the basis of the information at its disposal in case of notified aid (or may adopt an information injunction in case of unlawful aid).
- (33) If the Member State asks for an extension of the deadline, the Commission services / case-team should agree to the same additional one month deadline according to the same principles (no further delay + threat of decision on the basis of the information available).
- (34) In case of further absence of reply and in the absence of comments from other interested parties, upon expiry of the deadline, a draft decision should be prepared on the basis of the information available (for notified aid).
- (35) In case of a formal investigation of unlawful aid, and in the absence of the Member State's comments on the decision to open the formal investigation procedure, the Commission will issue an information injunction (unless it has already coupled its opening decision with such an injunction or it has already obtained the information necessary to assess the aid otherwise). Late response (or no response) by the Member State to an information injunction should trigger an immediate preparation of a Decision on the basis of the information available, without reminder or deadline. Indeed, if the Commission has requested certain information and has not received it, then it should carry out the procedure of Article 10 until the end (i.e. issue a reminder and then adopt the information injunction)⁶. Otherwise, if the Commission decides on the information available, the Court may consider that the Commission has wrongly decided because of incomplete information⁷. This was the conclusion of the Court *inter alia* in *Valmont* judgment⁸.

⁶ To that effect see judgment in Case T-274/01, *Valmont v Commission* [2004] ECR II-3145 and judgment in Case T-318/00, *Freistaat Thüringen v Commission* [2005] ECR II-4179, where the CFI confirmed the necessity to follow the three step procedure by stating that “it is clear from the course of the administrative procedure that the Commission complied with the procedural requirements laid down by the case-law and provided for in Regulation No 659/1999. On three occasions it formally ordered the Federal Republic of Germany to provide it with the information necessary in order that it might examine the compatibility of the disputed aid with the common market”.

⁷ Case T-274/01, *Valmont v Commission* [2004] ECR II-3145, paras 57 and 60.

⁸ Case T-274/01, *Valmont v Commission* [2004] ECR II-3145.

4.2. Interested parties' comments

4.2.1. Status of interested parties

- (36) The rights of interested parties in Article 108(2) and the [Procedural Regulation](#) (Article 20) flow from the requirement to give 'notice to the parties concerned to submit their comments'. The parties concerned or interested parties, are not only the firm or firms receiving aid but also firms, individuals or associations whose interest might be affected by the grant of the aid – such as competitors and trade associations.
- (37) In fact the term "interested parties" is misleading as they are not parties to the procedure in the normal legal sense of the term. The procedure itself is a contradictory procedure between the Commission and the Member State. The rights of third parties are limited to providing the Commission with information by submitting their comments in due time. Moreover, when the Commission takes a final decision, it is required to send a copy of that decision to those parties which have submitted comments.
- (38) However "interested parties" under State aid procedures have none of the rights of third parties under anti-trust procedures. In particular they have no right to require access to the file or to related correspondence.
- (39) Furthermore, the beneficiary of the aid has no special status or rights going beyond those of other interested parties

4.2.2. Transmission of comments from other Member States and interested parties

- (40) Interested parties and other Member States have one month, following the publication of the decision, to submit their comments.
- (41) The formal investigation procedure is a contradictory procedure between the Commission and the MS. The rights of third parties are limited to providing the information by submitting their comments in due time. The Commission is normally not obliged to consider comments received after the deadline, save in exceptional cases: for example, if a meeting took place with the interested party and the Commission agreed that further comments could be submitted within a set deadline. If no exceptional circumstances apply, late third parties' comments shall thus be rejected. Case teams can always accept meetings requests if they consider them necessary to clarify facts /information submitted.
- (42) Interested parties' comments should be transmitted without any delay (ie within 5 working days) to the Member State concerned. The Member State should be encouraged to accept submissions in their original languages, or, at least, to accept transmission of submissions made in one of the working languages of the Commission. To this effect, the letter to Member States points out that not accepting comments in a working language of the Commission would lead to considerable delays.
- (43) Should the Member State not be in a position to accept the transmission of non-translated submissions, the Member State concerned and the interested parties will be informed of this fact.

- (44) The Member State is given the opportunity to reply to comments and allegations made by other Member States and interested parties within one month. If no comment has been received after the expiry of the one month deadline, the Commission services / case-team should immediately send reminder to the Member State granting one additional month. This would also indicate that no further delay will be accepted.
- (45) In absence of a reply by the Member State, the Commission is free to take the interested party submissions into account in its decision.
- (46) If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned – [Procedural Regulation 659/1999](#) Article 6(2). If an interested party requests that its actual comments should be withheld from the Member State, then the Commission can only use the information received as background information and cannot refer to it in the final decision
- (47) It is not uncommon that no interested party reacts to the opening of the procedure. In that case it is good administrative practice to inform the Member State of that fact. Member States should thus be systematically informed of the absence of interested parties' comments.

4.3. Informal information gathering

- (48) In order for the Commission to have the possibility to gather the information necessary for the assessment of complex cases directly from identified interested parties, i.e. competitors, clients and suppliers, or business and trade associations, case-teams may decide to send the opening decisions to selected interested parties as soon as all confidentiality issues have been resolved. This might attract the attention of these interested parties to the investigation and increase the number of meaningful reactions to opening decisions. The letter would spell out that interested parties are not obliged to reply, but have a deadline of one month from the publication of the decision to respond, with no possibility to extend the deadline save in exceptional and fully justified circumstances of which the Member State would have to be informed (e.g., particularly large amount of factual data to be compiled). This letter should be sent as soon as the public version of the opening decision is published.
- (49) In order to ensure equality of treatment between parties, the beneficiary of the aid measure at stake must systematically be included in the list of addressees, and the questions raised in the transmission letter drawing the company's attention on the opening of a formal investigation need to be clearly related to issues which are indicated explicitly in the opening decision.
- (50) The Member State must be informed of any comment received and get an opportunity to comment.

4.4. Request for additional information

- (51) This should not become a systematic step in the procedure, and this possibility should only be used if the information at the disposal of the Commission is not clear enough to allow it to take a position on the project. If used, this should be limited to one request for information.
- (52) The following procedure should apply:
- If the information submitted by the Member States raises questions, the case-team makes a request for additional information. This should normally be done within 20 working days from the receipt of the Member State's comments. The Member State is asked to reply within one month.
 - In principle, if a Member State needs more time to assemble the information requested, it should request a delay extension. Save in exceptional circumstances, the Member State should be granted extra 15 working days and be told that there will be no further extension and that the Commission will take a decision on the basis of the information at its disposal if the information is not submitted. In case of non-notified aid, an information injunction may also be considered⁹.
 - Should the Member State not reply to the request for information, a reminder is sent immediately where the Member State is informed that the Commission will take a

⁹ Unless this was already done at an earlier stage of the procedure (see §30 above).

decision on the basis of the information at its disposal if the information is not submitted within 15 working days. In case of non-notified aid, an information injunction may also be considered¹⁰.

- (53) This does not exclude the possibility for case-teams to accept meetings if they consider them necessary, or to hold "state of play" meetings (on state of play meetings, see [point 7.7 of the Section Notification](#)). Closing a 108(2) proceeding - A final decision

4.5. Summary

<i>Adopted by:</i>	<i>oral procedure</i>
<i>ISC-period:</i>	<i>10 working days</i>
<i>Misc.:</i>	<i>A note to the Commissioner must always be drafted when closing an 108.2 proceeding. Request for reimbursement only for unlawful incompatible aid, not for existing aid.</i>

4.6. Formal requirements

- (54) Sec Gen standard forms must be used for the formal adoption of the final decision.
- (55) All final decisions are adopted by oral procedure. Before the adoption, the decision in the authentic language(s) must be revised by the lawyer linguist. The main purpose of revision is to ensure that the legal terminology is correct. After the revision, once the non-confidential version of the decision is established, the non-confidential version of the decision is translated into the community languages for publication in the OJ – L series (See [Section Publications](#)).

4.7. The assessment and the legal basis

- (56) A final decision can only be based on the elements covered by the 108(2) proceedings. All relevant arguments have to be answered.
- (57) The legal basis must be clearly stated. When the Commission takes a negative decision, it must explain that it could not declare compatible on the basis of the compatibility clauses provided for by the Treaty. Of course, depending on the type of aid it might be obvious that certain exceptions can not apply. In such case a standard sentence along the following lines is sufficient: "because of the nature and characteristics of the aid, it is self-evident that the exceptions xxx do not apply". For example:
- aid for R&D in a non-assisted area - exception of 107(2) and 107(3)d can obviously by their nature not apply.

¹⁰ Unless this was already done at an earlier stage of the procedure (see §30 above).

- 107(3)a and the regional component of 107(3)c can be excluded because of the geographical situation of the beneficiary.
- (58) For the other derogations -107(3)b and c- a more detailed explanation should be provided, since it is possible that they apply. Since 107(3)c is a sort of catch-all provision, while 107(3)b has a more clearly defined scope, one should first test 107(3) b but only if invoked by the member state. If it does not apply, 107(3)c should be examined. Only after having concluded that this provision does not apply either, a negative decision can be taken. Article 106(2) only applies to State aid granted for the financing of SGEI.
- (59) Article 296 of the TFEU requires that the decision clearly states 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. Unless a decision is well motivated it runs the risk of being annulled by the court for lack of motivation.¹¹
- (60) 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. Article 108(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 normally of two months. For recovery decisions, see paragraph 42 of the [Recovery notice](#) which specifies two deadlines:
- a first time-limit of two months following the entry into force of the decision, within which the Member State must inform the Commission of the measures planned or taken,
 - a second time-limit of four months following the entry into force of the decision, within which the Commission decision must have been executed.

4.7.1. Notified aid

- (61) The Commission closes the procedure with a motivated final decision, which finds that:
- there is no aid;
 - the aid is compatible with the common market - the aid can be implemented;
 - the aid is compatible but subject to stated conditions;
 - the aid is incompatible and cannot be implemented;
 - the Member state has withdrawn the notification.
- (62) In the case of notified aid, in accordance with Article 7(7) of the Procedural Regulation, 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

¹¹ See T-81/07, T-82/07 and T-83/07, KG Holding, 1.01.2009, paragraphs 136 ff.

information available to it– including information received from third parties in response to the public notice in the Official Journal which has been communicated to the Member State.

- (63) A Member State can withdraw its notification at any time before, during and after a formal investigation procedure (Article 8 of the [Procedural Regulation](#)). A withdrawal is of course not possible if the file entails elements of possible unlawful aid. In accordance with Article 8 of the Procedural regulation, once it has become clear that the Commission has substantial difficulties with a notified aid, rather than undergo the formal procedure, the Member State may instead choose to withdraw the notification. If the formal procedure has been opened, the Commission closes the formal investigation procedure since it has become without object. It is however, still necessary to adopt a decision which has to take the form of a motivated decision with articles, in the official language of the Member State. The decision is adopted by empowerment.
- (64) Regardless of whether or not the opening of procedures has been published in the Official Journal, a standard notice is published stating that the notification is withdrawn. The Member State can of course re-notify an amended measure. On how to proceed see [Section Publications](#).
- (65) The Commission assesses the compatibility of notified aid on the basis of the rules applicable when it takes its decision, unless otherwise provided for in those rules¹².

4.7.2. Unlawful aid

- (66) The Commission closes the procedure with a motivated final decision, which finds that:
- there is no aid;
 - the measure is existing aid;
 - the aid is compatible;
 - the aid is compatible but subject to stated conditions;
 - if incompatible and the aid has been granted - it must be recovered.
- (67) In accordance to the notice for the determination of the applicable rules for the assessment of unlawful aid (sees section 7-5) for assessing compatibility of the unlawful aid the Commission applies the guidelines which were in force at the time the aid was granted, unless otherwise provided in those rules. While the Commission assesses the compatibility, the aid remains unlawful which may have consequences under national law.
- (68) In the case of unlawful aid, if the Commission does not have sufficient information, it must generally first issue an information injunction to the Member State ordering

¹² Case before the General Court C-334/07P, Freistaat Sachsen, Report I-09465

it to supply the missing information. A second information injunction might be required should third parties (or any other source) have supplied the Commission with such information and the Commission wishes to have this verified by the Member State. If the Member state fails to comply with the injunction the Commission takes a decision on the information available to it.

- (69) A final negative decision can also be preceded by either a separate recovery/suspension injunction.¹³
- (70) When the Commission finds that the measure is an existing aid it does not assess its compatibility, only states that the aid is existing. If the Commission has doubts concerning the compatibility it commences 108(1) proceedings. See [Section Existing aid](#).

4.7.3. Existing aid

- (71) The Commission must close the formal investigation procedure which always follows an 108(1) proceeding - appropriate measure - where the Member State did not accept the recommendation (not at all or only partially) or did not reply. The Commission can find that:
- the aid is compatible.
 - the aid is incompatible and the Member State is required to abolish it. However, the Commission cannot require recovery.
 - the aid is compatible but subject to stated conditions or to be amended within a stated period of time.
- (72) Note that in a case where the Member State has not implemented in accordance with its acceptance of the appropriate measure proposed by the Commission, the scheme becomes unlawful aid after the date set in the appropriate measures. The Commission initiates 108(2) proceedings and the unlawful aid is subject to recovery.

4.8. Final conditional decision

- (73) The Commission can only impose conditions in a final decision after opening a formal investigation procedure under Article 108(2).
- (74) The first article of a final conditional decision states that the aid is compatible and the second on which conditions.

4.8.1. Example 1 - C 11/99, SCI, Netherlands¹⁴

- (75) The second article of the decision reads:
"Article 2
The aid under the '2000 Jobs' programme which the Netherlands has implemented in favour of SCI and which is limited by the undertaking of the Dutch authorities, is

¹³ Recovery injunction not used so far.

¹⁴ Official Journal L 186 of 7.7.2001, page 43, see points 15, 55 and 83.

compatible with the common market in so far as the combined amount of aid under the IPR scheme and the jobs programme does not exceed the regional aid ceiling of 20% gross grant equivalent. The Netherlands shall ensure that, with the final declaration of eligible costs, the ceiling of 20% will not be exceeded.

4.8.2. *Example 2 - C 18/98, Development of colour ink-jet printers, Netherlands*¹⁵

(76) Article 1:

The aid the Netherlands is planning to implement for Océ N.V., amounting to NLG 50 million (€ 22.7 million), for the development of colour ink-jet printers, is compatible with the common market, subject to the conditions set out in Article 2.

(77) Article 2:

The Netherlands strictly and on an annual basis monitors the progress of the project and monitors that all eligible costs in fact correspond to expenditure incurred for the COBALT project. The Netherlands provides at least five subsequent annual reports to the Commission. These reports comprise conclusive and detailed evidence of the exact destination of the aid for real incurred expenditure and eligible costs of the COBALT project and include detailed financial statements.

4.9. Final negative decision and recovery

- (78) In accordance with Article 14 of the [Procedural Regulation](#), in negative decisions on cases of unlawful aid, the Commission requires the Member State to reclaim the aid from the beneficiary, unless this would be contrary to a general principle of Community law (See [Recovery notice](#)¹⁶). There is no request for recovery in a case of a negative decision for non-notified aid where the aid legislation (conferment of powers enabling the aid to be granted without further formality) has been put into effect but the aid has not been paid out.
- (79) In accordance with Article 15 of the [Procedural Regulation](#), for reasons of legal certainty the power of the Commission to recover aid is limited to a period of ten years which begins on the day the aid was awarded even if a scheme is in force for more than 10 years.
- (80) The recovery should restore the *status quo ante*. The decision should also require the payment of interest. The decision shall require interest to be charged from the date the unlawful aid was awarded until it is recovered at the appropriate rate fixed in accordance with [Implementing regulation 794/2004](#). In complex cases where the aid does not take the form of a simple grant or where a net grant equivalent cannot be calculated, care must be taken to ensure that the provisions for the recovery order are clear and operational. For any recovery decisions, you should consult unit H-4 at an early stage. They will advise you on how to best draft the operational parts of your recovery decisions.
- (81) Should the Commission exceptionally not request recovery this must be clearly

¹⁵ OJ L 223 of 18.8. 2001 page 10. See also Aid to be granted by Ireland to the steel company Irish Steel, OJ, L 031 of 21.5.1996 page 16.

¹⁶ OJ C 272 of 15.11.2007, p.4.

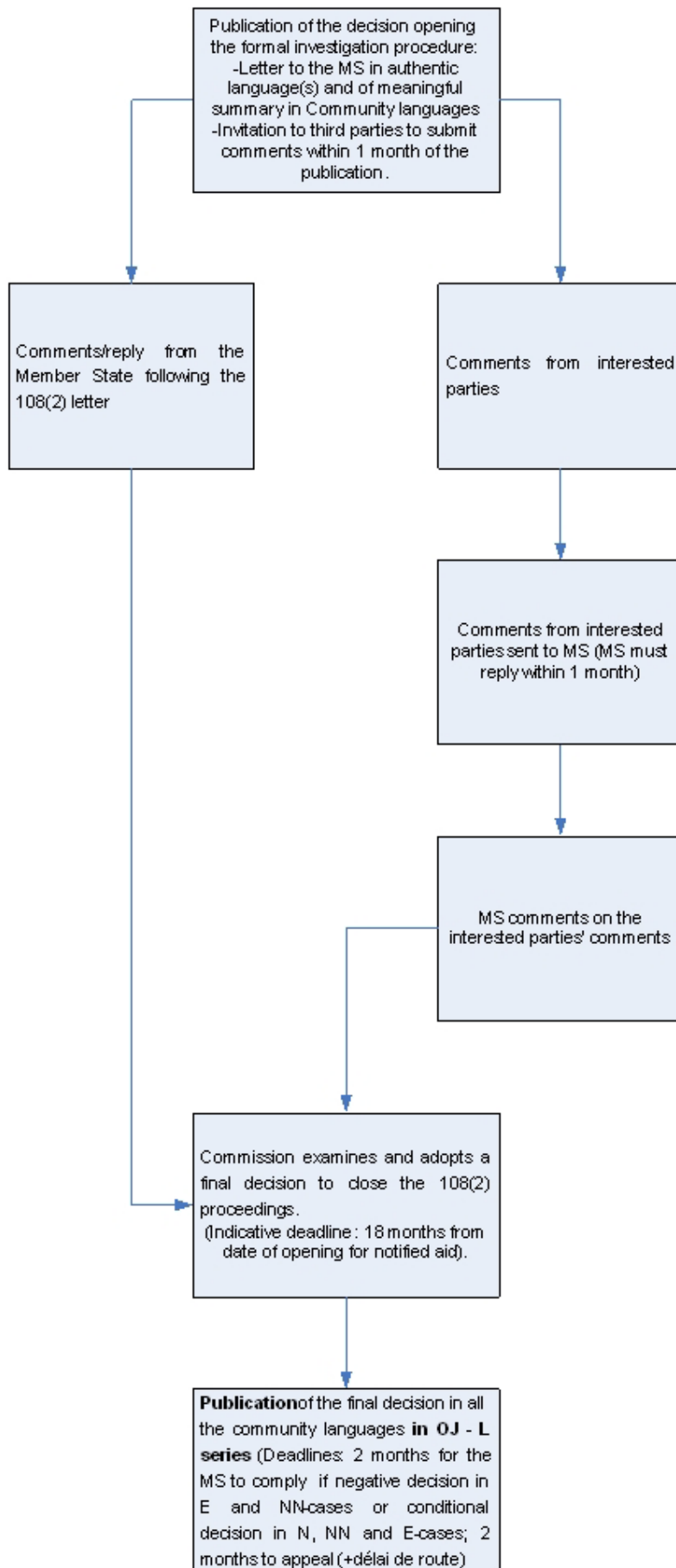
justified in the decision (*e.g.* when the recovery is without object – the economic activity of the beneficiary has totally and definitively ceased following termination of bankruptcy proceeding and there are no further sums available to repay the aid). Again consult with H-4.

(82) The decision should:

- determine/identify the beneficiary,
- the amount to be recovered or the method to determine the amount.

(83) 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. Court jurisprudence is very strict: only absolute impossibility to recover is acceptable. 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. Nor can the beneficiaries normally invoke legitimate expectations, because they have a duty of care before receiving aid to ensure that it is granted lawfully, or a Member State refuses to recover the aid on grounds of the supposed legitimate expectations of the beneficiaries. See [Recovery notice](#).

5. Flowchart overview



SECTION 7 COMPLAINT

Section 7	Complaint	1
1.	Foreword	2
2.	Legal/ Procedural context	2
2.1.	Applicable rules	2
2.2.	The Best Practices Code	3
2.3.	Case Law	3
3.	Registration and attribution	5
4.	Categorization of complaints - Procedure to follow	5
4.1.	Category I - The complainant has no standing in front of the EU Courts and the case is not significant	5
4.2.	Category II - The complainant has no standing in front of the EU Courts and the case is significant	6
4.3.	Category III - The complainant has standing in front of the EU Courts and the case is not significant	6
4.3.1.	Unsubstantiated complaint	6
4.3.2.	Unsubstantiated complaint - Insistent complainant	7
4.3.3.	Approved aid	7
4.3.4.	Existing aid	7
4.3.5.	Bouygues letter	7
4.3.6.	Request for information (REQ)	8
4.3.7.	Preliminary assessment	8
4.3.8.	Administrative closure	9
4.3.9.	Information of the MS in absence of a decision	9
4.3.10.	Decision – Definitive decision in the form of a service letter	9
4.3.11.	Monitoring and advocacy	9
4.4.	Category IV - The complainant has standing in front of the EU Courts and the case is significant	9
5.	Additional information for complaints handling	10
5.1.	Improper language	10
5.2.	Transfer to NN register	10
6.	Political Priority setting ('Priority 1'-cases)	10
7.	Handling of sensitive information	10
8.	Action for failure to act (“recours en carence”)	10
9.	Complaints to the Ombudsman	11
10.	Action for annulment	12

1. Foreword

- (1) The submission of a complaint opens a dialogue between the Commission and the complainant. Depending on the quality of the complaint and the legal standing of the complainant, the Commission will enter into a separate dialogue with the Member State. The examination of the alleged unlawful aid takes place in a contradictory procedure between the Commission and the Member State. Even though the complainant is not a party to this dialogue s/he has certain rights. These rights are specified in Article 20 of the [Procedural Regulation 659/1999](#) (hereafter "PR") and by the jurisprudence of the European Courts. Under Article 20 (1) of the PR, the complainant, if s/he is an interested party¹, may submit comments when the Commission initiates 108(2) TFEU proceedings. If the complainant has made observations, s/he shall receive a copy of the decision closing the formal investigation.
- (2) Moreover, the complainant has a right to be informed about all decisions taken after the preliminary examination procedure and to receive a copy (Article 20 (2) of the PR).
- (3) In light of the judgments of the Court in *Athinaiki Techniki*², *NDSHT*³ and *Ryanair*⁴ the complainant who is an interested party and has put the Commission in possession of information regarding alleged unlawful aid also has a right to obtain a decision.

2. Legal/ Procedural context

2.1. Applicable rules

- (4) The basic rules regarding the treatment of complaints in the state aid area are set out in the Procedural Regulation. Article 20(2) of the PR stipulates that any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid.
- (5) When read in combination with Article 10(1) of the PR, which obliges the Commission to examine "information from whatever source regarding alleged unlawful aid (...) without delay" and with the first sentence of Article 13(1) of the PR, which explicitly stipulates that such an examination of possible unlawful aid shall result in a no aid, a no objections or an opening decision, this Article does not leave much room for discretion to the Commission. The Commission cannot disregard a complaint if it contains information about possible unlawful aid and its investigation

¹ Under Article 1 (h) of Regulation 659/1999 'interested party' shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

² Case C-521/06, *Athinaiki Techniki AE v Commission*.

³ Case C-322/09P, *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v Commission*.

⁴ Case T-442/07, *Ryanair v. Commission*, [2011]

will have to lead to a decision (at least in most cases). Article 25 of the PR adds that the decisions mentioned in Article 13 "shall be addressed to the Member State concerned".

2.2. The Best Practices Code

- (6) According to the Best Practice Code⁵, the Commission is entitled to give different degrees of priority to the complaints brought before it⁶, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations⁷, it can thus postpone dealing with a measure which is not a priority.
- (7) As a matter of transparency under the Best Practices Code, the Commission services will already send a letter to the complainant, within two months from the date of receipt of the complaint:
 - if the complaint is a priority, a copy of the letter forwarding the complaint to the MS normally accompanied with a request for information (see point 4.4),
 - if the complaint is not a priority, a Bouygues holding reply (see point 4.3);
 - a pure Article 20(2) PR letter if the complaint is truly not substantiated (see point 4.3);
 - an information letter if the complaint refers to an approved aid easily identified by DG COMP (see point 4.3).
- (8) Within twelve months, the Commission will, in principle, endeavour to:
 - adopt a decision for priority cases pursuant to Article 4 of the PR, with a copy addressed to the complainant; or
 - send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases.
- (9) The above instructions are "Best practices" and therefore do not constitute legally binding deadlines. The specificity of an individual case may indeed require an adaptation of, or deviation from these instructions, depending on the case at hand. Nevertheless, since the Commission must examine complaints "*without delay*" (Article 10(1) of the PR, as confirmed by the Court in *Athinaiki* and *NDSHT*), the rules enshrined in the Best Practices Code should be used as the normal milestones for handling complaints.

2.3. Case Law

- (10) The procedure for the handling of complaints has been subject to a number of judgments. In the *Deutsche Bahn*⁸ case, the General Court recalled that Article 20(2) PR letters were only appropriate in cases in which there is an absence of sufficient grounds for taking a view on the case. Consequently, if the Commission takes a clear

⁵ OJ C 13, 16.6.2009, p.13, Code of Best Practice for the conduct of State aid control procedure.

⁶ Case C-119/97, *Ufex and Others v Commission*, paragraph 88.

⁷ Case T-475/04, *Bouygues SA v Commission*, paragraph 158 and 159.

⁸ Case T-351/02, *Deutsche Bahn AG v Commission*.

and definitive position on the case submitted to it (including that the measure at stake does not constitute state aid), it should adopt a decision within the meaning of Article 4 of the PR. In view of the *Deutsche Bahn* Judgment, the communication pursuant to the second sentence of Article 20(2) PR should therefore only be a provisional position of the Commission for cases with unsubstantiated factual background. The complainant is free to come back with further information and oblige the Commission to take a position with a decision.

- (11) Similarly, in the *Athinaiki Techniki* judgment, the Court considered that "where the Commission informs the interested parties, in accordance with Article 20(2) of Regulation No 659/1999, that there are insufficient grounds for taking a view on the case, it is required to allow the interested parties to submit additional comments within a reasonable period. Once those comments have been lodged, or the reasonable period has expired, Article 13(1) of Regulation No 659/1999 obliges the Commission to close the preliminary examination stage by adopting a (formal) decision pursuant to Article 4(2), (3) or (4) of that Regulation", that is to say, a decision stating that aid does not exist; raising no objections; or initiating the formal investigation procedure. Therefore, if a complainant comes back after an Article 20(2) PR letter with new substantive elements or disputes a preliminary assessment letter, then a formal decision addressed to the Member State has to be issued.
- (12) In the *NDSHT (Stockholm Hotell)*⁹ case, the Court first reiterated its findings in *Athinaiki Techniki*. It however broadened the scope of the Commission's obligation to adopt a decision by concluding that, where the Commission has examined information provided by the complainant and taken a position, it takes a decision. The Court considers that the Commission, by classifying a measure as existing aid, has subjected it to the procedure provided for by Article 108(1) TFEU, and thus refused by implication to initiate the procedure provided for by Article 108(2) TFEU. Since this position is "*definitive and cannot be characterized as mere provisional measure*", "*the persons intended to benefit from the procedural guarantees of Article [108 (2) TFEU] should be able to challenge such a decision before the European*" Courts, independently of whether this decision concerns no aid, compatible aid or existing aid. It follows from this judgment that the Commission is obliged to adopt a decision whenever it concludes its preliminary examination. This is also the case if the aid in question concerns existing aid.
- (13) In the *Ryanair* case¹⁰, the General Court reiterated its findings in *Athinaiki Techniki* and *NDSHT*. It also clarified the criteria that a letter has to fulfill to be considered as a complaint and/or as putting the Commission in possession of information on unlawful aid. It should be noted that the requirements are very limited. In fact, the General Court held that under the current Procedural Regulation, there is no rule which would allow the Commission to require the use of a standard complaint form. The complainant must only give information on the measure in question, which does not need to be detailed, and it should only indicate that the measure complained of is alleged to be unlawful aid. If these requirements are fulfilled, the Commission is under a duty to act, which means that, once it will have investigated the case, it will have to adopt a decision.

⁹ Case C-322/09P, *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v Commission*.

¹⁰ Case T-442/07, *Ryanair v. Commission*, [2011]

3. Registration and attribution

- (14) Some complaints about state aid do not in fact raise competition issues, but are primarily concerned about other infringements of Community law. For example, a complaint may allege that a large scale investment project which is receiving state aid has not been the subject of an environmental impact assessment in accordance with the Community's environmental protection rules. Where the centre of gravity of a complaint does not concern state aid rules, but infringements of other rules of Community law, the complaint should be reattributed to the DG more directly concerned.
- (15) Other complaints may relate to state aid which is dealt with by DGs AGRI or MARE. When it is clear from the outset that the subject matter of a complaint does not fall within the responsibility of DG COMP, the complainant should be directed to the DG responsible. Borderline cases should be discussed with the Head of Unit at the earliest possible stage.
- (16) The complaint is registered in ISIS with the letters CP (*Cas présumé*). When dealing with a complaint, the case team should make sure that the identity of the complainant is kept confidential. Thus the name of the company against whom the complaint is directed together with the sector at stake should be used in the working title of the case in ISIS and not the name of the complainant.

4. Categorization of complaints - Procedure to follow

- (17) Incoming complaints shall be categorized. The two criteria for categorization are (a) whether the complainant has legal standing in front of the European Courts and (b) whether the case is significant from a competition point of view (the notion of "significance" of a case replaces the notion of "priority" used in the Best Practices Code). The combination of these two criteria leads to four distinct categories of complaints that require different handling.
- (18) The categorization will be made with the help of the PAF (Preliminary assessment form). The categorization shall be concluded as far as possible within 15 working days from attribution of the complaint or receipt of its translation, and at the latest within the two-month milestone defined by the BPC. Depending on the category, case handlers/managers shall proceed as follows:

4.1. Category I - The complainant has no standing in front of the EU Courts and the case is not significant

- (19) The complainant is not an interested party in the meaning of the PR and has therefore no procedural rights under this Regulation. As a result, s/he has no legal standing and cannot challenge a Commission decision finding no/existing/compatible aid after a preliminary examination of the measure. The (natural or legal) person falling under category I shall not be treated as a complainant (see below, under 4.3 and 4.4.) but as a person that has a right to a reply under the Commission's Code of Good Administrative Behaviour¹¹. Accordingly, s/he should receive in addition to an

¹¹ OJ L 267/63 of 20.10.2000. More information under:
http://ec.europa.eu/transparency/civil_society/code/_docs/code_en.pdf

acknowledgement of receipt of his/her submission of a letter that shall include a short assessment of the measure and informing that person that the Commission will keep the information received in its files. . The reply shall be sent to the person as far as possible within 15 working days upon registration of the complaint. If it is unlikely that the deadline will be met (e.g. due to translation requirements), a holding letter shall be sent.

- (20) Case handlers can also contact the person and explain why the "complaint" will not be followed up. In any case, category-I complaints should be administratively closed as soon as the person has received a written reply. If s/he comes back without providing additional important information, case handlers shall reply to the complainant and attach the previous written reply once. If the complainant comes back a third time without providing new relevant information case handlers shall reply by letter where they point to the (i) content of the complainant's previous correspondence, (ii) the previous replies already provided and (iii) inform the complainant that the Commission services decided to discontinue correspondence with him/her on the same subject, since his/her successive letters do not contribute anything new to the discussion and refer in this regard to the Code of Good Administrative Behaviour. Further incoming letters will be regarded as "repetitive" according to the Code of Good Administrative Behaviour and will not require a reply.
- (21) Case teams should bear in mind that they can only proceed in the suggested way if the required conditions for a category-I complaint are clearly fulfilled. If a case handler is in doubt whether a complainant has legal standing, s/he should assume that this is so and treat the complaint as a category-III complaint (see below, under 4.3).

4.2. Category II - The complainant has no standing in front of the EU Courts and the case is significant

- (22) This category will cover the situation where a (natural or legal) person that is not an interested party according to the PR provides information about an alleged unlawful aid which is significant. The case handler/manager registers and marks the case in ISIS as *ex officio*. The person receives in addition to an acknowledgement of receipt of his/her submission one reply drafted referring to the opened *ex officio* case. The reply shall be sent to the person as far as possible within 15 working days upon registration of the submission. If it is unlikely that the deadline will be met (e.g. due to translation requirements), a holding letter shall be sent.
- (23) If a case has been registered as an *ex-officio* case, the investigation will take place ideally without delay. An *ex-officio* case will be typically closed by a decision. If a decision is taken, the person having provided the relevant information that triggered the investigation shall be informed thereof.

4.3. Category III - The complainant has standing in front of the EU Courts and the case is not significant

- (24) For this category, the Best Practices Code as modified by the instructions below applies. Case handlers/managers shall treat these complaints ideally without delay.

4.3.1. Unsubstantiated complaint

- (25) If the information is unsubstantiated, case handlers/managers shall send an Article 20 (2) letter within two months. This letter will include a paragraph on what kind of information is required in order to be able to investigate the complaint, and/or will

refer to the attached complaints form¹² (a separate prior invitation to use the complaints form has proven to be inefficient).

4.3.2. Unsubstantiated complaint - Insistent complainant

- (26) It results from the *Ryanair* judgment¹³ that the requirements to put the Commission under a duty to take a decision as regards a complaint are very limited (see paragraphs 13 and 60 of the present section of the Manual of Procedure). If a complainant insists, case handlers/managers will, therefore, have to examine carefully, in close cooperation with the Legal Service and COMP Support Unit (if necessary) if the complaint fulfills the criteria of the *Ryanair* jurisprudence (i.e. (i) the complainant shall give information on the measure in question, which does not need to be detailed, and (ii) it should indicate that the measure complained of is alleged to be unlawful aid (iii) for the benefit of a specific beneficiary). If the complaint fulfills these criteria, the case handler/manager will have to investigate the measure (contact the Member State), and then prepare a decision to close the examination of the complaint.
- (27) In those extremely rare cases where the complainant insists but its submission does not even meet the *Ryanair* criteria or the case handlers are not able to identify an unlawful aid measure even after having requested and received information by the Member State concerned, the case can be closed by a service letter saying that the Commission does not see any potential violation of State aid law and therefore does not consider the information as State aid complaint or as information relating to alleged unlawful aid. Prior consultation and agreement of COMP Enforcement and Support Units is compulsory.

4.3.3. Approved aid

- (28) If the complaint refers to an approved aid easily identified by DG Competition's services, DG COMP sends an information letter to the complainant within two months from the date of receipt of the complaint and the case is closed.

4.3.4. Existing aid

- (29) If the investigation reveals the existence of an existing aid measure that is compatible with the internal market, the Commission is still under the obligation to adopt a decision (see *NDSHT* judgment). The decision is to be adopted in analogy to Article 4(2) of the PR.
- (30) If the investigation reveals the existence of an existing aid measure which is or has become incompatible with the common market, the Head of Unit should be consulted on whether the measure should be the subject of an 'appropriate measures' procedure (see Section Existing aid). The complainant should be informed about this procedure if this is launched.

4.3.5. Bouygues letter

- (31) If dealing with the complaint immediately is not possible because of other priority work, a courtesy holding reply based on the *Bouygues* judgment¹⁴ is sent within two

¹² http://ec.europa.eu/competition/forms/intro_en.html

¹³ Case T-442/07, *Ryanair v. Commission*, [2011]

¹⁴ Case T-475/04, *Bouygues SA v Commission*, paragraph 158.

months from the date of receipt of the complaint. This letter will explain that DG COMP services are analysing the information submitted, but that the Commission, acting as an administrative body which must act in the public interest, is entitled to give differing degrees of priority to the complaints brought before it; it can therefore postpone the investigation of a measure which is not a priority.

4.3.6. Request for information (REQ)

- (32) Unless sufficient arguments to reject the complaint already result from the complaint itself (rare), and unless the complainant raises confidentiality issues which need to be clarified, a non-confidential version of the complaint is forwarded to the Member State for its input, at the latest in parallel to the *Bouygues* letter. A copy of that letter is sent to the complainant (in a redacted version). The Member State has 20 working days to reply.

4.3.7. Preliminary assessment

- (33) The Member State's reply can eventually be forwarded to the complainant, notably if the Member State has provided substantial reasoning why it does not consider the alleged measures to be unlawful aid. If DG COMP shares the Member State's assessment, it will add a preliminary assessment to the Member State submission and ask the complainant to take a position thereon within one month. If the complainant fails to reply, the complaint will be deemed withdrawn.
- (34) The complainant shall in any case receive a substantiated preliminary assessment letter within one year of the receipt of the complaint. The letter shall also indicate that the complaint shall be deemed withdrawn if the complainant does not react within one month. No reference should be made to Article 20(2) of the PR in that letter.
- (35) Where COMP takes a preliminary view on a complaint, it should be made clear that this is a preliminary view of DG COMP on the basis of the information in its possession and not an official position of the Commission.
- (36) A large number of preliminary assessment letters sent in the past to complainants (i.e. letters stating that the measure does not constitute state aid, or stating that the aid would be compatible) did not clearly highlight the preliminary character of the assessment of the case and/or erroneously referred to Article 20(2) of the PR. Consequently, some of them have been considered as acts liable to be challenged, because they gave the impression of a clear and definitive Commission position¹⁵. It is therefore very important to strictly follow the templates proposed in the ManProc.
- (37) Since the preliminary assessment letter may lead to a reaction from the complainant triggering either the obligation to adopt a decision or Court action, this letter has to be of sufficient quality in terms of substantive assessment and arguments presented. All preliminary assessment letters must therefore be submitted to the Legal Service for quality check before being sent out.

¹⁵ See *Athinaiki* and *NDSHT*. For instance, a "reasoned" Article 20(2) PR letter is currently being challenged before the Court in case T-128/08 -ABISP & CBI v Commission, where the complainant seeks annulment of the "decision".

4.3.8. Administrative closure

- (38) If the complainant does not react within the fixed deadline (one month), the case is administratively closed. The closure is performed by the Registry upon written request from the Head of Unit concerned.

4.3.9. Information of the MS in absence of a decision

- (39) If a Member State has been asked to provide information in connection with the investigation of a complaint which is deemed unfounded, and on which the complainant has not provided further information (complaint deemed withdrawn) the Member State must be informed that the Commission services deem this complaint withdrawn, but reserve the possibility to review the situation if the complainant returns with new evidence or if new evidence arises otherwise.

4.3.10. Decision – Definitive decision in the form of a service letter

- (40) If the complainant comes back and disputes the findings in the preliminary assessment letter, the competent case team must prepare a decision to be addressed to the Member State, with a copy of that decision to the complainant.
- (41) There is one exception to this rule, however: as regards measures that are exempted from notification and the stand-still obligation, such as those falling under the *de minimis* Regulation, the General Block Exemption Regulation, the Public Service Compensation Decision of 20 December 201¹⁶, Regulation (EC) no.1370/2007 and Regulation (EC) No.1192/1969 as well as individual aid measures which fully comply with a Commission decision authorizing an aid scheme, the Commission can also express the position that the aid complies with those legal instruments in the form of a letter of its services. Since those service letters are a challengeable act, however, they have to be fully motivated, and approved by the Legal Service prior to their sending (mandatory consultation).

4.3.11. Monitoring and advocacy

- (42) Case managers shall regularly follow-up their case-teams' complaints action, in respect of normal best practices (i.e. monitor deadlines, send reminders). Complaints action (including backlog reduction) also forms part of the unit's bi-monthly Work Program/Case Management Plan to be submitted to and discussed with the DDG ('backlog reduction plan').
- (43) For the sake of procedural economy and rational use of resources, in some cases it might be worthwhile to directly contact the complainant by phone, either at an early stage or after having sent the preliminary assessment, in order to explain to him/her our position and to convince him/her to drop the complaint if it is not substantiated.

4.4. Category IV - The complainant has standing in front of the EU Courts and the case is significant

- (44) For this category, the Best Practices Code applies. Case handlers/managers shall send the non-confidential version of the complaint to the Member State for comments, in principle within two months of its receipt, normally with a detailed request for information. A letter is sent to the complainant to inform him that his

¹⁶ OJEU L7 of 11.01.2012, p.3

complaint has been forwarded to the Member State for comments, eventually with a copy of that letter (in a redacted version) . The Member State has 20 working days to reply.

- (45) If a Member State does not cooperate during the examination of a complaint, and the complaint appears well-motivated, it may be necessary to consider an information injunction to order the Member State to provide the necessary information.
- (46) Case handlers/managers shall follow-up the complaint action in respect of normal best practices (*i.e.* monitor deadlines, send reminders *etc.*).
- (47) The examination of a category-IV complaint will result in a decision, pursuant to Article 4(2), 4(3) or 4(4) of the PR. Such a decision (no aid, no objection or opening of the formal investigation) should in principle be adopted within twelve months after the receipt of the complaint, and a copy of the decision sent to the complainant.

5. Additional information for complaints handling

5.1. Improper language

- (48) When the complaint is using improper language, the Commission can decline to deal with it, referring to Section 4 of the Commission Code of Good Administrative Behaviour.

5.2. Transfer to NN register

- (49) If the Member State notifies an investigated measure in the meantime, the case is registered as an NN file (belated notification) and a formal decision is taken accordingly. That decision would normally also address the complaint – the complainant would be informed that his/her complaint will be examined in that context. After the adoption of the decision, the complainant should receive a copy .

6. Political Priority setting ('Priority 1'-cases)

- (50) Cases of policy relevance should be given 'Priority 1' status. In deciding whether a case is relevant from a policy point of view the generally applicable criteria apply. The key considerations include: the interest and importance of the case in terms of its effect on competition and trade between Member States; the interest of the case for the future development of state aid and competition policy in general; the risk for the Vice President of being confronted by fellow politicians or the press with the case at hand. If the case is classified as a "Priority-1 case", this proposed attribution, based on a completed PAF, will be discussed in the weekly co-ordination meeting of the state aid network (SAMM) and endorsed by the OCM.
- (51) The cabinet should receive a copy of all PAFs.

7. Handling of sensitive information

- (52) See section of the ManProc on the handling of sensitive information.

8. Action for failure to act (“recours en carence”)

- (53) If the complainant is not satisfied with the Commission's (lack of) processing of a

complaint, s/he may ask for a formal decision according to Article 265 TFEU. Such a request to act within the meaning of Article 265 must:

- (54) - be sufficiently explicit and precise to enable the Commission to know the nature of the act which is being asked to take,
- (55) and
- (56) - make clear that the invitation is intended to compel the Commission to take a position.
- (57) We typically receive formal requests to act in the context of complaints. For registered cases, including CPs, the responsibility for identifying a formal request to act lies with the case-handler(s). In other situations, responsibility lies with the Head of Unit.
- (58) In many cases it will be clear that a letter does constitute a formal request to act; for example, a letter expressly referring to Article 265 and threatening an action for failure to act if no position is taken within 2 months. However, there are also borderline cases (for example, a complainant who requests that action be taken on their complaint and suggests vaguely that they will take further steps in the absence of any action). In case of doubt, advice should urgently be sought from COMP Support Unit. If necessary, the complainant should without delay be asked to clarify his/her request.
- (59) When a case handler receives such a request s/he must inform the hierarchy and the Legal Service immediately.
- (60) The action for failure to act is extinguished when the institution concerned has defined its position. Clearly a decision by the Commission not to raise objections, to declare that a measure does not involve State aid or to open the formal investigation procedure constitutes a definition of the Commission's position. As any State aid decision, also these decisions should be taken in conformity with the applicable procedural rules (at the level of the College or by empowerment, as applicable).
- (61) The only possible exceptions are those cases where the Commission services have informed the complainant that there are insufficient grounds for taking a view on the case under Art. 20(2) of the Procedural Regulation and the complainant has not remedied the situation by submitting additional information. Since true Art. 20(2)-cases are in practice very rare, however, each such case must be carefully examined on its own merits, in close cooperation with the Legal Service and COMP Support Unit.

9. Complaints to the Ombudsman

- (62) Any citizen of the EU may make a complaint to the Ombudsman alleging maladministration on the part of the Commission. If the Ombudsman takes up the complaint, he undertakes an investigation. As a first step he contacts the Secretary General of the Commission with a request for information which is forwarded to the DG responsible.
- (63) Guidance on the treatment of requests from the Ombudsman is given on the [DG COMP intranet](#). For an example of a complaint alleging maladministration by DG COMP in failing to investigate correctly a complaint about state aid see: <http://www.euro-ombudsman.eu.int/decision/en/010173.htm>

- (64) In view of the sensitivity of these complaints and the potential reputational risk involved for the Institution, case-teams are advised to always motivate their letters (at least summarily).

10. Action for annulment

- (65) The judgments *Athinaiki Techniki* and *NDSHT* demonstrate that a complainant can launch an action for annulment against administrative letters, if these include a definite position of the Commission on the continuation of the examination of the complaint or the substance of the case (e.g. existing aid). Since the Court considers these letters as challengeable acts, it has found actions for annulment against such letters admissible. This is also why it is essential that preliminary assessment letters or Article 20(2) PR letters always declare their preliminary nature.
- (66) Once administrative letters have been the subject of an action for annulment and the Court has concluded that these letters constitute a challengeable act, they can no longer be withdrawn¹⁷. The only possibility in such a situation is to adopt a decision (in most cases: open the formal investigation procedure).

¹⁷ C-362/09 P, *Athinaiki Techniki v Commission* (Athinaiki II).

SECTION 8 SIMPLIFIED PROCEDURE

<u>Section 8</u>	<u>SIMPLIFIED PROCEDURE.....</u>	<u>1</u>
<u>1.</u>	<u>Introduction.....</u>	<u>2</u>
1.1.	Overview	2
1.2.	Scope: eligible categories and exclusionary safeguards.....	2
1.2.1.	Eligible Categories	2
1.2.2.	Safeguards and exclusions.....	3
1.3.	Difference with the Simplified Notification Procedure under Regulation 794/2004	4
<u>2.</u>	<u>Pre-notification phase ('PN phase')</u>	<u>5</u>
2.1.	Timing and structure.....	5
2.2.	Checklist – requirements and safeguards	5
2.3.	Pre-notification contact(s) ('PN contacts').....	6
2.4.	Feedback by DG COMP	6
2.5.	Preparation for controlling translation of summary of the notification	7
2.6.	Deadline for submitting a formal notification	7
<u>3.</u>	<u>Notification</u>	<u>7</u>
3.1.	Timing and organisation.....	7
3.2.	First steps: requirements, safeguards, translation and information email	7
3.2.1.	Requirements	8
3.2.2.	Safeguards.....	9
3.2.3.	Translation for publication and information email.....	9
3.3.	Publication of summary of notification	9
3.4.	Consultation period of interested third parties	10
3.5.	Preliminary internal approval within the Commission	10
3.6.	Adoption of short-form decision	10
3.7.	Publication of short-form decision	10
3.8.	Flowchart – overview	11

1. Introduction

- (1) The Commission Notice on a simplified procedure for treatment of certain types of State aid (hereinafter, 'the SP Notice'), adopted by the Commission on 29 April 2009¹, is intended to facilitate a swifter treatment of straightforward notified cases. The SP Notice specifies the categories of aid measures which are eligible for treatment under this procedure, as well as the conditions necessary for its application. The SP Notice does not provide for special notifications forms, except for the scenarios envisaged by the simplified notification form provided by Article 4 of the Implementing Regulation ([Commission Regulation 794/2004](#)) (see Chapter 1.3 below). Member States should thus use the traditional notification forms and supplementary information sheets available on the [Competition website](#).

1.1. Overview

- (2) If the aid measure falls within one of the eligible categories mentioned in the SP Notice, or the Member State presents a series of three pre-existing consistent precedents, and all conditions set out in the SP Notice are met, the Commission must endeavour to adopt a short-form approval decision within a time-limit of 20 working days from the date of notification. The "best endeavours" nature of the procedure implies that there is no automatic legal sanction in case this deadline is not respected. It must be underlined however that the political credibility of the Commission and of DG COMP in particular is at stake in this respect. In order to render this short deadline viable, pre-notification contacts between the Member State and the Commission are made compulsory for the application of the SP Notice within DG COMP. Exceptions to this rule are foreseen at § 14 of the SP Notice, in particular for the category of aid set out in point 5(c) of the SP Notice in case of prolongation or extension of existing schemes. The SP Notice provides for sufficient safeguards for the Commission to revert to the normal procedure and to adopt full-form decisions in case of need.
- (3) From a structural point of view, the simplified procedure is divided into two phases: (1) Pre-notification; and (2) Notification. Altogether, the procedure should normally not last more than 2 months, assuming that the notification is submitted within one week from the end of the pre-notification phase. For an overall view of the different steps in the procedure and internal deadlines, please check the attached flowchart.

1.2. Scope: eligible categories and exclusionary safeguards

- (4) Section 2 of the SP Notice sets out the categories of State support measures (both "no aid" and "compatible aid" decisions) in principle eligible for treatment under the simplified procedure (point 5), as well as the applicable safeguards and exclusions (points 6-12).

1.2.1. Eligible Categories

- (5) Point 5 of the SP Notice mentions three main categories of suitable State support

¹ Commission Notice on a Simplified procedure for the treatment of certain types of State aid, OJ C136, 16.06.2009, p. 3-12

measures:

- (6) Category 1 groups those aid measures which fall within the 'standard assessment' sections of the existing frameworks and guidelines. The SP Notice provides for an illustrative list of measures falling within this category (This list may be updated over time, in which case case-handlers will be informed of the changes). It is crucial to check that the (pre)notified measure effectively corresponds to one of the measures listed and that it meets the relevant substantive and procedural requirements laid down in the applicable horizontal instrument.
- (7) Category 2 refers to measures which correspond to constant Commission decision-making practice. 'Established' or 'constant' means the existence of at least three earlier Commission decisions containing the same standard assessment and structure (adopted within the last ten years preceding the pre-notification). Contrary to category 1, these types of measures are not covered by a horizontal instrument at this stage. Here again, the substantive and procedural conditions having governed the precedent decisions must be met. The SP Notice also provides for an illustrative list of measures falling within this category (This list may be updated over time, in which case case-handlers will be informed of the changes).
- (8) Category 3 reiterates, in substance, the content of Article 4 of [Regulation 794/2004](#), which already foresees a simplified notification procedure for certain alterations to existing aid (with a simplified notification form). The Member State is invited to follow the procedural practices presented in the SP Notice, but it may refuse to do so. Please see Chapter 1.3 below for an explanation of the difference between this category and the procedure provided by Article 4 of [Regulation 794/2004](#).

1.2.2. Safeguards and exclusions

- (9) Points 6-12 of the SP Notice describe a series of situations which entitle the Commission to decide not to apply the simplified procedure. Even if the (pre)notified measure falls within one of the eligible categories, if one of the indicated safeguards and exclusions apply, the simplified procedure cannot be applied and its application must be abandoned. These safeguards and exclusions can appear at different moments of the procedure (pre-notification or notification phase). The various procedural Chapters below explain how to deal with them.
- (10) The most important of these safeguards relates to the publication of a summary of the notification (on COMP's website) for interested third parties to provide comments on the summary of the notification: If an interested party expresses "substantiated" concerns during the consultation period, the simplified procedure must be abandoned and one should revert to the normal procedure and inform the Member State thereof. This constitutes an important safeguard for the Commission which counterbalances the more expedient analysis in the simplified procedure. But there are also more specific safeguards – such as the existence of a 'Deggendorf' issue², when the Commission will revert to the normal procedure where the notified aid

² See Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833.

measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market, or a possible conflict of the notified measure with other provisions of the Treaties (non-discrimination, four freedoms...). Substantive issues or negative opinions raised by an associated service in inter-service consultation will also lead to reverting to the standard procedure. Please consult points 6-12 of the SP Notice for a list of these situations.

1.3. Difference with the Simplified Notification Procedure under Regulation 794/2004

- (11) Article 4 of [Regulation 794/2004](#)³ foresees a simplified notification procedure for certain alterations to existing aid, with a (best-endeavours) time-line of 1 month. Under this provision, the "[...] following alterations to existing aid shall be notified on the simplified notification form set out in Annex II of the Regulation 794/2004:

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

- (12) From a substantial point of view, the possibility of applying Article 4 of [Regulation 794/2004](#) remains unaffected by the SP Notice (the above conditions remain the same). However, for 'coherence reasons', the SP Notice "invites" Member States to follow the procedural rules of the SP Notice when (pre)notifying a measure in accordance with Article 4 of [Regulation 794/2004](#) (Category 3). This would mean following the pre-notification phase (on the basis of the simplified notification form provided by Article 4 of [Regulation 794/2004](#)), the applicability of 20 working days deadline from notification, and agreeing on a publication of the summary of the notification. Whilst waiting for the reaction of the Member State to the 'invitation' of the Commission, the case-team should continue to work on the case as if it would be dealt with exclusively under Article 4 of [Regulation 794/2004](#).

- (13) Therefore, a measure (pre)notified under Category 3 of the SP Notice will, once agreement of the Member States has been obtained, have to comply with the substantial conditions laid down in Article 4 of Regulation 794/2004, would have to be (pre)notified on the basis of the simplified notification form provided by the same Article, and follow the procedural rules set out in the SP Notice including publication (on COMP's website). If the Member State disregards this "invitation" and decides to notify the measure under Article 4 of Regulation 794/2004, and not under the SP Notice, the latter would not apply. The PN phase and publication will then not take place.

³ Commission Regulation (EC) N° 794/2004 of 21 April 2004 implementing Council Regulation (EC) N° 659/1999 laying down detailed rules for the application of Article [93] of the EC Treaty, OJ L 140, 30.04.2004, p. 1, as last amended by Commission Regulation (EC) N° 271/2008 of 30 January 2008, OJ L 82, 25.03.2008, p. 1., hereinafter referred to as the 'Implementing Regulation'.

2. Pre-notification phase ('PN phase')

- (14) In the course of the pre-notification phase ("PN phase"), the case team should ensure that the relevant applicable precedents or horizontal instruments highlighted by the Member States are indeed relevant for the case at stake. On this basis it should be possible to conduct a preliminary assessment of the case to determine whether the SP Notice can *prima facie* be applied. At the end of the PN phase, in a feedback email, the Member State concerned should be informed thereof.
- (15) Due to specific time constraints under the SP Notice, the PN phase is, from the point of view of the case-team, obligatory (the use of the PN phase should certainly not be waived in the first months of application of the SP). Therefore, at the notification stage in SANI, the MS will have to indicate the original PN number of the case (this change was introduced in July 2010 to facilitate case registration and allocation). Only in particularly straightforward cases, the Member State and the Commission can agree to proceed directly to the notification phase (for example for repetitive aid measures falling under Category 3 of the SP Notice: see § 14 of the SP Notice). For more general information about the PN phase, please see the [Pre-notification Section](#) of the ManProc.

2.1. Timing and structure

- (16) The Member State launches the PN phase by submitting the draft notification form via SANI. At this stage, the Member State can request a waiver for completion of certain parts of the notification form. If the Member State attempts to submit the notification form via PKI, it should be strongly encouraged to do so via SANI. The reason is that SANI allows for the automatic generation of a summary of the notification to be published on COMP's website later on. The Head of Unit while allocating the case should take into consideration the necessary language skills of the case-team. Where appropriate, once the case is allocated to the case team, each team member has to sign the Conflict of Interest Form.
- (17) The case team has to analyse the draft notification and organise a first PN contact, preferably an email or a phone call, within two weeks (10 working days) from the launch of the PN phase by the Member State, so as to indicate potential problems, for instance missing information or insufficient / inappropriate precedents.
- (18) Ideally, there should be only one PN contact, but if that is not possible, the exchange of emails or phone calls should not last excessively. As a general rule, the PN phase should not last more than 2 months; (see, in this sense, p.14 of the Best Practices Code).
- (19) Within five working days after the last PN contact, a feedback email should be sent to the Member State concerned.

2.2. Checklist – requirements and safeguards

- (20) To check whether *prima facie* the case qualifies under the simplified procedure or whether the Commission services should revert to the normal procedure, the following minimum elements (not exhaustive) should be analysed:
 - Does the case fall under one of the categories of the SP Notice? See point 5 of the SP Notice.

- Did the Member State indicate in the pre-notification documents the relevant horizontal instrument/three precedents?
- Is any safeguard of the SP Notice applicable? For example, the aid measure could benefit an undertaking subject to an outstanding recovery order (Deggendorf issue) or there could be some 'special circumstances', like problems with other Treaty provisions (see point 10 of the Notice). (See in particular points 6-12 of the SP Notice for more detail).
- Is the measure prima facie in line with the horizontal instrument/three precedents?
- Is the pre-notification complete; is there any missing information?
- Double check if the contact person is clearly indicated in the PN documents submitted by the Member State
- Did the Member State request a waiver for completion of certain sections of the notification form?
- Are there any language issues that might cause delays in the course of the procedure? For instance, some documents might have been submitted in a language not covered by the case-team and thus it might be necessary to translate them. Such language issues should be communicated to the Member State via phone in order to find a reasonable solution. In the absence of such solution, it should be highlighted that the Simplified Procedure deadlines cannot be maintained.
- Check whether the Member State is aware that it has to provide acknowledgment that the (likely) short-form decision does not contain confidential information.

2.3. Pre-notification contact(s) ('PN contacts')

- (21) PN contact(s) should enable the case team to assess the depth and complexity of the assessment that needs to be conducted, as well as to identify and possibly clarify any outstanding issues.
- (22) As indicated above (see point 15), ideally there should be only one PN contact but, if that is not possible, the exchange of emails or phone calls should not last excessively.

2.4. Feedback by DG COMP

- (23) In very straightforward cases the feedback can be given already over the phone or by email during the PN contact itself. However, a final feedback email must be sent by the case-manager within five working days after the last PN contact. This can be a normal email but it needs to be registered in ISIS. If the email contains highly sensitive or confidential information, it must then be sent via PKI, but the case-team must make sure to respect the deadline, i.e. submit this to the Greffe sufficiently in advance to allow proper sending.
- (24) This email contains a non-binding assessment of the case and does not constitute an official position of the Commission. It indicates whether and, without prejudice to closer examination upon full notification, the simplified procedure (a) prima facie

applies; (b) does not apply; or (c) prima facie applies on condition that notification contains specifically identified additional information. It might also contain an indication of possible waivers to the notification form. This e-mail should also confirm the PN number given to the case, which the MS will have to use when notifying the measure via SANI.

2.5. Preparation for controlling translation of summary of the notification

- (25) Upon notification, a summary of the notification must be published on the website of DG COMP in the original language and in EN. Due to a new ISIS functionality, "SNC preview", already in the PN phase, the case-team can preview the summary of the notification in EN and in the original language (for more details see paragraph 31). This tool can be used by the case-team to spot and communicate issues related to the summary of the notification to the Member State at an early stage. After the notification, the main part of this document will be created and translated automatically via SANI/ISIS. However, case-handlers will need to double-check the translated items. Therefore, the case-manager must designate, already at the pre-notification stage, a case-handler with the appropriate language skills.

2.6. Deadline for submitting a formal notification

- (26) The Member State shall notify the aid measure concerned not later than 2 months after the pre-notification contact (see point 17 of the Notice). This time requirement has been included in order to avoid that the case team (and the officials from the Member States) lose memory of the detailed content of the case and of the discussions between the Commission and the Member State concerned. This 2 months deadline is also indicated in the feedback email.

3. Notification

3.1. Timing and organisation

- (27) The submission of the notification by the Member State concerned triggers the start of the time-limit of 20 working days for the Commission to adopt a short-form no aid or no objections decision. Similarly to what is provided under the simplified notification procedure foreseen under Article 4 of Regulation 794/2004, the Commission has indicated that it will "use its best endeavours" to adopt a short form decision within those deadlines. This implies that there is no automatic legal sanction (similar to the Lorenz deadline described in Article 4(5) of the [Procedural Regulation 659/1999](#) – Council Regulation 659/1999) in case the deadline is not respected. It must be underlined however that the political credibility of the Commission and of DG COMP in particular is at stake in this respect.
- (28) In order to ensure that the Commission will be in a position to adopt the short-form decision within the foreseen deadlines, it is essential that the different (internal and external) procedural steps are each taken within the predetermined deadlines. These deadlines are indicated clearly in the flowchart attached to this section. In particular, the case needs to be registered by the Greffe as soon as possible upon notification as 'simplified procedure' case (to enable the publication of summary of the notification within the set timeframe).

3.2. First steps: requirements, safeguards, translation and information

email

3.2.1. Requirements

- (29) The simplified procedure does not provide for a specific simplified notification form. Except as regards cases subject to category 3 above, the notification is to be carried out, via SANI, on the basis of the standard notification forms contained in Regulation 794/2004 (see in this respect Chapter 1.5 of the [Notification section](#) of the Manproc).
- (30) The short deadlines of the Simplified Procedure can only be respected in case the notification is complete (see [section on PN phase](#)). In this light, the assessment of a case under Simplified Procedure is characterised by a series of specificities.
- (31) Within **the first two days** upon notification, the following needs to be checked:
- Check that the measure at stake has been already pre-discussed in the context of PN contacts. While completing the notification form in SANI, the MS must indicate the relevant PN number (this field was made obligatory in SANI to facilitate case registration and allocation). This implies that no notification can be made under the Simplified Procedure without PN contacts;
 - Check overall completeness of notification (precise reference to applicable guidelines or precedents);
 - Check completeness of notification as compared to PN documentation and further documents/information required by case team during PN contacts; Member States should provide a list (track-changed version for instance) of issues/topics modified as compared to PN phase;
 - Check whether the MS indicated that the notification contains any business secrets;
 - Check whether Member State has provided acknowledgment that short-form decision does not contain confidential information (absence of this indication does not disqualify measure at stake from Simplified Procedure).
 - Check the correctness of the summaries of the notification. This issue is very important in practice and should be prepared properly as it is a feature which differs from traditional State aid cases.
- (32)
- When the case was properly notified via SANI under the SP Notice and registered in ISIS, a summary notification preview function is available in ISIS in both languages in which it is to be published on our website, i.e. in EN and the language of notification. In particular, the case-team should check the correctness of the two documents to be published. If something needs to be changed (aid amount, description of the measure, legal basis, ...) these changes should be introduced by the case-team in ISIS. Once everything is correct, the case-team sends an email to Greffe confirming that the summaries can be published on the website and sent for information to relevant internal services.
- (33) As soon as it appears that a request for information is necessary, the Simplified

Procedure should be abandoned.

3.2.2. Safeguards

- (34) If the notification includes any changes as compared to the notification presented in the pre-notification documents, such changes must be highlighted prominently in the context of the notification form (see point 17 of the SP Notice). In case of incorrect, misleading or incomplete information or in case the measure has not been pre-notified, it is essential to immediately abandon the Simplified Procedure and revert to the standard procedure (see Chapter Safeguards and Exclusions, in particular at points 7 & 8 of the SP Notice). The Case manager should, for this purpose, inform Member State by e-mail that the simplified procedure is abandoned. A copy of this e-mail is sent in parallel for info to relevant internal services.

3.2.3. Translation for publication and information email

- (35) On the day of receiving the notification, it is also crucial to double-check both, the original language version and its translation into EN, of the draft summary of notification for the publication on DG COMP's website. The main part of the summaries will be created and translated automatically via SANI/ISIS. However, the case-team must in particular double-check the translated items (warning: title, legal basis, region, granting authority remain in original language even in EN version). The case-team must also confirm to Greffe the correctness of both summaries of the notification. Only after that, Greffe sends (by activating a step in ISIS) an information to relevant internal services putting in copy the webmaster for publication with the summaries in two languages (version in authentic language + version in EN).

3.3. Publication of summary of notification

- (36) On the basis of the arrangements described in paragraph 31 above, the non-confidential summary of the notification must be published on COMP's website at the latest 2 working days after the notification to allow third parties an opportunity to submit their comments, within 10 working days from the date of the publication. Comments submitted after the 10 working-day period normally should not be considered by the case-team. If substantiated, these comments can lead to abandoning the simplified procedure (see Chapter 3.4 below).
- (37) Interested parties should provide a non-confidential version of their submission, but the absence of such version should not lead to third parties views not being taken into account. However, the third party should be reminded immediately to provide such a non-confidential version within 5 working days, especially if the comments in question have led to abandoning the simplified procedure, and reminded that its submission will be deemed withdrawn in the absence of a timely response.
- (38) On the day of publication of the summary on the website, the case team shall ensure that a reference to the publication will appear in the E-Newsletter. See [Publication section of the ManProc](#). Short IPs for the Midday Express may be prepared in duly justified cases (e.g. first cases to be approved under the SP Notice, new precedents, etc).

3.4. Consultation period of interested third parties

- (39) Third parties have 10 working days (two weeks) to react to the publication and provide their views on the measure envisaged by the Member State concerned.
- (40) In case a comment from a third party raises substantiated concerns or in presence of special circumstances, the Member State needs to be informed by e-mail (case manager) that simplified procedure is abandoned. A copy of this e-mail is sent in parallel for information, in the language in which it has been sent to the Member State (with a short explanation in EN at least in the title of the e-mail), to Assistant/COMP O3, LS, associated services, Cabinet and SG and registered at the Greffe. The interested party should also be informed of that fact informally.
- (41) Where the Commission abandons the simplified procedure due to substantiated concerns being raised by an outside stakeholder, the Member State concerned will, as a matter of good administrative practice, be provided with a copy of the non-confidential version of relevant comments received, and will have the opportunity to present its own comments within 20 working days. Therefore, the case-team must inform the Member State as soon as possible that the simplified procedure has been abandoned and that the non-confidential version of the relevant comments will be communicated to it shortly if submitted in good time by the third party concerned. Such comments do not necessary imply that the Commission will have to open the formal procedure in the meaning of article 4(4) of [Procedural Regulation 659/1999](#).

3.5. Preliminary internal approval within the Commission

- (42) During the consultation period of third parties, the draft Commission decision should be prepared.
- (43) At the latest the day after the end of the consultation period, the ISC of Legal Service and other associated services needs to be launched for 5 working days. [See [ISC section of the ManProc](#)].
- (44) In case of a negative opinion expressed by one of the consulted services, the Member State needs to be informed immediately by email (case manager) that simplified procedure is abandoned. A copy of this e-mail is sent in parallel for information, in the language in which it has been sent to the Member State (with a short explanation in EN at least in the title of the e-mail), to Assistant/O3, LS, associated services, Cabinet and SG and registered at the greffe.

3.6. Adoption of short-form decision

- (45) In case no outside stakeholder provides substantiated concerns and no negative opinion is received in the ISC, case-secretary should submit the decision by E-Greffe for adoption of the decision by the Commissioner on the basis of the empowerment procedure See [Empowerment section of the ManProc](#).

3.7. Publication of short-form decision

- (46) The fact of the decision needs to be published in the OJ, in line with Article 26 of Regulation 659/1999. See [Publication section of the ManProc](#).
- (47) The full text of the decision (in authentic language and EN) is to be made available

on DG COMP website.

3.8. Flowchart – overview

See following pages.

SIMPLIFIED PROCEDURE: FLOWCHART

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
PRE-NOTIFICATION	1) Member State launches pre-notification (draft notification form via SANI)	Registration at the greffe (SA,PN SP)	Grefe	Total of 10 workings days max Upon (pre)notification
		Grefe to issue acknowledgment of receipt stating that Commission services will call/e-mail contact person in view of setting up pre-notification contact within 10 working days	Grefe	Upon (pre)notification
		Attribution to responsible operational unit	Grefe	Upon (pre)notification
		Allocation to case-team (language knowledge crucial)	HoU	As soon as possible

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		<p>Language problems (documents in languages not mastered by the case-team) should be communicated to MS via phone</p> <p>Where applicable, conflict of interest forms to be signed by case-team members</p> <p>Information in SAMM of incoming PN Simplified Procedure</p>	<p>Case-team</p> <p>Case-secretary</p> <p>HoU</p>	<p>As soon as possible</p> <p>As soon as possible</p> <p>SAMM meeting</p>

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
PRE-NOTIFICATION		<p>Analysis of the quality of the notification and substance of the case: (1) is there precise reference to a section of the guidelines or to three identified precedents?; (2) is case <i>prima facie</i> fitting into scope of relevant horizontal instrument / in line with three consistent precedents?</p> <p>Identification of missing information for complete notification</p> <p>First assessment of requests for waiving completion of certain sections of notification form (if any)</p> <p>Preparation of pre-notification contact(s)</p>	<p>Case-team</p> <p>Case-team</p> <p>Case-team</p> <p>Case-team</p>	
	2) Pre-notification contact(s)	<p>The case team shall inform the Member</p>	Case-team	At the latest 10 working days after launch PN

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		<p>State (by email or phone call) of potential issues identified (missing or contradictory info, questions, waiver request, etc.)</p> <p>In principle the contact should be limited to a phone call or email exchange (this implies that in principle the 5 working days to provide feedback would start running from the phone call/email reply from MS)</p> <p>In case of unclear issues, exchange of emails may be possible but should not last excessively</p> <p><u>SAFEGUARD</u>: if needed, it is possible to revert to standard procedure: inform Member State (and interested party, if applicable) by e-mail (case manager) that simplified procedure is abandoned;</p>		
	3) Feedback by COMP			Within 5 working days after end of pre-notification

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		<p>In very straightforward cases the feedback can be provided already during the phone call/email exchange</p> <p>Finalisation of <i>prima facie</i> assessment of substance / completeness notification form</p> <p>E-mail by COMP services (case manager) indicating that Simplified Procedure does not apply or <i>prima facie and without prejudice to closer examination upon full notification</i> the simplified procedure applies / applies on condition that notification contains specifically identified additional information. Indication of possible waivers to the notification form (normal email, except for PKI if confidentiality issues). The SA, PN number must be mentioned to ensure that the MS can indicate it when later notifying the measure via SANI. This facilitates case registration and allocation.</p> <p>Make sure that the feedback email is</p>	<p>Case-team</p> <p>Case-team</p> <p>Case-team + case-secretary</p>	contact(s)

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		registered in ISIS		
	4) Member State prepares notification			Maximum period of <u>2 months</u> after the feedback by DG COMP to submit formal notification.

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
	5) Notification	<p>Check completeness of notification as compared to (1) PN documentation; (2) feedback given</p> <p><u>SAFEGUARD:</u> in case of incorrect, misleading or incomplete information, revert to standard procedure: inform Member State by e-mail (case manager) that simplified procedure is abandoned; sent in parallel for info to relevant internal services</p> <p><u>Check the correctness of summaries of the notification.</u> A summary notification preview function is available in ISIS both in EN and the language of notification. The case-team should introduce all the necessary changes in ISIS. Once everything is correct, <u>send an email to Greffe confirming that it can be published on the website</u> and sent by Greffe. <u>If any other Commission service should be informed, the case team should forward the email itself to the DGs concerned.</u></p>	<p>Case-team</p> <p>Case secretary + Case-team</p> <p>Case-team + Greffe</p>	<p>Total of 20 working days maximum</p> <p>2 working days (N 0; N +2)</p>

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
NOTIFICATION	6) Publication of the fact / summary of notification on website	<p>The webmasters should receive the cartouche in two languages (version in authentic language + version in EN) by e-mail once it has been checked by the case-team.</p> <p>Publication online</p> <p>Inform the Transparency unit for reference of publication in E-Newsletter</p>	<p>Grefe</p> <p>Webmaster</p> <p>Case-team/Case-secretary</p>	<p><u>2 working days</u> after notification maximum</p> <p>(N 0 ; N +2)</p>
	7) Consultation period of interested third parties	<p><u>SAFEGUARD</u>: In case of substantiated concerns expressed by interested party or in presence of special circumstances, inform Member State (and interested party, if applicable) by e-mail (case manager) that simplified procedure is abandoned; sent in parallel for info to relevant internal services.</p> <p>If the third party does not submit the non-confidential version of the comments it should be reminded to do so within 5</p>	<p>Case-team</p> <p>Case-team</p>	<p>For period of <u>10 working days</u> after publication of notification</p> <p>(N +2; N +12)</p> <p>Immediately upon receipt of incomplete submission.</p>

State Aid ManProc – Simplified Procedure

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		<p>working days and reminded that this submission will be deemed withdrawn in the absence of a timely request.</p> <p>If the simplified procedure is abandoned at this stage, send then letter to relevant MS transmitting the substantiated non-confidential comments arrived (with a 20 working days deadline to submit comments)</p> <p>Write draft short form decision;</p>	<p>Case-team</p> <p>Case-team</p>	<p>Once non-confidential version has been received.</p> <p>Upon publication of notification</p>
	8) Preliminary internal approval within Commission	<p>ISC of LS and associated services (5 working days).</p> <p><u>SAFEGUARD</u>: in case of negative opinion, inform Member State by email (case</p>	<p>Case-secretary</p> <p>Case-team</p>	<p><u>5 working days</u> after end of consultation period (N + 13; N+17)</p>

	STEPS	TASKS	RESPONSIBILITY	TIME-LIMITS
		manager) that simplified procedure is abandoned (as above); sent in parallel for info to relevant internal services.		
	9) Short form decision	<p>Submit the decision by E-Grefte for adoption of the decision by the Commissioner on the basis of the empowerment procedure</p> <p>SG faxes/e-mails decision to Member State concerned</p> <p>No press release but mention in E-Newsletter (short Information for the Press for Midday Express possible in justified cases).</p>	<p>Case-secretary</p> <p>SG</p> <p>Transparency unit</p>	<p>Decision must be adopted within 3 working days after end of ISC</p> <p>(N + 18; N + 20)</p>
	10) Publication of short form decision	<p>Publication of the fact/summary of decision in OJ</p> <p>Full text made available on Comp website and Eur-Lex website only in English and language of procedure</p>	<p>Case-secretary</p> <p>Webmaster</p>	<p>Best practice target: 10 working days</p>

SECTION 9 RECOVERY

<u>Section 9</u>	<u>Recovery</u>	<u>1</u>
<u>1.</u>	<u>General principles</u>	<u>3</u>
1.1.	Purpose and importance of recovery.....	3
1.2.	Legal framework	3
<u>2.</u>	<u>Recovery proceedings</u>	<u>4</u>
2.1.	Adoption of a final decision with a recovery obligation	4
2.2.	Registration	6
2.3.	Administrative follow-up: Reminders in case of no reply	6
2.4.	Administrative follow-up: Information requests and reminders in case of insufficient action (individual aid quantified in the Decision or easily quantifiable).....	7
2.5.	Administrative follow-up: Information requests and reminders in case of insufficient action (complex cases, in particular schemes)	7
2.6.	Administrative follow-up: Information requests and reminders when the Member State acts diligently (residual category)	8
2.7.	Closure of a recovery case	9
2.8.	Provisional closure of a recovery case	10
2.9.	Article 108(2) TFEU action	10
2.10.	Administrative follow-up after Article 108(2) TFEU judgment.....	11
2.11.	Article 260(2) TFEU action	11

<u>3.</u>	<u>Substantial aspects</u>	<u>12</u>
3.1.	Limits to recovery	12
3.2.	How to calculate the interest.....	13
3.3.	Correct execution of recovery decisions	14
3.4.	Specific situations: recovery in insolvency/bankruptcy cases.....	15
<u>4.</u>	<u>The Deggendorf case-law</u>	<u>16</u>
4.1.	Application of the Deggendorf case-law in case of new notifications	17
4.2.	Application of the Deggendorf case-law in cases of illegal aid.....	18
4.3.	Definition of the beneficiaries when applying the Deggendorf case-law	18

1. General principles

1.1. Purpose and importance of recovery

Recovery is not a penalty, but a means to restore the situation previous to the granting of the illegal and unlawful aid. This objective is obtained once the aid (plus interests) is repaid by the recipient who enjoyed an advantage over its competitors on the market. When a negative decision is taken in cases of unlawful State aid, the Commission shall decide that the Member State must take all necessary measures to recover the aid from the beneficiary in accordance with its national procedures.

The effective enforcement of State aid recovery decisions is essential for the credibility of the Commission's State aid policy. However, enforcement of the recovery orders by the Member State is not always obvious due to the obstacles existing in the legal and judicial systems of the Member States.

Responsibility for monitoring and follow-up of all pending recovery cases was transferred to a dedicated unit (Recovery Unit), which ensures a systematic approach to the enforcement of State aid decisions.

1.2. Legal framework

Article 108(3) of the TFEU establishes the prohibition for Member States to put in place aid measures prior to the Commission's authorisation.

The basic rules regarding the recovery of State aid are laid down in Article 14 of the Procedural Regulation¹:

- **Article 14(1)** of the Procedural Regulation states that: "Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law".
- **Article 14(2)** of the Procedural Regulation states that: "Aid to be recovered shall include recovery interests"
- **Article 14(3)** of the Procedural Regulation provides that: "Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To

¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.03.1999, pp 1-9).

this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law”.

- **Article 15** of the Procedural Regulation sets up a limitation period of 10 years for the recovery of illegal and incompatible state aid.

The Implementing Regulation², contains several provisions concerning the interest rate for the recovery of the unlawful aid. Concretely:

- **Article 9** - Method for fixing the interest rate
- **Article 10** – Publication
- **Article 11** - Method for applying interest

2. Recovery proceedings

2.1. Adoption of a final decision with a recovery obligation

The recovery decision constitutes the departing point for a recovery case and therefore, it should be as clear as possible. Experience suggests that the effectiveness of the enforcement of State aid decisions depends to a large extent on the quality of the final decision.

The Recovery Unit should systematically be involved in the preparation of final negative decisions regarding unlawful aid measures. As regards the operative part of the decision, “templates” have been prepared by the Recovery Unit for the recovery provisions of the decision that should be compulsorily used. These templates may be slightly modified in agreement with the Recovery Unit to take into account the specific characteristics of an individual case. In cases where arguments concerning legitimate expectations, legal certainty, or good administration, are raised during or after the adoption of a negative decision ordering recovery, the case-team in charge should liaise with Unit H4.

Recovery decisions should normally contain the following elements:

- For individual cases, the identification of the legal entity that has to reimburse the aid. In particular in cases of indirect aid, it is essential that the Commission decision establishes clearly who are the beneficiaries of the aid liable for recovery;
- Whenever possible, quantification of the amount of aid to be recovered. It should be underlined that notably when the Commission does not dispose of the necessary

² Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008.

information despite several requests to the Member State, it is not under the obligation to quantify the aid and may leave this exercise to the Member State³ concerned. Nevertheless, the Commission should always try to get the necessary information to quantify the aid and identify the beneficiary.

- Where quantification is not possible (e.g. in the case of schemes), a clear specification of the method, which the Member State has to use to quantify the amount of aid to be recovered, must be defined. A clarification of the methods for the quantification of aid in less obvious forms like guarantees or capital injections is also necessary.
- The aid to be recovered should also include interest. The decision itself should not quantify the amount of interest to be recovered but it should indicate how this has to be calculated according to the relevant provisions of the implementing regulation⁴.
- A strict timetable for the sending out of recovery orders to the recipients of the aid to push Member States to initiate the recovery proceedings. From the Publication of the Recovery Notice (November 2007) onwards, we therefore specify two time limits for the implementation of the recovery:
 - a first time-limit of **two months** following the adoption of the decision, within which the Member State must inform the Commission of the measures planned or taken,
 - a second time-limit of **four months** following the adoption of the decision, within which the Commission decision must have been executed.

³ Joined Cases T-111/01 and T-133/01, *Saxonia and ZEMAG v. Commission*, [2005] ECR II-1579.

⁴ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L140, 30.04.2004, p. 1) as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008

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2.2. Registration

The CR procedure (Monitoring of recovery procedures) has to be registered immediately by the State aid Greffe (within the same SA case), taking usually the same number as the C procedure. The case is then attributed by the HoU to a case-team which normally has been previously involved in the drafting of the final decision.

2.3. Administrative follow-up: Reminders in case of no reply

As stated above, the recovery decision provides that the Member State shall inform the Commission, within two months following its notification, of the measures planned or taken to comply with its recovery obligation.

In all cases (schemes or individual aid):

- **when, within the two-month deadline, the Member State does not provide any information**, the case-handler should send a reminder inviting the Member State to provide the information and to take all steps required to fully implement the decision within four months following the date of notification of the decision. This reminder at Head of Unit level shall mention that the Commission may refer the subject to the Court of Justice under 108(2) TFEU.
- **if, after the four month deadline has elapsed, the Member State has still not replied** the case-handler should send a further reminder with a new deadline of 20 working days. This reminder at Director's level shall mention that the Commission may refer the subject to the Court of Justice under 108(2) TFEU.

Generally, should the Member State **not reply to a request for information**, standard reminders should mention that the Commission may refer the subject to the Court of Justice under 108(2) TFEU. The new deadline can vary between 15 or 20 working days depending on the circumstances of the case (e.g. large number of beneficiaries or granting authorities, internal reorganisation). In case of a second reminder, the additional deadline can again vary depending on the circumstances of the case. A second reminder shall in principle include mention that the Commission may refer the subject to the Court of Justice under 108(2) TFEU at Director's level.

If the Member State requests an extension of the deadline for replying, this is normally granted, if justified.

2.4. Administrative follow-up: Information requests and reminders in case of insufficient action (individual aid quantified in the Decision or easily quantifiable)

The following rules apply to cases concerning individual aid quantified in the decision or easily quantifiable⁵:

- if, within the two month deadline, **the information provided by the Member State indicates that the actions requested by the Decision are not implemented** (calculation of aid amount / recovery interests, sending out of the recovery order), a request for information shall be sent, which includes a reminder that the deadline has elapsed and that the Commission may refer the subject to the Court of Justice under 108(2) TFEU;
- if a warning that the subject may be brought to the Court of Justice at Head of Unit (HoU) level had **not** been sent after the two month deadline (for instance, because the Member State had provided the information requested by the Decision, but then has not implemented the Decision), and if , within the four month deadline, **the information provided by the Member State indicates that the Decision is not implemented in a satisfactory manner**, a request for information shall be sent, which includes a reminder that the deadline has elapsed and that the Commission may refer the subject to the Court of Justice under 108(2) TFEU at HoU's level;
- if a warning that the subject may be brought to the Court of Justice at HoU level had been sent after the two month deadline, the next letter shall be signed by the Director after the end of the four month period, and include that the Commission may refer the subject to the Court of Justice under 108(2) TFEU at Director's level.

2.5. Administrative follow-up: Information requests and reminders in case of insufficient action (complex cases, in particular schemes)

The following rules apply in all other "complex"⁶ cases, in particular schemes:

- if, within the two month deadline, **the information provided by the Member State indicates that the actions requested by the Decision are**

⁵ The notion of "easily quantifiable" should be assessed on a case by case basis. This should cover in particular cases where the aid amount was not provided in the Decision only because few data was missing (for instance, in case of a loan, the actual interest rate granted to the company).

⁶ The notion of "complex" case should also be assessed on a case by case basis. This mostly concerns schemes, but also individual aid not quantified in the decision and where the quantification requires complex calculations (for instance the simulation of a counterfactual scenario).

not implemented (identification of beneficiaries, calculation of aid amount / recovery interests, sending out of the recovery orders), a request for information shall be sent, which includes a reminder that the deadline has elapsed;

- then if, within the four month deadline, **the information provided by the Member State still indicates that the Decision is not implemented in a satisfactory manner**, a request for information shall be sent, which includes a reminder that the deadline has elapsed;
- **if the reply to this letter still shows lack of implementation** by the Member State, a request for information shall be sent, which includes both a reminder that the deadline has elapsed and that the subject may be referred to the Court of Justice under 108(2) TFEU at HoU's level;
- if, again, the reply to this letter shows lack of implementation by the Member State, a request for information shall be sent, which includes both a reminder and a warning that the subject may be referred to the Court of Justice at Director's level .

2.6. Administrative follow-up: Information requests and reminders when the Member State acts diligently (residual category)

Within the four months deadline, the initial information provided by the Member State may show that the Member State is **acting diligently**, but that the implementation may be delayed because of the complexity of the case or unexpected difficulties. These difficulties should be clearly raised by the Member State together with proposals on how to overcome them.

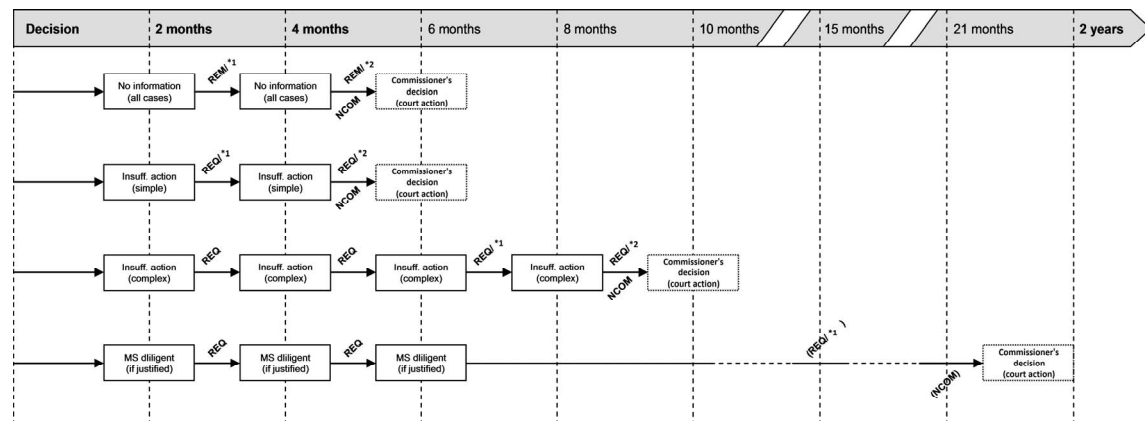
In such cases, requests for information will be needed, and legal action should only be considered later in the process. Requests for information are signed by the HoU of Unit H4 and should include a reminder that the deadline has elapsed. If the Member State does not reply within the deadline foreseen (20 working days of the date of the letter), the normal rules regarding reminders should apply (see part 2.3).

IMPORTANT !!!

Information submissions by the Member State should normally be analysed by the case-handler within two weeks.

Any relevant exchange of information between the Member State and the Commission (including e-mails and records of meetings) has to be registered by the State aid Greffe. To that end, the documents must be forwarded to COMP state aid registry for registration in ISIS.

Flowchart:



***1: first warning that the subject may be referred to the Court of Justice at Head of Unit's level**

***2: second warning that the subject may be referred to the Court of Justice at Director's level**

REM: Reminder

REQ: Request for information

Commissioner in charge of competition

2.7. Closure of a recovery case

The information available has to be analysed by the case-handler in the light of the conditions to be fulfilled by the Member State as regards recovery (see point 3.3).

If the case-handler considers that the recovery procedure has been correctly implemented, the following steps must be followed:

- To prepare a closure note and send it to the Head of Unit of H4 for its approval.
- Once approved, the note must be sent to the Recovery policy coordination team for inclusion in the next recovery update.
- All closure notes will be attached to one of the two semestrial information notes addressed to the Commissioner on the situation of the implementation of recovery decisions.
- Once approved by the Commissioner, the note is sent to the State aid Greffe for registration. The case can only be considered as closed when the State aid Greffe has created a new event "closure".

2.8. Provisional closure of a recovery case

In cases where Member States have adopted all the necessary measures available in their national legal system but recovery cannot be considered as fully executed, we propose to provisionally close a case as an internal administrative step. There are three types of cases that normally fall under this category of provisional closure:

- (1) Cases in which the Commission's recovery decision has been annulled by the General Court, but the Commission has decided to appeal the judgement. In these cases, and as long as the Court of Justice has not ruled on the appeal, there is no recovery to be pursued in an active manner. The case will need to be assessed again (definitive closure or re-opening) once the Court of Justice has rendered its judgment.
- (2) Cases in which the beneficiary is insolvent, has ended his activity and the recovery claim has been properly registered. In this type of cases, the decision is only considered to be fully implemented after the sale of the assets through an open and transparent procedure, on market terms. In some cases, the Member State has taken all the necessary steps and conducted a fully transparent sales procedure, but this is not yet fully completed. Nevertheless the activity has ended, and the distortion caused by the aid has been stopped. The case can be definitively closed once the last sale of the last asset has been completed.
- (3) Cases in which the aid to be recovered has been provisionally implemented and paid into a blocked account, pending a ruling of a Court (European or national). These cases will need to be reassessed after the judgment. If the Commission Decision is upheld and definitive, we will have to ensure that the money put into the blocked account is paid to the Member State, together with the corresponding recovery interest. The case can then be definitely closed.

Case handlers need to follow the same internal procedure for provisional closures as for closures.

2.9. Article 108(2) TFEU action

Article 23(1) of the Procedural Regulation provides that, where the **Member State** concerned **does not comply with a recovery decision**, the Commission may refer the matter directly to the Court of Justice of the EU in accordance with **Article 108(2) TFEU**.

In case of clear lack of co-operation from the Member State or in case of incorrect implementation of the recovery obligation, the case-handlers will send an information request (or reminder) including an Article 108(2) TFEU warning to be signed by the Director.

If the reply leads to the conclusion that it is necessary to refer a Member State to the Court of Justice for failure to comply with the Commission's recovery decision, the following steps should be taken:

- The case-handler prepares a note to the Commissioner clearly explaining the reasons for going to Court (see the general NCOM template).
- Once approved, an ISC proposing to initiate Article 108(2) TFEU proceedings has to be launched. The normal procedural rules for ISC are applicable. The decision is adopted through oral procedure.
- A press release and a one-pager note have to be prepared.
- Once the decision is adopted by the Commission, the LS becomes "chef de file" for the Court proceedings with the support of the case-handler in charge at DG COMP. The case-handler prepares the file to be transmitted and sends it to the LS' agent.

2.10. Administrative follow-up after Article 108(2) TFEU judgment

As soon as the Court of Justice judgment condemning the Member State for failing to implement the recovery decision is available, the case-handler will send a letter to the Member State concerned informing it of the judgment and requesting information on the measures taken to execute the recovery decision. When necessary, a request of information with an Article 260(2) TFEU warning should be sent.

If the Member State does not co-operate or if the Member State's reply does not indicate that the recovery decision will be executed in a short period of time, the case-team should consider initiating an Article 260(2) TFEU action. Normally, Article 260(2) TFEU action will be considered at the latest one year after the date of the Article 108(2) TFEU Court judgment.

2.11. Article 260(2) TFEU action

Article 23(2) of the Procedural Regulation provides that, 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 **Article 260(2) TFEU**. If the Court of Justice recognises that the Member State did not comply with its judgment, it may impose on it the payment of penalties.

In order to refer a case to the Court of Justice in accordance with Article 260(2) TFEU, a number of preliminary steps have to be taken:

- The case-handler prepares a note to the Commissioner requesting her/his agreement to propose the Commission to send a letter of formal notice to the Member State. The letter of formal notice constitutes the first stage in the pre-litigation procedure during which the Commission requests the Member State to submit its observations on an identified problem within two months (unless the Commission decides otherwise).
- Under the EC Treaty, a reasoned opinion was necessary (if the Member State does

not put an end to the infringement and if its observations fail to be satisfactory). Following the adoption of the Lisbon Treaty, this step is no longer required. Only for transitory cases, a complementary letter of formal notice will be sent to the Member State in place of a reasoned opinion.

- The adoption of a Commission's decision is necessary before sending a letter of formal notice and a complementary letter of formal notice. Commission's decisions on infringements are based on infringement fiches which must be accurate, up-to-date as regards the facts of the case, the legal basis and the status of the file. The infringement cases are registered by the SG in NIF (infringement database) and a number is attributed to them. There is also a specific calendar for the Commission's meetings on infringements.
- The NIF database serves as unique tool through which the report exercises are administrated allowing the infringement coordinators in the DGs, the SG and LS to receive the necessary information on which the proposed decisions are based. The DG COMP coordinator of infringements must be informed about each step of the Article 260 (2) TFEU proceedings (letter of formal notice, complementary letter of formal notice, saisine/court referral).
- If the Member State still does not come into line with Community law, the Commission (through a Commission decision) can seek the imposition of a fine or penalty payment under Article 260 TFEU by bringing the case before the Court of Justice, whose judgment is binding. To this end, the case handler will first prepare a note to the Commissioner providing an update on the state of play of the recovery. The note will also have to contain a calculation fiche setting out the fine or penalty payment to be proposed to the Court of Justice. The proposal is then discussed with the Commissioner, following which the case is introduced into the regular infringement cycle.
- For the Court proceedings LS becomes "chef de file" with the support of the case-handler in charge at DG COMP. The case-handler prepares the file to be transmitted and sends it to the LS' agent.

3. Substantial aspects

3.1. Limits to recovery

The non recovery of an illegal and incompatible aid will only be possible in the following cases:

- Existence of a general principle of Community law

Article 14 (1) of Regulation 659/99 states that recovery may not be ordered by the Commission if this is contrary to a general principle of law. Member States and beneficiaries can also invoke these principles in their actions to invalidate Commission recovery orders.

The most common principles invoked within the context of recovery are legitimate expectations and the principle of legal certainty. The Court of Justice has however interpreted these principles in a very restrictive manner. For instance, Member States

whose authorities have granted aid contrary to the State aid procedural rules may not rely on the legitimate expectations of recipients in order to justify a failure to comply with their recovery obligation.

If the principles of legitimate expectations or legal certainty are raised during or after the adoption of a negative decision ordering recovery, the case team in charge should liaise with Unit H4.

- Ten year limitation

Article 15 of the Procedural Regulation states, that the Commission's possibility to recover is subject to a period of 10 years. This period is starting from the award of the aid to the beneficiary. However, it must be underlined that any action of the Commission or of the Member State with regard to the measure makes the limitation period start afresh.

- Absolute impossibility to recover the aid

The Court of Justice has stated that the only argument that could be invoked by the Member State to avoid the recovery of illegal aid is the absolute impossibility to recover it. This notion has been interpreted in a very restrictive manner by the Court. For instance, it does not justify the impossibility based on specific provisions of national law or the financial position of the beneficiary from whom aid must be recovered.

Finally, the condition of absolute impossibility is not satisfied where the Member State argues legal and practical difficulties for recovering to the Commission, without taking any concrete measure to recover the aid or without proposing any alternative solution.

In case Member States encounter difficulties in implementing the recovery decision, they should contact the Commission in accordance with the **loyal cooperation principle set in Article 4(3) TEU**, in order to work together in good faith with a view of overcoming the difficulties whilst fully observing the TFEU provisions.

3.2. How to calculate the interest

The sums to be recovered shall bear interest throughout the period running from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

Articles 9 to 11 of the Implementing Regulation, as amended by Commission Regulation No 271/2008, establish the method of calculating the applicable recovery interest rate.

The reference rates (by Member States) are regularly updated in order to take into account the changes in the base rates. This is done by way of a "Communication from the Commission on the revision of the method for setting the reference and discount rates", which is sent to the Member States' permanent representations, published in the Official Journal and on DG COMP's website, at:

http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

The interest rate shall be calculated by adding 100 basis points on the reference rate. However, the reference rates are calculated with a new methodology only as from

14/04/2008. For recovery rates before this date, one has to use the published reference rates as such (without adding 100 basis points) as the rates before that date already contain the appropriate top-up.

The recovery rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year. However, if more than one year has elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the date of the recovery of the aid, the recovery rate shall be recalculated at yearly intervals, taking as a basis the rate in force at the time of recalculation.

The legislation on methodology for reference/discount rates and recovery interest rates can be found at the following address:

http://ec.europa.eu/competition/state_aid/legislation/reference.html

Exceptions:

If the Decision has been adopted between 8 May 2003 and 14 April 2008, the recovery rate only has to be recalculated on 5-year intervals (and not yearly intervals). The interests have to be calculated on a compound basis.

We accept that interests are not calculated on a compound basis (i.e. simple interests) if **each** of the following conditions is satisfied:

- the decision was adopted before the 2003 Communication;
- the decision does not explicitly impose the calculation of recovery interests on a compound basis;
- the Member State shows that in similar situations, the calculation of interests is done in a simple manner.

3.3. Correct execution of recovery decisions

According to Article 14 (3) of the Procedural Regulation “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”.

Taking into account this provision, the Commission expects Member States to comply with the following conditions when implementing a recovery decision:

- (1) The State must initiate the recovery procedure immediately and without delay:
 - The Member State must identify the beneficiary and the aid amount to be recovered in case this is not specified in the Commission’s decision. The Court of Justice stated that there is no obligation on the Commission to quantify the aid;
 - The Commission’s decision must be recognised by the Member State as a sufficient legal basis for issuing the national legal act ordering recovery;

- The Member State must send the recovery order to the beneficiaries within the initial four month period (save in duly justified cases) .

(2) From a procedural point of view:

- The Member State must choose the most efficient proceeding to execute the recovery;
- The recovery orders must be immediately enforceable;
- The Member State must at any stage of the recovery procedure ensure that the interest of the Community is duly taken into account, especially in national litigations.

(3) In case of litigation of a national recovery order before national courts:

- National courts must set aside any procedural rules which render an efficient recovery procedure ineffective (Scott⁷).
- Suspension of the execution of the recovery order may only be granted by the national judge if the Zuckerfabrik⁸ criteria are fulfilled:
 - Serious doubts as to the validity of the Community measure (if the case is not yet pending before the EU Courts, the national court must request a preliminary ruling)
 - Urgency
 - Threat of serious and irreparable damage to the applicant
 - Community's interests are duly taken into account

(4) Actions by Member States must produce concrete effects

The Court of Justice stated⁹ that measures undertaken by Member States must produce concrete effect with regard to the effective recovery of the aid.

3.4. Specific situations: recovery in insolvency/bankruptcy cases

According to the Court of Justice, the fact that a firm is insolvent and/or subject to bankruptcy proceedings has no effect on its recovery obligation. However, in the majority of the cases in which the beneficiary of the aid is insolvent, it is not possible

⁷ Case C-232/05, *Commission v. France* ('Scott'), paras 49-53 [2006] ECR I-10071.

⁸ Joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, [1991] ECR I-415.

⁹ Case C-415/03, *Commission v. Greece* ('Olympic Airways'), [2005] ECR I-3875.

to recover the full amount of illegal aid and its interests. In these cases, the alternative to the full recovery is the liquidation of the beneficiary.

The Commission expects Member States to fulfill the following **conditions** when implementing recovery decisions concerning **insolvent beneficiaries**:

- The Member State must immediately register its claims in the bankruptcy proceedings and oppose any refusal by the insolvency administrator to register the recovery claim or any ranking depriving it of rights in the proceedings. In case no action is available to the Member State to obtain a proper ranking, we will expect it to take any action which enables it to obtain recovery or liquidation;
- The Member State should appeal against any decision by the insolvency administrator or the court to allow a continuation of the insolvent beneficiary's activity;
- In the absence of a full repayment of the aid (principal + interests), the Member State should vote against the adoption of a continuation plan and/or appeal the decision to adopt the continuation plan before the national court, and should insist on the ending of the activity of the beneficiary;
- In case of liquidation, the Member State should oppose any transfer of assets that is not done on market terms and/or that is organised so as to circumvent the recovery decision. If the transfer took place, it should initiate action at national level to recover the aid from the buyer of the assets.

Criteria to be fulfilled in order to close the case:

- If there is a continuation of the activity: full recovery (principal + interest)
- Beneficiary no longer active: assets sold on market terms following an open, transparent and unconditional tender, carried out in an organized insolvency procedure in which all State aid claims are properly registered.

4. The Deggendorf case-law

In the Deggendorf case¹⁰, the Court of Justice confirmed that, when assessing a new aid measure, the Commission can take into account the fact that the beneficiary of this new aid has not fully repaid earlier aid (that is the subject of an earlier recovery decision) and decide not to approve the otherwise compatible aid until the old aid has been fully reimbursed. DG COMP applies the Deggendorf case-law rigorously so as to strengthen the enforcement of state aid decisions and speed up the execution of recovery decisions.

¹⁰ Joined cases T-244/93 and T-486/93, *TWD/Commission*, [1995] ECR II-2265; Case C-355/93P, *TWD/Commission*, [1997] ECR I-2549.

4.1. Application of the Deggendorf case-law in case of new notifications

When assessing a new aid measure, be it an individual aid or an aid scheme, case handlers should systematically verify whether the Deggendorf case-law is applicable. If the notified measure is an individual aid, it should be checked whether the beneficiary did pay back an earlier unlawful and incompatible aid. If the notified measure is an aid scheme, case handlers should ask Member States to suspend payment of aid under the new aid scheme to applicants that still have not complied with a recovery decision.

Concrete **actions** by **case-handlers** concerning individual aid:

- Case-handlers should first verify the answer provided by the Member State to the question in point 11 of the notification form (“outstanding recovery order”). This information can be cross-checked with the information in the **list of pending recovery cases**. In case the potential beneficiary is established in a Member State where a recovery case concerning an aid scheme is still pending, the case-handler should liaise with Unit H4 for more detailed information on the beneficiaries.
- If the information given by the Member State is incomplete or contradictory to the data provided in the **list of pending recovery cases** or by Unit H4, the case-handler should first ask the Member State to clarify the matter.
- If it is established that the beneficiary of the new aid has not yet complied with an earlier recovery decision, the case-handler should ask the Member State to provide a commitment that they will suspend the payment of the new aid until the beneficiary has fully complied with the recovery order.
- If the Member State provides this undertaking, this should be recorded in the approval decision. The following sentence should be inserted in the decision: *“The Member State has undertaken to suspend the payment of aid to the undertaking as it has received aid which has been declared to be illegal and incompatible by virtue of the decision of the Commission of (add a reference to the former decision) until the undertaking concerned has paid back the incompatible aid with the recovery interests due”*.
- In cases where the Member State refuses to make such a commitment (or where it has already paid out the aid), Article 108(2) TFEU proceedings should normally be opened regarding the new aid. Thereafter and unless the outstanding aid amount is significant compared to the new aid requested, the Commission can take a final conditional decision on the basis of Article 7 (4) of the Procedural Regulation, requiring the Member State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.
- In case of doubt, do not hesitate to contact Unit H4

Concrete actions by case-handlers concerning aid schemes:

- In case the Member State that notified the new aid scheme is still under the obligation to implement a recovery decision (please check **in the list of pending recovery cases**) the case-handler will request a commitment from the Member State to suspend payment of aid under the new scheme to any undertaking that still has to comply with recovery obligations.
- If the Member State provides this undertaking, this should be recorded in the approval decision. The following sentence should be inserted in the decision: *“The Member State has undertaken to suspend the payment of aid under the present scheme to any undertaking that has received illegal and incompatible aid under the aid schemes listed below (add references to the cases concerned) until the undertaking concerned has paid back the incompatible aid with the recovery interests due”*.
- If the Member State refuses to make such a commitment (or where it has already paid out the aid) the case-handler should normally propose to initiate Article 108(2) TFEU proceedings regarding the new aid (see below). If clear data on the aid measures involved are not available, (e.g. in case of illegal and incompatible schemes where the amount and the beneficiaries are not known to the Commission), the Commission will take a final conditional decision on the basis of Article 7 (4) of the Procedural Regulation, requiring the Member State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.
- In case of doubt, do not hesitate to contact Unit H4.

4.2. Application of the Deggendorf case-law in cases of illegal aid

In the case of illegal individual aid, case-handlers should first try to establish whether the beneficiary still has to comply with earlier recovery decisions. If this is confirmed by the Member State, case-handlers will normally propose to initiate the 108(2) TFEU proceedings in relation to the new aid. Article 108(2) TFEU proceedings should also be initiated regarding new illegal aid schemes. This will allow case handlers to examine the effect of the cumulation of the old and the new aid.

4.3. Definition of the beneficiaries when applying the Deggendorf case-law

Usually, the Deggendorf case-law will be applied only in cases where the beneficiary (i.e. the legal entity) of the new aid is identical to the beneficiary of the “old” aid. In exceptional circumstances, the case-handler should examine whether it is necessary to extend the application of the Deggendorf case-law to other legal entities. This would be the case when the beneficiary of the new aid belongs to the same economic

unit¹¹ as the beneficiary of the “old” aid and when there are clear indications of a possible circumvention of the Deggendorf doctrine.

¹¹ Case 323/82, *Intermills v. Commission*, [1984] ECR 3809 and Case C-480/09 P *AceaElectrabel Produzione SpA v Commission* [2010] ECR paragraphs 47 to 55; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

SECTION 10 MONITORING

<u>Section 10</u>	<u>Monitoring</u>	<u>1</u>
<u>1.</u>	<u>General principles</u>	<u>3</u>
1.1.	Purpose and importance of monitoring	3
1.2.	Legal framework	3
<u>2.</u>	<u>Main steps in the Monitoring procedure</u>	<u>5</u>
2.1.	Definition of the monitoring sample & allocation of cases	5
2.2.	First monitoring round: legal basis and list of beneficiaries	6
2.3.	Second monitoring round: implementation at the beneficiaries' level	7
2.4.	Further information requests, if necessary	8
2.5.	Finalisation of the exercise: Reports to the Commissioner (NCOM/NCAB)	8
2.5.1.	Closure of a monitoring case (compliance)	8
2.5.2.	Addressing problems encountered in the context of monitoring (non-compliance)	8
<u>3.</u>	<u>Guidelines on Timing</u>	<u>10</u>
3.1.	Milestones	10
3.2.	Member States' requests for deadline extension	11
3.3.	Administrative follow-up: Reminders in case of no reply	11
<u>4.</u>	<u>Guidelines on Substance</u>	<u>12</u>
4.1.	Compliance issues relating to the national legal basis of the aid schemes	12
4.2.	Compliance issues relating to the sample of aids granted under the scheme	13

5. Reporting and other useful information..... 14

5.1. Reports to the Commissioner (NCOM/NCAB)..... 14

5.2. Quarterly report to SAMM..... 14

5.3. Contact and coordination..... 14

1. General principles

1.1. Purpose and importance of monitoring

Member States are increasingly implementing horizontal policy goals by means of approved aid schemes or measures implemented under the General block exemption regulation (GBER). The 2012 Autumn Scoreboard (http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html), show that those two categories together account for roughly 88% of aid volumes granted, whereas ad hoc individual aid covers the rest (crisis excluded). In order to ensure the proper enforcement of State aid rules, DG Competition conducts an ex-post, sample based control of existing aid schemes in the form of the so-called "monitoring exercises" since 2006-2007. This control allows detecting and tackling irregularities and more generally enhancing Member States' discipline.

In the recent years, two general trends have increased the importance of monitoring as a disciplining tool towards Member States and as a way to address the main volumes of State aid granted in the EU:

- first, the **block exemption regulation(s) (BERs)** and since its adoption the **General Block Exemption Regulation (GBER)** allow for an increased scope of State aid measures with higher aid amounts being implemented by Member States without prior notification;
- second, Member States are increasingly implementing horizontal policy goals by means of **approved aid schemes**.
- In the context of the State Aid Modernisation initiative, there are plans to further increase the possibility for Member States to grant aid without prior notification, by enlarging the scope of the GBER and increasing the thresholds for individual notification. In its **Communication on State Aid Modernisation** adopted on the 8th May 2012, the Commission noted that "a lower administrative burden through less notification obligations can only be envisaged if it is accompanied by increased commitment and delivery on the part of the national authorities in terms of compliance" and that "**consequently, ex post control by the Commission will have to be stepped-up**".

1.2. Legal framework

Ex-post monitoring stems from **Article 108(1) TFEU**, according to which "the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States".

Article 4(3) TEU provides that "pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

Article 17 of the Procedural Regulation¹ provides that "the Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes² pursuant to Article 93(1) of the Treaty [now Article 108(1) TFEU]."

Article 21 of the Procedural Regulation³ provides that "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)." It is on the basis of these reports that the yearly monitoring sample is established.

Article 22 of the Procedural Regulation concerns the possibility of on-site monitoring (in practice, rarely used).

Article 16 of the Procedural Regulation states that the Commission may open the formal investigation when an aid is used by the beneficiary in contravention of a positive or conditional decision ("misuse of aid").

The respective tasks of the Commission and of the Member States as regards **monitoring** (of block-exempted measures) were defined in the **General Block Exemption Regulation** (GBER)⁴ as follows:

- **Article 9 and Article 11** provide for specific obligations of transparency and annual reporting to the Commission.
- **Article 10(1)** states that "The Commission shall regularly monitor aid measures of which it has been informed pursuant to Article 9."
- **Article 10(2)** provides for detailed rules on Member States' records of aid granted under the GBER, which have to be maintained for 10 years from the date on which the last aid was granted under such scheme, in line with the limitation period laid down in Article 15 of the Procedural Regulation.
- Pursuant to **Article 10(3)**, "On written request, the Member State concerned shall provide the Commission within a period of 20 working days or such longer period as may be fixed in the request, with all the information which the Commission considers necessary to monitor the application of this Regulation. Where the Member State concerned does not provide the information requested within the

1 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.03.1999, pp 1-9).

2 Article 1(b) of the Procedural Regulation defines existing aid, in particular, as "authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council".

3 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.03.1999, pp 1-9).

4 Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3-47

period prescribed by the Commission or within a commonly agreed period, or where the Member State provides incomplete information, the Commission shall send a reminder setting a new deadline for the submission of the information. If, despite such reminder, the Member State concerned does not provide the information requested, the Commission may, after having provided the Member State concerned with the possibility to make its views known, adopt a decision stating that all or part of the future aid measures to which this Regulation applies are to be notified to the Commission in accordance with Article 88(3) of the Treaty [now Article 108(3) TFEU].

- The Commission's **right to conduct monitoring** of State aid granted under block-exemption regulations has been **confirmed by the General Court** in case T-376/07.⁵ Although the Court only mentions the monitoring provisions foreseen in the 2001 SME BER, this judgment can be extended to all similar monitoring provisions foreseen in the more recent regulations.

2. Main steps in the Monitoring procedure

2.1. Definition of the monitoring sample & allocation of cases

- The monitoring exercise is in principle an annual exercise. It starts with a NCOM/NCAB presenting the main priorities and the proposed criteria for defining the sample of cases to be monitored.
- Once the competent Commissioner has decided the approach to follow for the design of the monitoring sample, the COMP Enforcement Unit draws-up a sample that meets the necessary conditions, on the basis of information/data on Member States' expenditure provided by COMP Transparency Unit (Scoreboard).
- Given the important scope of the exercise, the contribution of the entire State aid network is necessary to successfully conduct it. Monitoring has thus become part of each Unit's core tasks, each Unit being responsible to treat notifications, complaints and to monitor how Member States implement existing aid schemes in its field of competence. This means that the monitoring cases are now in principle handled and managed by the responsible operational Units. However, adjustments in the allocation of cases can be decided to ensure a more balanced distribution of the work across the State aid network. COMP Enforcement Unit therefore also makes a proposal on the allocation of cases to different Units based on the principle that each Unit should, to the extent possible, deal with cases in its own field of competence and taking into account also the available linguistic skills in different Units to reduce reliance on translation. These proposals are discussed in SAMM. The DDG decides on open issues concerning the definition of the sample and the allocation of cases.

⁵ Judgment of the Court of First Instance of 25 November 2009 - Germany v Commission (Case T-376/07), OJ C 11 of 16.01.2010, p.24

- Once the monitoring sample is defined and the cases allocated to different Units, the responsible Heads of Units nominate a responsible case team for each case (case manager, case secretary and 2 case officers). A monitoring case (MX) is created in ISIS under the SA number corresponding to the monitored aid scheme.
- DG Competition carries out monitoring in principle in **two phases** ("monitoring rounds"): a first check of the legal basis and of the list of beneficiaries, followed by an evaluation of the implementation of the scheme for a limited number of beneficiaries (sample of individual aid awards granted under the scheme). Further information requests can be sent out if necessary to clarify open issues.

2.2. First monitoring round: legal basis and list of beneficiaries

- In a first step, the case team examines the conformity of the selected aid schemes (i.e. the national measures transposing the GBER or Commission approval decision into an aid instrument under national law) with the provisions laid down in the GBER or in the Commission approval decision.
- An initial **information request** is sent to the Member States concerned, asking them to submit the national legal basis for the selected schemes and the list of individual aid awards granted under these schemes exceeding in principle € 200,000 / 500.000 € (depending on the area concerned)⁶. The normal deadline for responding to this first request for information is 20 working days.
- As soon as it is received, the Member States' submission is analysed with the view to checking compliance with the applicable State aid rules. The outcome of this analysis is recorded in a **Note to the file** which
 - indicates the European rules under which the scheme is assessed (Commission approval decision, subsequently adopted Guidelines, BER, GBER),
 - if necessary provides the necessary justification for the European rules under which the scheme is assessed,
 - notes one by one, all applicable compatibility conditions,
 - and indicates whether the scheme complies with these conditions (with reference to documents submitted by the Member State/the provisions of the national legislation).
- The Note to the file is sent by email within the agreed timeframe (see below) to the coordinating Units, i.e. COMP 03 which ensures the general coordination within the State aid network and COMP Enforcement Unit which coordinates the monitoring exercise. COMP Support Unit and COMP Enforcement Unit can raise questions or

6 It can also be useful to ask the Member States to clarify whether these amounts correspond to aids granted or paid out in the relevant year.

make comments. The responsible Unit should reply within 1 week by giving the necessary clarifications.

- The Note to the file may include any additional information or clarification needed and is saved in ISIS.

2.3. Second monitoring round: implementation at the beneficiaries' level

- In a second step, a limited number of individual aid awards is selected (3 to 5 depending on the size of the scheme and taking into account the likely workload, to be agreed with COMP Support/COMP Enforcement Units). The case team may choose the highest aid amounts, 1 large/1 medium/1 small company, several aids to the same company to check compliance with notification thresholds etc. An **information request** is then sent to the Member States within the agreed timeframe (see below). This second information request also raises with the Member State the questions/issues detected in the context of the first phase analysis (analysis of the national legislation underpinning the aid scheme) and asks for the necessary clarifications.
- The normal deadline for the Member State to respond to this second request for information is 20 working days, but can be extended (depending on the quantity or complexity of information requested).
- The compliance of the individual aid awards with the conditions laid down in the GBER or Commission approval decision is examined in detail (full audit trail)⁷. In this context, the case team will check compliance with all the main compatibility conditions, for instance check the size of the beneficiary (SME or not), as well as whether eligible costs, aid intensity and individual aid amounts respect the applicable provisions, the incentive effect condition in R&D cases etc.
- The **Note to the file** is updated to record the outcome of this second phase analysis. The Note
 - indicates which companies/aid awards have been selected for individual examination and if necessary explains why and
 - indicates one by one all the applicable compatibility conditions and whether each of the individual aid awards examined complies with them (with reference to documents submitted by the Member State).
- The Note to the file is sent by email within the agreed timeframe (see below) to COMP Support Unit and COMP Enforcement Unit which can raise questions or make

⁷ At the beginning of a monitoring case, case handlers draw-up a checklist with conditions that must be met for the scheme and the individual aid awards to be compatible. This list will be then used to ensure a complete compliance check.

comments. The responsible Unit should reply within 1 week by giving the necessary clarifications.

- The Note to the file may include any additional information or clarification needed and is saved in ISIS.

2.4. Further information requests, if necessary

- In certain monitoring cases, it may be necessary to send a third or even a fourth information request to gather additional information necessary for the assessment or obtain further clarifications. In case of small irregularities, this can be the occasion to explore with the Member State whether it would be willing to voluntarily address them (change the national legislation, recover small excess aid granted).
- The Note to the file is updated to record the outcome of the analysis of this further information, it is sent to COMP Support Unit and COMP Enforcement Unit for comments/questions, to which the responsible Unit should in principle reply within 1 week. The updated Note to the file is saved in ISIS.

2.5. Finalisation of the exercise: Reports to the Commissioner (NCOM/NCAB)

Each monitoring exercise is concluded by a report to the Commissioner on the previous monitoring exercise(s), presenting the main issues encountered, the cases proposed for closure or for further investigation (including formal opening, if need be) and the cases where the monitoring procedure is not yet concluded. This report is formally prepared by COMP Enforcement Unit with input from the case teams.

2.5.1. Closure of a monitoring case (compliance)

If the case team considers (1) that the legal basis is in line with the relevant BER or approval decision, and (2) that there is no doubt as to the compliance of the individual aid awards with State aid rules, the closure of the case is proposed to the Commissioner via the COMP Enforcement Unit report (NCAB/NCOM). If the Commissioner agrees with the proposal, a **closure note** summarizing the main facts of the case, the features of the measure and the reasons to propose closure, is drafted and saved in ISIS. Examples of monitoring closure notes can be provided by COMP Enforcement Unit.

A letter is sent to the Member State, in order to inform it that no further requests will be made to the Member State regarding the individual aid awards under the measure. This does however not prevent DG Competition from monitoring the same scheme in subsequent years (should it decide to do so).

The case can then be **closed** in ISIS.

2.5.2. Addressing problems encountered in the context of monitoring (non-compliance)

Should the legal basis not be in line with the relevant BER or approval decision, or should the case team have doubts about the compliance of the individual awards with their legal basis or with State aid rules, these problems are reported to the

Commissioner with a proposal on the way to address them in the context of the reports made by COMP Enforcement Unit with input from the case-teams (NCOM/NCAB).

Dealing with minor issues encountered in monitoring

If the problems encountered are **of a formal/procedural nature**, but no incompatible aid has been granted (e.g. cases where the aid does not meet all the conditions to be lawfully granted under the scheme but is compatible on another basis), it may be proposed to the Commissioner to alert the Member State to these problems and the need to step-up its efforts to better comply with State aid rules, but without taking formal action.

Also, in some cases, the Member State may agree to **voluntarily address the problems** encountered. This concerns cases of limited/accidental non-compliance with State aid rules, where the Member State may agree to recover the excess aid granted to a specific beneficiary or amend the legal basis of the scheme to introduce an omitted compatibility condition which was in practice respected. In such cases, it may be proposed to the Commissioner to make sure that the Member State effectively addresses the problem (recovery of excess aid/clarification in the legal basis), without taking formal action.

If the Commissioner agrees with the proposal, the case team alerts the Member State to the error encountered and **makes sure that the Member State addresses the detected irregularity**. A **closure note** summarizing the main facts of the case and the reasons for closing the case is drafted and saved in ISIS. A **letter** is sent to the Member State, in order to inform it that no further requests will be made regarding the individual aid awards under the measure. This does however not prevent DG Competition from monitoring the same scheme in subsequent years (should it decide to do so). The case is then **closed** in ISIS.

Further investigation of problems encountered in monitoring

In all other cases where problems are encountered, it is proposed to the Commissioner to **further investigate** the case as a matter of priority via the reports made by COMP Enforcement Unit (NCOM/NCAB). The approval of the NCOM/NCAB by the Commissioner triggers the creation of an ex-officio case (CP or NN) by the operational unit in charge of the relevant sector, to be followed-up by a formal opening of procedures, where necessary.

If the Unit in charge of the monitoring case is not the operational Unit responsible for this type of aid/sector, it transfers the case to the relevant unit. A **handover note** is drafted to this effect, to reflect the main findings of the monitoring procedure, and thereby ease the work of the new case-team. This Note is saved in ISIS.

The **new ex-officio case** should mention the MX case as "background procedure".

The Member State is informed by the new case team that it follows-up the investigation of the case (under a different procedure). No specific letter is sent to inform the Member State of the closure of the monitoring case.

The monitoring case can then be **closed** in ISIS.

Example of problems identified in monitoring cases and leading to a transfer are the definition of SMEs, the definition of R&D activities, the Deggendorf principle, infringement such as a systematic exceeding of the threshold or aid intensities⁸, etc.

3. Guidelines on Timing

3.1. Milestones

- The monitoring exercise is in principle an annual exercise. To be finalised on time, the different steps of the procedure must be conducted within a **strict time plan**. At the beginning of the exercise, COMP Enforcement Unit makes a proposal on the planning. This proposal is discussed in SAMM. The DDG decides on open issues.
- The Milestones thereby defined concern the **different phases of the exercise** and in particular the deadlines for sending the information requests and analysing the Member States' submissions. All Units must do the necessary to comply with these milestones.
- For example, for the monitoring exercise 2012/2013, the agreed Milestones are as follows:

• 1 st round	• First info requests to be sent out	• by End November
	• Member States to reply	• by Mid-January
	• Analysis to be finalised & Note to the file drafted	• by Mid-February
	• COMP Enforcement Unit to report to SAMM	• in March
• 2 nd round	• Second info requests to be sent out	• by End February
	• Member States to reply	• by End March
	• Analysis to be finalised & Note to the file drafted	• by End April
	• COMP Enforcement Unit to report to SAMM/VP	• in May/June

⁸ The way in which some schemes are implemented in practice (insufficient controls, no clear conditions defined in national legislation etc.) results into a frequent, some times systematic breach of certain rules (e.g. aid intensities, SMEs definition etc.).

• 3 rd round	• Third info requests may be necessary in some cases	•
•	• COMP Enforcement Unit report to SAMM on state of play of the exercise	• before the summer break •
• 4 th round	• Further clarifications with MS if necessary over the summer	•
• Finalisation of the exercise	• Updated Notes to the file	• End September
•	• COMP Enforcement Unit to report to SAMM/VP	• October/November

- In the regular reports to SAMM, COMP Enforcement Unit reports also on compliance with the milestones. Delays linked with delayed submission of information by the Member States and reliance on translation are duly taken into account.

3.2. Member States' requests for deadline extension

- The normal deadline for the Member State to respond to requests for information is 20 working days, but this can be extended (depending on the quantity or complexity of information requested).
- In principle, it should be easy for the Member State to provide to the Commission the copy of the national legal basis underpinning the scheme. Therefore, requests for deadline extension for the first phase are generally not considered as justified, except as concerns the request to provide the list of beneficiaries, which may involve several managing authorities and may be more difficult to compile. Prolongation requests to provide the list of beneficiaries can therefore be accepted, if duly justified, in principle up to 20 working days.
- The information requested in the second phase (demonstration that the conditions to grant aid are met for a sample of individual aids granted under the scheme) can be more voluminous/ difficult to retrieve. The deadline for the Member State to respond to this request can therefore be extended, if justified by the Member State (depending on the quantity or complexity of information requested), again, in principle up to 20 working days.

3.3. Administrative follow-up: Reminders in case of no reply

Generally, should the Member State **not reply to a request for information**, **reminders** should be sent. The new deadline can vary between 15 or 20 working days

depending on the circumstances of the case (e.g. large number of beneficiaries or granting authorities, internal reorganization, etc.).

Should the Member State again fail to provide the information, an **information injunction**⁹ has to be envisaged (see the [Manproc section on Unlawful aid](#)).

- In cases of persistent failure to provide the requested information in relation to schemes coming under the **GBER**, the case team, in agreement with COMP Support/COMP Enforcement Units proposes first to the DDG and upon his agreement to the Commissioner, the withdrawal of **the benefit of the block exemption**. Indeed, in line with article 10.3 GBER, if a Member State does not provide the requested information within the period prescribed, the Commission can, after having sent a reminder and after having provided the Member State with the possibility to make its views known, adopt a decision stating that all or part of the future aid measures to which this Regulation applies are to be notified to the Commission.

4. Guidelines on Substance

4.1. Compliance issues relating to the national legal basis of the aid schemes

The introduction of an aid scheme generally presupposes the formal adoption by the Member State of a text which spells out the purposes of the aid scheme, the conditions to receive aid, the applicable procedure and eventually the aid granting authorities. This national legal basis for the scheme can be a law, a decree, an administrative act, a contract, a call for proposals or other (or a combination of these). For approved aid schemes, the Commission must have seen a draft of the national legal basis of the scheme in the context of the notification, but it generally does not see the scheme as actually adopted. As far as block exempted aid schemes are concerned, the Commission is informed that an aid scheme is introduced under the GBER (so-called summary information sheet), and the national legal basis of the scheme should be available online, but this is normally not reviewed outside monitoring.

Therefore, the first phase of the monitoring exercise consists in checking whether the scheme, as designed by national law, complies with applicable EU rules. In this context, the following types of problems can in particular be encountered:

- cases where an aid scheme has never been approved nor block-exempted and is therefore fully illegal;
- cases where an approved aid scheme has been modified without notification and approval by the Commission,

⁹ This was done in two German cases, MX 19/06 (Monitoring of XS 24/2002 - Financing business start-ups and growth (GuW) Hessen) and MX 9/06 (Monitoring of XS 29/2002 - Directive on implementation of the Bavarian regional support program for business and industry), where an information injunction was adopted (Commission Decision C(2007) 3226 of 18 July 2007). This led to the abovementioned Court case T-376/07.

- cases where an aid scheme has not been adapted to subsequently adopted Guidelines (appropriate measures);
- cases where the national legal basis does not reflect all necessary compatibility conditions and
- cases where the national legal basis wrongly reflects some compatibility conditions.

All irregularities encountered are signalled in the Note to the file. The COMP Enforcement Unit report(s) to the Commissioner present(s) these irregularities together with a proposal on how to address them (NCOM/NCAB).

Irregularities detected at the level of the legal basis which have not resulted in the granting of incompatible aid may be addressed by an amendment of the legal basis of the scheme (e.g. the legal basis of the scheme omits to exclude certain sectors from aid, but no aid to such sectors has been granted). If the Commissioner agrees with this proposal, the case team makes sure that the Member State addresses the detected irregularity. The relevant supporting documentation is saved in ISIS and the monitoring case can be closed on this basis (see 2.5.2 above).

In cases where it cannot be ascertained that the irregularities detected have not resulted in the granting of incompatible aid, further investigation of the case is proposed to the Commissioner (see 2.5.2 above).

4.2. Compliance issues relating to the sample of aids granted under the scheme

The second check to be done, in the context of this monitoring exercise, is to see how the scheme is applied in practice. On the basis of a sample of individual aid awards (minimum 3), the case team verifies whether aid granted under the scheme meets all necessary compatibility conditions. In some cases, this "second phase" reveals that the scheme is not correctly applied.

In a number of cases, the **problems encountered are mainly of a formal/procedural nature**, meaning that the aid does not meet all necessary conditions to be lawfully granted under a scheme (i.e. it is illegal), but can be deemed compatible with the internal market on another basis. This is for example the case of a company that received aid under a scheme without meeting certain conditions (e.g. aid intensity slightly exceeded), but where this aid could be considered compatible because, at the time it was granted, it met the necessary compatibility conditions to be block exempted. These illegality issues are signalled to the Member States the attention of which is drawn to the fact that they must perform a closer scrutiny of the aids they award, but no further action is taken, if materially the individual aid at stake can be considered compatible.

In other cases, there are **material problems** with the individual aid awarded, because for example the aid also covers costs that are not eligible or because the maximum permissible aid intensity was exceeded. In such cases, these problems are signalled to the Member States which can be requested **to "voluntarily" remedy them, typically by recovering the aid granted in excess**. It is not unlikely that Member States accept to make such correction, even in the absence of a formal Commission decision. This approach has been followed with success in the past. If a Member State refuses however, or if the problem encountered is important (gravity of

the breach, scale of undue aid granted etc.) formal action must be proposed to the Competent commissioner.

Where there are indications that the problem identified is not accidental, because for example the same problem is encountered in several cases, or because the issue is linked with an unclear wording of the scheme, **it may be necessary to conduct a more systematic analysis of the implementation of the scheme** to assess whether in one case the scheme was incorrectly applied accidentally (in which case the Member State can be asked to address this problem voluntarily) or whether the problem is of a larger scale. In the latter case, formal action must be envisaged.

5. Reporting and other useful information

5.1. Reports to the Commissioner (NCOM/NCAB)

- The monitoring exercise starts with an NCOM/NCAB prepared by COMP Enforcement Unit presenting the main priorities of DG Competition and the proposed criteria for defining the sample of cases to be monitored.
- The monitoring exercise is also finalised with an NCOM prepared by COMP Enforcement Unit reporting on the previous monitoring exercise(s), presenting the main issues encountered, the cases proposed for closure, for further investigation, or where the monitoring procedure is not yet concluded.
- Intermediate reports (NCOM/NCAB) may be necessary (e.g. to propose formal action in certain problematic cases). These reports are prepared by COMP Enforcement Unit with input from the case-teams.

5.2. Quarterly report to SAMM

An information point on the progress of the monitoring exercise is included in the SAMM agenda within the agreed time-plan (approximately every quarter). All Units send their Notes to the file on time to allow COMP Enforcement Unit to report to SAMM within the agreed timeframe.

5.3. Contact and coordination

COMP Enforcement is in charge of the coordination of monitoring policy. This includes coordination of monitoring cases, monitoring policy and the drafting of the yearly monitoring reports.

SECTION 11 PUBLICATION, COPIES, CONFIDENTIALITIES, WEBSITE

<u>Section 11</u>	<u>Publication, copies, confidentiality, website</u>	<u>1</u>
<u>1.</u>	<u>Dealing with confidentiality.....</u>	<u>2</u>
<u>2.</u>	<u>Publication of decisions</u>	<u>2</u>
<u>2.1.</u>	<u>Publications and procedure to follow by decision type</u>	<u>3</u>
2.1.1.	Decisions not to raise objections (art 4 (3)) and no aid decisions (art 4 (2)) :Publication in the OJ	3
2.1.1.1.	Publication on the website	3
2.1.2.	Decisions to open the formal investigation procedure and decision to extend proceedings:	4
2.1.2.1.	Publication in the OJ	4
2.1.2.2.	Notification withdrawn after the opening of procedure	6
2.1.3.	Injunctions	6
2.1.4.	Proposals for appropriate measures	6
<u>2.2.</u>	<u>How to find out what has been published</u>	<u>6</u>
<u>3.</u>	<u>Providing interested parties with a copy of a decision.....</u>	<u>7</u>
<u>4.</u>	<u>How to upload (draft) legislation on State aid onto the DG COMP website</u>	<u>7</u>
<u>5.</u>	<u>How to publish the Summary of a notification (under the Simplified procedure)</u>	<u>11</u>

1. Dealing with confidentiality

The Member State has, in accordance with Article 24 and 25 of *Regulation 659/99*, the right to request that certain information is not disclosed to third parties. Before any decision is published in the Official Journal or on Internet or sent to third parties or a beneficiary, the Member State has a period of 15 working days to request the deletion of any confidential information.

With effect from the entry into force of Regulation 794/2004, Member States are asked by question 9 in the new notification form whether or not the notification contains confidential information. Also for requests for additional information, the Member State should be asked systematically whether any of the information is confidential. In many cases this could help to avoid going back to the Member State at a later stage of the procedure. In principle, if the decision relies on the information contained in the notification form, and the Member State has not indicated that anything is confidential, publication can proceed immediately. The same would apply where the Commission agrees with the request for confidentiality. However, so far it is still practice before any decision (not to raise objections, to open the procedure, final decisions) is published in the Official Journal or on Internet or sent to third parties or a beneficiary, to ask the Member State (again) to indicate within a period of 15 working days whether the decision contains any confidential information. If possible, this step should be avoided.

Currently, in order to inform the Member State of his right, each decision contains the following paragraph:

“If this letter contains confidential information which should not be published, please inform the Commission within 15 working days from the date of receipt. If the Commission does not receive a reasoned request by the stipulated deadline, you will be deemed to agree to publication of the full text. Your request should be sent by registered letter, fax or secure PKI e mail to the State Aid Registry”

In the event that the Member State does reply requesting the confidential treatment of certain information, you should follow the guidance given in the [Commission Communication of 1 December 2003 on professional secrecy in State aid decisions](#)¹. Note that an empowerment exists for rejections to consider that certain information is covered by the obligation of professional secrecy².

2. Publication of decisions

The Commission is obliged under Article 26 of Regulation 659/1999 to publish its decisions or a summary notice in the Official Journal. In addition, the Commission's State aid decisions not to raise objections and to open and close the formal investigation procedure as well as proposals for appropriate measures are also published on the website. It is important to note that the precise format (e.g. decision letter or factsheet or meaningful summary), the procedure and where it is published (OJ and/or website) vary according to the type of decision.

¹ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions Official Journal C 297, 09.12.2003, p. 6-9.

² COM PV(2004)1652, of 30.3.2004), SEC(2004) 335

2.1. Publications and procedure to follow by decision type

2.1.1. Decisions not to raise objections (art 4 (3)) and no aid decisions (art 4 (2)) :Publication in the OJ

What is published in the OJ?

- **Only the summary notice** (also known as the factsheet or the "cartouche") is published in the OJ (part C).

Procedure to follow

- The factsheets should be produced (in all languages of the OJ which means 23 versions) by following the instructions "[How to produce a factsheet \(cartouche\)](#)".
 - (1) When the factsheets have been produced with the automated translation tool³, the case secretary sends an e-mail to the State Aid Registry requesting to forward the final factsheets to the SG, for publication in the Official Journal (OJ). The factsheets are stored in ISIS and will be forwarded automatically to SG by e-mail.
 - (2) In the very limited cases where the automated translation tool could not be used to produce the factsheets, the case secretary should send an e-mail **containing all language versions**, to the State Aid Registry, with a copy to the case-team and head of unit. The Registry forwards the e-mail to *functional mailbox* SG aides d'Etat in the SG and also links it with the attachments in ISIS.
 - (3) When the decision is published in the OJ, a link to the relevant OJ will then appear automatically next to the case in the [State aid Register](#).

2.1.1.1. Publication on the website

What is published on the website?

- A public version of the letter to the Member State in the authentic language, cleansed of any confidential information. The factsheet published in the OJ contains a reference to the web address and informs the reader that the letter can be found on the internet. The aim is to have the public version of the letter and factsheet published at the same time within one month after informing the Member State.
- A public version of the letter in the working language if available.

³ The factsheet is always produced with the automated translation tool except in very rare cases when there is free text in the field "other information"

Procedure to follow

An **authentic language** public version is encoded in ISIS, this is the version that is sent to the Registry. When the Registry has completed the relevant step in ISIS the decision text appears on COMP website.

A **working language** public version is encoded in ISIS.

Authentic language and working language public versions to be published on the website should be created for each decision. The only exception is when the working language is the same as the authentic language; in this case, there is **no need to create** a working language public version. This is usually the case when the authentic language is either in English or in French; however it is sometimes possible that the English version exists when the authentic language is French, in those cases the working language public version should also be prepared.

In case of language waiver, the official decision can sometimes be published in the language agreed by the Member State, often English–, this is then the authentic language⁴.

2.1.2. Decisions to open the formal investigation procedure and decision to extend proceedings:

2.1.2.1. Publication in the OJ

What is published?

- A '**meaningful summary**' followed by the **full public version of the decision** is published in the OJ (part C). However **only the meaningful summary is translated into all languages** of the OJ and the full public version of the decision is published in the authentic language. This means for example that for a decision in Spanish, the French version of the OJ will include the meaningful summary in French together with the full public version in Spanish.
- Following the annulment of a final decision by the Court, the formal investigation procedure is reopened. In that context, the case team may wish to publish again the communication in order to give third parties the opportunity to present their observations taking into account the annulment of the final decision. In such a case, there is no need to adopt such a communication by the College. However, note that often, instead an extension of procedure is adopted and hence, the normal procedure for publication applies.

⁴ For courtesy reason, the decision may be sent to the Member State in its own language but it won't be published.

Procedure to follow by the case team

- (1) After the decision is taken, the case secretary should check with the case handler whether the decision contains confidential information and, if it does, the case handler should **cleanse** the text which means replace **confidential information** by the use of [...], by the use of a range or by paraphrasing the confidential information in line with the Commission Communication on Professional secrecy in State aid decisions⁵. It is important to check also that this has been done correctly in authentic and all working language versions.
- (2) All meaningful summaries should also be cleansed of any confidential information, in all languages
- (3) The case secretary prepares an e-mail to be sent to the Registry:
 - If confidential information has been removed, the non confidential version of the decision is attached together with the meaningful summaries.
 - If there was no confidentiality, only the meaningful summaries are attached to the mail.
- (4) Before sending the mail to the Registry, double-check that the right version, without confidential information, is transmitted. In addition to the case secretary, at least the case-handler or – depending on the sensitivity of the case- the case manager verifies the versions attached.
- (5) After the documents have been sent for publication, if an error is noticed and a new version of the text has to be sent for publication, ensure that there is good communication between COMP and the SG.
 - (a) Link clearly the message to the one that originally launched the publication procedure
 - (b) Alert the Sec Gen by phone that there is an error and that the publication should be stopped
 - (c) Write clearly that the text attached to the mail is a corrected version which replaces the one previously sent.
- (6) When the decision is published in the OJ, the SG completes the step in ISIS. A link to the relevant OJ will then appear automatically next to the case in the [State aid Register](#).

⁵ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions Official Journal C 297, 09.12.2003, p. 6-9.

- (7) Note that due to the application by OPOCE of interinstitutional drafting guidelines, the numbering of paragraphs and of footnotes in the text published may be different than in the text adopted by the Commission and notified to the Member State. In order to avoid confusion in case of an appeal before the Court of Justice, it is important that the Commission refers to the same version as the applicant.

2.1.2.2. Notification withdrawn after the opening of procedure

- First, the decision type in ISIS must be completed by "*Art 8(2) withdrawal of notification (after formal investigation procedure)*" together with the date of withdrawal. The fact of the opening, together with any press release and the public version of the decision published on the web and in the OJ will remain in the public domain through the State aid Register.
- Second, a notice must be published in the OJ, in line with Art 26(4) of the Procedural Regulation (a short, standard text translated into all languages instead of the full public version of the decision. As regards the final phrase of the text "will not pursue this aid project further", in cases where this would be misleading or additional information may be appropriate, this sentence could be deleted or replaced by the appropriate explanation (with a full-stop after [date] to make it a full sentence). Provided the additional sentence does not exceed 250 characters, translation of this sentence can be obtained normally within 2 working days and inserted into the template.

Note that if the Member State withdraws the notification prior to publication of the opening in the OJ, then this publication process should be stopped if still possible, i.e., not sent to the SG, or the SG asked to stop the publication process, as it is no longer appropriate to publish the opening decision.

2.1.3. Injunctions

- **Injunctions (information, suspension, recovery)** are bilateral and are therefore **not published** unless coupled with another decision, e.g., when the injunction is issued together with the decision to open or extend the formal investigation procedure. In such cases the publication requirements are those which are applicable to the coupling decision.

2.1.4. Proposals for appropriate measures

- **Proposals for appropriate measures** are bilateral and are therefore **not published** unless coupled with another decision. However after **acceptance of appropriate measures** by the Member State a **summary notice (factsheet)** is published in the OJ (in all languages). The procedure to follow and documents published are the same as for no objection/no aid decisions (section 2.1.1.1 and 2.1.12). However, once the factsheets have been produced automatically, the title should be changed in all versions into "Decisions to propose appropriate measures pursuant to Article 108(1) of the TFEU where the Member State concerned has accepted those measures".

2.2. How to find out what has been published

In principle, if the relevant steps in ISIS have been correctly completed, one can assume that the decision has been published on the web and in the OJ.

Since January 2006, the [State aid weekly e-news](#) provides details of all state aid decisions published on the web or in the OJ during the preceding week.

3. Providing interested parties with a copy of a decision

In accordance with Article 20 of Regulation 659/1999, the Commission (DG COMP) is obliged to send a copy of the **final decision** closing a formal procedure to the **beneficiary** of an **individual aid** (not schemes) and **interested parties** who have **submitted comments during the** procedure. The Commission is also obliged to send to **complainant(s)** a copy of all decisions concerning the **subject matter** of their complaint. All final decisions must be sent by **registered post**.

Case law makes it clear that **generally publication in the Official Journal is sufficient to start the time limits**, i.e. to start the two month time limit for appeal to the Court of First Instance laid down by Article 230 of the Treaty by third parties and the Member States other than the one to whom the decision is addressed.⁶

4. How to upload (draft) legislation on State aid onto the DG COMP website

- (1) Each unit is responsible for providing the webmaster with the draft and final legislation, appropriate reports, memos and press releases. The unit indicates the exact section on the website to which the document(s) should be uploaded.
- (2) All **draft legislation** should be stored under the relevant section on the State Aid Modernisation (SAM) page: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html
- (3) Please ensure that each language version of the document(s) includes a date and indication that it is a draft. For each set of documents, please also include a clear title in English for the webmaster to use, together with a date.
- (4) As regards draft legislation with a **public consultation period**, it is necessary to add a deadline for comments as well as the email address and postal address or fax of the Registry and the topic of the consultation (see example below). In such cases, the webmaster should create a new entry in the [public consultations](#) page (open consultations) and on the State Aid Modernisation page. When the consultation period expires, the webmaster moves it to the closed consultations but it remains on the State Aid Modernisation page until it is finally adopted after which it will be archived. The results of the public consultations should also appear on both the Reform page and the closed consultations page.

⁶ Judgements of 10 March 1998, case C-122/95, Germany v. Council points 33-40, in 1998 ECR I-973; 15 September 1998, case BP Chemicals v. Commission points 47-51; 6 October 1999, case T-110/97, Kneissl v Commission and case T-123/97, Salomon v. Commission; see also Olsen (T-17/02)

- (5) When the **final legislation** is adopted by the Commission, the relevant document(s) should be stored under the relevant section on the [Legislation](#) page and on the State Aid Modernisation page. It is common practice to upload the EN/FR/DE texts adopted by the Commission prior to publication in the OJ. In such cases, the following text should appear below the title of the document: "Published for information purposes only and without any prejudice to the official text as will be published in the Official Journal". For each set of documents, please also include a clear title in English for the webmaster to use. The date of adoption should also appear beside the title and in the document itself.
- (6) When the **final legislation** is published in the OJ, the text uploaded under point 4 should be replaced by a link to the OJ on the Legislation page. On the Reform page, the same text should be replaced by a link entitled "Legislation recently adopted" which directs users to the relevant legislation section. Also on the Reform page, there should be another link entitled "Reform process - see archive" which directs users to the Reform archive page. All material previously on the Reform page for this topic should be moved here.
- (7) **All related memos or press releases** should also be included on the website together with the draft and final legislative texts.
- (8) The webmaster ensures that links to all draft and final legislation appear automatically in the "[What's new](#)" State aid section and in the [News](#) on the DG COMP homepage. A "new" icon is added to each new entry and remains there for a few weeks (has to be maintained manually).

Uploading draft legislation for which there is a public consultation – an example:

Consultation on the first draft of the new *de minimis* Regulation replacing Regulation No 1998/2006

Policy field

Competition: State aid

Target group

Public authorities, citizens, companies and organisations are welcome to contribute to this consultation. Contributions are particularly sought from public authorities dealing with measures covered by the *de minimis* Regulation.

Period of consultation

From 20.03.2013 to 15.05.2013

Objective

State funding meeting the criteria of Article 107(1) TFEU constitutes State aid. However, the Council, by adopting [Regulation \(EC\) No. 994/98 \('Enabling Regulation'\)](#) enabled the Commission to set out in a Regulation a **threshold below which aid measures are exempted from the notification obligation** under Article 108(3) TFEU even when they do not meet all the criteria of Article 107(1).

On this basis, the Commission adopted Regulation (EC) 1998/2006 to ***de minimis aid***, in force since 1 January 2007. This Regulation set the *de minimis* ceiling at EUR 200 000 per undertaking granted over any period of three fiscal years, and thus considerably simplified the granting of small amounts of support. It will expire on 31 December 2013 and will therefore be reviewed.

On 8 May 2012, the Commission adopted a [Communication on the State aid modernisation initiative \('SAM'\)](#), launching the political debate on the modernisation of State aid control. The review of the *de minimis* Regulation is an important element of SAM.

The Commission already invited the other institutions, Member States and stakeholders to provide input for the revision of the *de minimis* Regulation. This [first consultation](#) using a explanatory_note took place between 13 July and 5 October 2012. The present consultation aims to collect the views of the Member States and stakeholders on the first draft text of the *de minimis* Regulation.

The draft proposes the introduction of a central register of all *de minimis* measures as a gradual process, allowing Member States a generous transitional period for setting it up. The draft also substantially **clarifies and simplifies the rules**, in line with recurring requests from stakeholders, and so will reduce the administrative burden for small aid measures considerably.

How to submit your contribution

- You are invited to respond to this consultation in any official EU language. Given the possible delays in translating comments submitted in certain languages, translations of the replies into one of the Commission's working languages (preferably English) would be welcome to enable the Commission to process them more swiftly.
- Please note that we cannot guarantee to take account of replies received after the deadline. We would appreciate receiving documents in an electronic format.
- In your reply, please indicate whether you are replying as citizen, organisation or public authority. If your organisation is registered in the Transparency Register, please indicate your Register ID number. If your organisation is not registered, we invite you to [register now](#), although it is not compulsory to be registered to reply to the consultation. Responses from organisations not registered will be published separately.
- Contributions will be published on this webpage. Submissions that are clearly marked "confidential" will be treated as such and not published. In that case please also provide a non-confidential version of your reply. It is important to read the [privacy statement](#) attached to this consultation for information on how your personal data and contribution will be dealt with.

View the consultation documents

These are non-official translations. In case of doubt, the English version prevails.

- Explanatory note
[bg cs da de el en es et fi fr hu it lt lv mt nl pl pt ro sk sl sv](#) (PDF)
- First draft of the new *de minimis* Regulation
[bg cs da de el en es et fi fr hu it lt lv mt nl pl pt ro sk sl sv](#) (DOCX)
[bg cs da de el en es et fi fr hu it lt lv mt nl pl pt ro sk sl sv](#) (PDF)

Reference documents and other, related consultations

- Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid
- [First consultation](#) (July-October 2012)

Contact details

Responsible service: Competition DG, Unit A3. State aid policy and scrutiny
Please always indicate the reference number in your correspondence: HT.3572 – SAM – *de minimis* review

E-mail address for replies: stateaidgreffe@ec.europa.eu

Postal address:	
European Commission	
Directorate-General for	
State aid	
1049	
BELGIQUE/BELGIE	
Ref.: HT.3572 – SAM – <i>de minimis</i> review	

5. How to publish the Summary of a notification (under the Simplified procedure)

See chapters 3.2 and 3.3 in the ManProc section relating to the [Simplified procedure](#).

SECTION 12 ISIS WEB

<u>Section 12</u>	<u>ISIS Web.....</u>	<u>1</u>
<u>1.</u>	<u>Introduction.....</u>	<u>2</u>
<u>2.</u>	<u>Basic concepts</u>	<u>4</u>
<u>3.</u>	<u>The users</u>	<u>5</u>
<u>4.</u>	<u>How to register a new case.....</u>	<u>5</u>
<u>5.</u>	<u>Case number – unique for each case</u>	<u>6</u>
<u>6.</u>	<u>My cases cases SA.(N, NN, C, E)</u>	<u>7</u>
<u>6.1.</u>	<u>Identity</u>	<u>8</u>
<u>6.2.</u>	<u>Description</u>	<u>9</u>
<u>6.3.</u>	<u>Geographical scope</u>	<u>11</u>
<u>6.4.</u>	<u>Beneficiary</u>	<u>12</u>
<u>6.5.</u>	<u>Budget& intensity</u>	<u>13</u>
<u>6.6.</u>	<u>Duration.....</u>	<u>13</u>
<u>6.7.</u>	<u>Legal Basis (EU).....</u>	<u>13</u>
<u>6.8.</u>	<u>Assessment</u>	<u>14</u>
<u>6.9.</u>	<u>When is a case considered to be « pending /closed »</u>	<u>15</u>
<u>7.</u>	<u>My procedures.....</u>	<u>15</u>
<u>7.1.</u>	<u>Case general information.....</u>	<u>16</u>
<u>7.2.</u>	<u>Procedure general information</u>	<u>16</u>
<u>7.3.</u>	<u>Chopin Information</u>	<u>16</u>
<u>7.4.</u>	<u>Consultation.....</u>	<u>17</u>

7.5.	Case Team	17
7.6.	Team History	18
7.7.	Decision	18
7.8.	Calendar or administrative steps identified by events	18
7.9.	When is a procedure considered to be « pending /closed » ?	19
<u>8.</u>	<u>Description of additional variables on recovery cases</u>	<u>19</u>
8.1.	Recovery procedures	19
8.2.	Recovery results	20
8.3.	Recovery status	21
<u>9.</u>	<u>Query</u>	<u>21</u>

1. Introduction

ISIS– Integrated State aid Information System –is a multi DG application – an information system which manages and monitors state aid cases. The following DGs also use ISIS: SG, COMP, AGRI, and MARE. This multi-DG information system allows the encoding of data as well as the follow-up and the management of State aid procedures.

ISIS communicates with other State Aid applications:

- **SANI (State Aid Notification Interactive)**
- **CHOPIN (Case Handling Optimization and Planning Initiative)**
- Multi-criteria research tool **(ISEF)**

An example, when a Member State submits a notification through SANI the general part of the notification is automatically transferred and uploaded into ISIS. The other parts of the notification form remain in SANI.

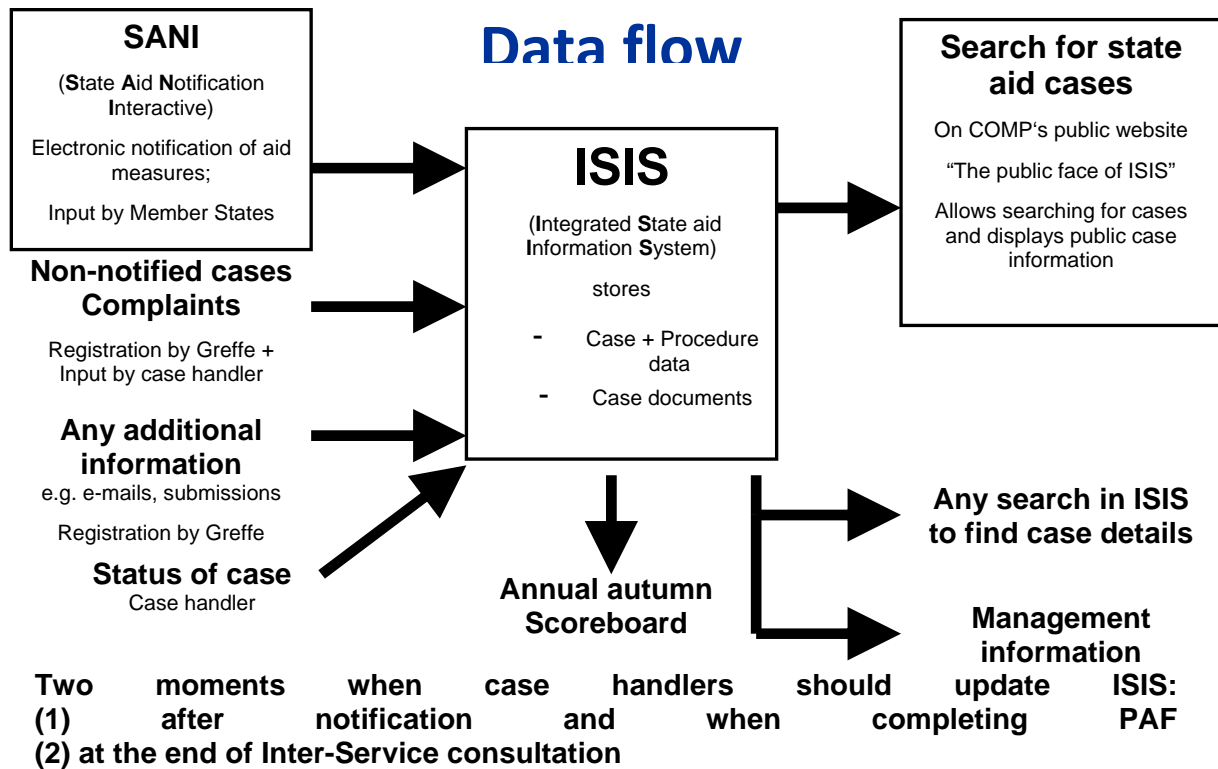
Why is it important to complete the information for all cases?

- For management and planning purposes, a number of reports are produced from ISIS (e.g. list of significant cases, statistics on duration, backlog, etc). In addition, to answer a simple query such as how many pending rescue and restructuring cases there are, it is essential that case-handlers complete information such as the ‘primary objective’ as soon as the case is assigned to them.
- PAFs (Preliminary Assessment Form) are generated automatically from ISIS Web.
- Information on each case in ISIS Web is used directly to feed our State aid Register which is open to the public and is also the basis for the State aid weekly e-news.
- To provide input for the revision of our guidelines and frameworks, e.g., information such as that under primary law and secondary law is essential to check all the cases

approved under various Articles of the Treaty or in which a particular guideline/framework has been applied.

- For case-handlers to get accurate results when researching previous cases and decisions, e.g., the query facility in ISIS is only as good as the information that is fed into it.
- Information from ISIS is used to prepare the annual reporting spreadsheet sent to Member States each year in line with Regulation 794/2004 and to produce the statistical information for the Annual Competition Report and State aid Scoreboard.

Principal data flow of State aid data in/out of ISIS



2. Basic concepts

The information concerning a case is divided in two parts: case and procedure. The socio-economic data and the data concerning the monitoring of the administrative procedures are stored together in the database.

Case – the socio-economic data common to any procedure

The data covers the socio-economic conditions such as the Member State concerned, the title of aid, the legal basis, the type of aid (scheme or individual), economic sectors and sub-sectors etc. This information is independent of the administrative procedures.

Procedures – monitoring of the administrative procedures

A procedure contains several elements:

- type of case: notified aid, non notified aid, existing aid.
- decision concerning the compatibility of the aid: to raise no objections, initiate 108.2 proceedings (open formal investigation procedure), final decision (closing a 108.2 proceedings), initiate 108.1 proceedings (review of existing aid).
- Formal adoption procedure: oral, empowerment or written.

A case has several procedures and they can, of course, change over time. A non-notified aid can become an existing aid, instead of an approval we initiate 108.1 proceedings and the decision is adopted by oral procedure and not empowerment.

An administrative procedure is made up of a **sequence of administrative events** such as the registration of the case (REG), the inter service consultation (CONS), the decision-

making by the Commission (DEC), etc. Following the choice of procedure a deadline(s) is automatically calculated for the implementation of each administrative step – an event schedule. When creating a new procedure, ISIS again automatically generates (by default) a new event schedule and determines the sequence of the administrative events – called the "Rescheduling".

When an event not envisaged in the sequence (by default) – for example a request for further information (REQ) which suspends the completion periods for the procedure, the event sequence is automatically modified – an event is added and/or suppressed following the type of event that has to be inserted.

When the additional information is obtained, the assignment of the date of creation to the event "additional information receipt" triggers the generation of a new event sequence in which, for example, the deadline of the "Decision-making" event (DEC) is recomputed in relation to the date of receipt of additional information.

3. The users

A case is allocated to one Responsible DG, one Unit and one Case Handler.

State Aid Registry	Creates the case. Completes basic details: working title, original title, case number, etc
Case handler	Completes Socio-economic and assessment data. Verify information from part 1 of the notification form. Checks data entries made by SA registry.
Head of Unit	Supervises cases of his unit
Director	Supervises cases of his/her direction
Secretariat General	Co-ordinates between the DG's
Administration	Manages ISIS Web

The Greffe (State aid Registry) creates each case and completes basic details such as the working title, original title, case number, case type and Member State as well as procedural data.

The case-handler is responsible for the socio-economic and assessment data for each case. His/her task is to carefully check and complete the information for each variable. For notified cases, many of the variables will already contain information provided by the Member State and automatically transferred to ISIS from Part One of the electronic notification forms (information from supplementary information sheets will be stored in separate files). Thus, for notified cases, the case handler's task is likely to be more of a verification exercise whereas for complaints and non-notified aid cases, the case-handler will have to complete most of the information.

4. How to register a new case

As soon as a case is allocated, the case-handler must fill in the registration form. Once the State Aid Registry receives the completed form, it creates (electronically) the new case in ISIS. For non notified and/or presumed aid, it is the case-handler who requests the

creation of a new case. Note however that only in exceptional cases, and with the agreement of the Head of Unit, is a case registered directly in the NN Register. Transfer from the initial register to the NN register should occur only following consultation of the Head of Unit, when it is sure that a formal Commission decision will need to be taken on the case.

All facts and figures related to a case are kept in ISIS. In principle, all you need to know about a case can be found in ISIS.

All documents/correspondence relating to a new notification, complaint or non notified aid case must be registered with the Greffe. Unregistered documents shall be considered as non-existent and consequently cannot be part of the file.

Generally speaking, the point of entry for such documents is the Greffe, who, in co-operation with the Directors' assistants, identifies the case-handler responsible. However, certain documents are sent to the unit and/or case-handler directly.

Secretaries and case-handlers are therefore obliged to immediately forward the document to the State Aid Registry for registration (COMP STATE AID GREFFE), specifying the case number and the type of document.

Case teams are reminded that they cannot use in a decision material which has not been formally submitted to the Commission or which is not publicly available. All documents formally transmitted to the Commission are registered (Ares number), associated to an event and uploaded by the State aid Registry in the appropriate procedure in ISIS.

Case teams should also transmit, where appropriate, to the State aid Registry all other documents, such as minutes of meetings/conference calls and informal correspondence (e.g. e-mails), in order to complete the procedure file in ISIS. Since there is no link between the unit drive and ISIS, documents which are created or stored on the unit drive, such as internal notes to the file, need also to be sent to the State aid registry to be uploaded in ISIS to be part of the procedure file.

In all cases, case teams should ensure that the documents have been uploaded and associated to the correct procedure and event in ISIS. Defining the correct steps enables correct and standard labeling of the documents.

5. Case number – unique for each case

A new, simplified numbering system for state aid cases was introduced in November 2010. Cases registered after this date are identified by one single number, prefixed by "SA", e.g. SA.12345. Individual procedure types are indicated in the details of the case where relevant.

For cases decided prior to 23 November 2010 the previous numbering system is maintained, i.e., the case number is composed of three (sometimes four) elements (for example N793b/1999): a letter indicating procedure type (see below), a number indicating the serial number of the procedure and the year of the case's notification or registration, e.g. N652/2007. Particularly complex cases may be split into two or more cases, which is indicated by an additional letter e.g. C36a/2005.

Letter(s) indicating procedure type:

C – Contradictoire – case in which the Commission opened the formal investigation procedure due to doubts as to the compatibility of the measure with the common market

E – case of existing aid

MC – Monitoring of state aid decision

N – notified aid case

NN – case of unlawful aid, i.e. non-notified aid or aid that was notified but granted before the Commission has reached a decision

X – General Block Exemption case

XA – Agriculture block exemption case

XE – Employment block exemption case

XF – Fisheries block exemption case

XP – Agriculture Production block exemption case

XR – Regional block exemption case

XS – SME block exemption case

XT – Training block exemption case

A state aid case (except for block exemption cases) could have several case numbers during its lifetime. For example: An N case got a new NN case number when the Commission received information that the aid was unlawfully granted;

An N case, NN case and E case got a new C case number when the Commission opened a formal investigation procedure.

6. My cases cases SA.(N, NN, C, E)

This section covers all different types of cases though a description of the additional variables for recovery cases (CR) and court cases (CC) is provided separately. Many of the variables below are self-explanatory, for others, a short description is provided.

From the list of “My cases”, click on the “modify” button of the selected case to complete/amend the socio-economic and assessment data.

For each variable, select from the relevant drop-down lists, where necessary using the green arrow to drop the selected categories into the adjacent box. In some instances, comments may be added in the various ‘free text’ boxes.

At present, drop-down lists are based, with one or two exceptions, on the notification forms in Implementing Regulation 794/2004.

Changes are only saved when the ‘save’ button is clicked. The ‘ok’ button saves the changes and exits the screen.

ISIS WEB > My cases - Microsoft Internet Explorer provided by European Commission

File Edit View Favorites Tools Help

Address http://testmx/isisweb/case/index.cfm?fuseaction=dsp_form_update&key_value=4442278cr=28&case_key_value=444227

ISIS WEB • My cases

Query My cases View cases Procedural data Horizontal Projects What's new Logout

OK Save Cancel Chopin Core Data

XT 35 / 2004

Aide à la formation des travailleurs

Identity

Original title: Aiuti alla formazione dei lavoratori

National legal basis:

Granting authority: MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI - UFFICIO CENTRALE FORMAZIONE PROFESSIONALE DEI LAVORATORI - DIV. IV VIA FORNOVO, 8

Associated procedures:

Background:

Type	Nb	Split	Year
None			

Delete

Status: PENDING

Description

Case type: Scheme

Primary objective: Training

Secondary objective:

Training	
Other	
Energy saving	
Innovation	

Aid instrument:

Soft loan (including details of how the loan is secured)	
Interest subsidy	
Tax advantage (e.g. tax allowance, tax base reduction, tax rate re	
Reduction of social security contributions	

Direct grant

Instrument comments:

Budget Euro: Budget Cur:

Geographical scope

Member state: Italy

Region:

Regional aid status:

Article 87(3)(a)	
Article 87(3)(c)	
Non-assisted areas	
Mixed	

Delete

Beneficiary

Size of beneficiaries: All

Number of beneficiaries: Unknown

Identity:

6.1. Identity

Name of the field	Definition	Action and by whom
Original Title	Title in the authentic language	Inserted or updated by the Greffe
*National Legal basis (in the authentic language)	Legal basis in the Member State	Inserted or updated by the Greffe
*Granting Authority	Name and address of the national granting authority	Inserted or updated by the Greffe
Associated procedure	See below	Inserted by the Greffe
Hidden	Used for extremely sensitive cases. The case is then only accessible to the case team and it does not appear on any report.	Ticked by the Registry

*Part 1 of the standard notification form automatically transferred to ISIS.

Case title is the working title which is displayed in the result list (usually in English or French). For most block exempted measures the working title is in the language of the Member State concerned.

Associated procedures of this case - this should list all procedures associated with the case. For example, a C case may have originated as a CP followed by an NN.

Linked cases should list the latest procedure and working title of all related cases:

- Transfer of register (from CP to NN, from N to NN, from N or NN to C)
- where a previous case is being extended or modified
- where a case is split into parts a, b, c, etc
- where a monitoring, a recovery or court case has been opened following the decision on the case.

Case team should indicate the associated procedures to the registry when requesting the creation of a new procedure.

6.2. Description

Name of the field	Definition	Action and by whom
Case type	Scheme Individual application of a scheme; Ad hoc, i.e. individual aid awarded outside of a scheme	inserted by the Greffe. Case-handlers should check in particular the distinction between an individual application of a scheme and an ad hoc aid measure.
Short description	Brief description of the case	Inserted by the Case handler
Primary objective	Main objective of the aid	Selected by the Case handler from the list of values
Secondary objective	Secondary objective of the aid	Selected by the Case handler from the list of values where appropriate
Comments	Comments on the objectives	Inserted by the Case handler
Aid instrument	Instrument chosen for the aid	Selected by the Case handler from the list of values

Comments	Comments on aid instrument	Inserted by the Case handler
----------	----------------------------	------------------------------

Primary objective

As far as possible, try to use one of the categories in the drop-down list. If, however, none of the objectives are appropriate, please tick 'other' and add a comment under 'please specify'.

The categories correspond to those in the notification form (Implementing Regulation 794/2004) although three additional categories have been added: 'innovation', 'energy saving' and 'other'.

There is an important distinction between primary objective and two other parameters 'sector' and 'legal basis', each of which captures different information. Below are examples of how various measures should be classified:

Example 1: An aid measure to the shipbuilding sector

Primary objective - 'Sectoral development'

Sector – NACE code 'Manufacturing/ Manufacture of transport equipment/Manufacture of other transport equipment/Building and repairing of ships and boats'

Primary Legal basis – Article 107(3)c, part1 'Development of certain economic activities' for example

Secondary Legal basis – Shipbuilding Framework on State aid to shipbuilding 2003, for example

Example 2: An aid measure to the broadcasting sector

Primary objective - 'SGEI'

Sector – NACE code 'Other community, social and personal service activities/Recreational, cultural and sporting activities/Radio and television activities'

Primary Legal basis – Article 106(2) EC, for example

Secondary Legal basis – Broadcasting Communication, for example

Example 3: An aid measure for broadband

Primary objective - 'Regional development'

Sector – NACE code 'Real estate, renting and business activities/ Computer and related activities'

Primary Legal basis – Article 107(3)c, part1 'Development of certain economic activities' for example

Secondary Legal basis – 'Not applicable, approved directly under the Treaty'

Other examples of primary objectives include:

Audiovisual - Culture

Broadband - Regional development

Broadcasting - Services of General Economic Interest

Digital TV - Service of General Economic Interest/Sectoral development/Social support to individual consumers

Publishing & education - Culture/SGEI/Sectoral development

Sport - Culture/SGEI/Sectoral development

Telecoms - Services of General Economic Interest/Sectoral development

Secondary objective

A secondary objective is one for which, in addition to the primary objective, the aid is exclusively earmarked. For example, a scheme for which the primary objective is R&D may have as a secondary objective SMEs if the aid is earmarked exclusively for SMEs. Use the green arrow to drop the selected categories into the adjacent box.

Aid instrument

This variable is divided into two parts:

- the type of instrument used: grant, loan, guarantee, etc
- the financing of the aid: through parafiscal charges, accumulated reserves, etc

Multiple answers are possible. Use the green arrow to drop the selected categories into the adjacent box.

As far as possible, try to use one of the categories in the drop-down list. If, however, none of the instruments are appropriate, please tick 'other' and add a new category under 'instrument comments'. The categories correspond to those in the notification form (Implementing Regulation 794/2004) although two additional categories have been identified: 'reimbursable advances/grants' and 'other forms of equity intervention'.

6.3. Geographical scope

Name of the field	Definition	Action and by whom
Member State	Member State granting the aid	completed by the Greffe
Region	Region of the beneficiaries	Selected by the Case handler from the list of values
Regional aid status	Type of region	Selected by the Case handler from the list of values

Region

Select the appropriate region from the drop-down NUTS classification tree. Clicking on the binoculars opens up the tree and then clicking on the small '+' sign opens up the more

detailed regional levels. Multiple answers are possible but only one region at a time can be added. It is necessary to click on 'save' each time to be able to add another region.

Regional aid status

The aim is to identify measures earmarked exclusively for all Article 107(3)'a' or Article 107(3)'c' regions in a particular Member State.

6.4. Beneficiary

Name of the field	Definition	Action and by whom
Size of beneficiaries	Size of the beneficiaries of the aid	Selected by the Case handler from the list of values. The default setting is 'All'.
Number of beneficiaries	Number of beneficiaries of the aid	Selected by the Case handler from the list of values. The default setting is 'Unknown'.
Identity	Name of the beneficiary	Inserted by the Case handler
Sector	Nace code of the sector supported	Selected by the Case handler from the list of values.

Identity

For ad hoc cases or individual applications, complete the name of the beneficiary taking care with the spelling so that it will be retrievable at a later stage through the search facility.

Sector

Economic sector (NACE) (NACE Rev 2 is the statistical classification of economic activities in the European Community. You can specify one (or more) economic sector(s) or sub-sector(s) for which the aid measure(s) in question is earmarked.

You can choose a broad sector, e.g. F – Construction, or narrow the scope by selecting a sub-sector, e.g. F42 – Civil engineering or even F420103 – Construction of bridges and tunnels. Note that every "more general category" (the higher level) will automatically comprise the "more specific ones" (the lower ones), e.g. by selecting J – Information and communication, the system will select by default all J-labeled sub-sectors.

Select from the drop-down NACE classification tree. Clicking on the binoculars opens up the tree and then clicking on the small '+' sign opens up the lower digit levels. The default setting is 'Not sector specific'. Multiple answers are possible but only one sector at a time can be added. It is necessary to click on 'save' each time to be able to add another sector.

6.5. Budget& intensity

Name of the field	Definition	Action and by whom	Remarks
Overall aid amount in million Euro	Total amount of the aid	Inserted by the Case handler	Possibility to insert comments
Annual expenditure planned in million EUR	Annual expenditure	Inserted by the Case handler	Possibility to insert comments
Maximum aid intensity	aid intensity + bonuses	Inserted by the Case handler	

The information required differs slightly for schemes and ad hoc cases/individual applications within a scheme.

6.6. Duration

Name of the field	Definition	Action	Remarks
Date from which aid can be granted: dd/mm/yyyy	Date of implementation of the aid	Inserted by the Case handler	Possibility to insert comments
Last date until when aid can be granted:	End date for implementation	Inserted by the Case handler	Possibility to insert comments

The information required differs slightly for schemes and ad hoc cases/individual applications within a scheme.

- For schemes: Date from which aid can be granted and last date until when aid can be granted.
- For ad hoc cases and individual applications within a scheme: Date when put into effect and duration of the measure, end date.

6.7. Legal Basis (EU)

Name of the field	Definition	Action
Primary law	Applicable Treaty provision	Selected by the Case handler from the list of values
Secondary law	Guidelines applicable	Selected by the Case handler from the list of values
Secondary law	Outdated guidelines	Selected by the Case handler from the list of values

Primary law

This is a new variable in ISISweb and should not be confused with the national legal basis. Case-handlers should fill in the relevant Treaty article on which the decision was based. Please see examples under '7.3. Description, Primary objective'.

Secondary law

Please select either 'Not applicable as approved directly under the Treaty' or one or more frameworks/set of guidelines on which the decision was based. Multiple answers are possible. Use the green arrow to drop the selected categories into the adjacent box. Please see examples under '7.3. Description, Primary objective'.

Secondary law (bis)

This contains outdated rules which may still be used in treating non-notified aid measures. Multiple answers are possible. Use the green arrow to drop the selected categories into the adjacent box.

6.8. Assessment

Name of the field	Definition	Action and by whom
Line to take	Likely line to take (e.g. initiate 108(2) proceedings, raise no objections)	Completed by the Case handler
State of play	Current status of the file (e.g. expecting information on outstanding issues)	Completed by the Case handler
Translation reference	Reference of the translation request	Completed by the Case secretary
Next step	Next step in the procedure	Selected by the Case handler from the list of values
Date	Next step indicative date	Completed by the Case handler
Comments	Comments relating to next step	Completed by the Case handler
Last key	Last major step in the procedure	Selected by the Case handler from the list of values
Comments	Comments relating to last major step	Completed by the Case handler
Final deadline	Planned date for the completion of the closure of the case	Completed by the Case handler

Crit. 1: Effect on trade	Priority criteria 1	Case handler selects yes or no
Crit. 2: Market power	Priority criteria 2	Case handler selects yes or no
Crit. 3: Precedent	Priority criteria 3	Case handler selects yes or no
Crit. 4: Political priority	Priority criteria 4	Case handler selects yes or no
Crit. 5: Obligatory	Priority criteria 5	Case handler selects yes or no
Crit. 6: Simplified procedure	Priority criteria 6	Case handler selects yes or no
Workload:	Estimate of the workload	Case handler selects light/medium/heavy
Sensitive	Sensitivity of the case at national level	Case handler ticks the box where appropriate
Adopted by	Type of formal adoption procedure	Case handler selects oral, empowerment or written procedure

Note that the priority criteria are currently being adapted to reflect the new priority setting system.

6.9. When is a case considered to be « pending /closed »

A case is 'pending' when one of the procedures associated with the case is 'pending'. When the final procedure of a case is closed then the case is also closed. Information on a closed case can no longer be modified.

7. My procedures

As soon as a casehandler receives a case, he/she should check the data encoded, and the documents uploaded by the Greffe under the relevant procedure. Select Procedural data /view by clicking on the procedure number. To go back to the case information, click on the working title.

Data regarding procedures are structured:

- according to administrative steps identified by "Events" starting from the registration by the Greffe (Event REG –REGISTRY) to the closure (Event CLOS- CLOSURE OF PROCEDURE)

- according to administrative steps identified by the procedure number, the responsible DG, unit and case handler.

7.1. Case general information

Name of the field	Definition	Action and by whom
Original Title	Title of the measure in the authentic language	Automatically fed from information at case level
Working Title	Title of the measure in working language (EN or FR)	Case handler provides the Greffe with a working title in the case registration form.
Case Type	Type of measure : Scheme (S), ad hoc (AH), Individual application of a scheme (IA)	Automatically fed from information at case level
Member state	Member State	Automatically fed from information at case level

7.2. Procedure general information

Name of the field	Definition	Action and by whom
Current decisionnal process	Type of formal adoption procedure	Automatically fed from information at case level
Accelerated procedure	Duration of the procedure: Normal (N) Accélérée (A) Multisectoriel (M)	Completed by the Greffe
Decided date	Date of adoption of the decision or date of closure	Completed by the Greffe
Deadline	Planned date for the completion of the closure of the case	Automatically fed from information at case level

7.3. Chopin Information

This information is automatically fed from data entered by the Case secretary in Chopin:

Name of the field	Definition
Creation date	Date of creation of the procedure
Decision date	Date of adoption of the Commission's decision
Commission meeting date	Planned date for the meeting with the Commissioner
Cabinet meeting date	Planned date for the Chefs Cab meeting
Closing date	date of formal adoption of the Commission's decision
Priority	Priority of the case

7.4. Consultation

Name of the field	Definition	Action and by whom
DG	List of consulted services	Completed by the Greffe
Unit	Consulted units	Completed by the Greffe
Status	DG and/or unit currently consulted (E) or consulted earlier in the procedure (e.g. pre-consultation of ENTR for LIP) in the procedure	Completed by the Greffe
Consulted	Oui = Y Non = N	Completed by the Greffe
Response	Reply from the consulted DG and/or unit	Inserted by the Greffe
Date	Date of reply	Completed by the Greffe

7.5. Case Team

Name of the field	Definition	Action and by whom
Name	Name of the team member	Completed by the Greffe
DG	DG of the team member	Completed by the Greffe
Unit	Unit of the team member	Completed by the Greffe
Role	Role in the team Case manager, case handler, case assistant	Completed by the Greffe

Start date	Date of involvement in the team	Completed by the Greffe
End date	End of involvement in the team	Completed by the Greffe

7.6. Team History

List of team members previously involved.

7.7. Decision

Name of the field	Definition	Action and by whom
Date of adoption	Date of adoption of the Commission's decision	Completed by the Greffe
Commission PV	Reference to the PV of the Commission's meeting	Completed by the Greffe
SG decision reference	Reference of the Sec Gen internal document (cote C)	Completed by the Greffe
Document	reference of the Letter to the MS	Completed by the Greffe
OJ Publication	OJ Nr. Where the decision or the factsheet is published	Completed by the Greffe
Decision Type	Type of decision	Completed by the Greffe
Monitoring	Whether monitoring is necessary	Completed by the Greffe

7.8. Calendar or administrative steps identified by events

Generally-speaking, each event corresponds to a document. Only the Greffe is able to create new steps and to upload documents.

Name of the field	Definition	Remarques
Step name	Name of the step	
Description	Reference of the document	Adonis number and/or Greffe stamp
Document	Document uploaded	
Target	Deadline for completion of the step l'événement	Calculated by ISIS according to the type of procedure
actioned	date of completion of the step	

One of the essential elements of Isis Web is that it generates deadlines for each procedural step. Certain deadlines are imposed (for example for a notification: the date for the (event DEC) Commission decision while others are indicative).

7.9. When is a procedure considered to be « pending /closed » ?

Procedures are '**pending**' as long as a date has not been encoded under the '**Decided date**'.

The procedures N-NN-C-E –XS-XT-XE-XA-XF are '**pending publication**' when a date has been encoded under 'Decided date' but no actioned date has been encoded under the event POJ (Publication in the Official Journal).

Criteria to close a procedure

All procedures are closed when:

- The field 'Decided date' has an encoded date
- The event POJ (Publication in the Official Journal) has a date encoded
- The event CLOS (Closure of the procedure) has a date encoded

The event CLOS is not however encoded when the following decisions published in the OJ:

- A decision to open the formal investigation procedure;
- A decision to extend proceedings;
- An injunction decision.

A CP is closed by the Greffe upon written request of the Head of Unit.

8. Description of additional variables on recovery cases

As for the structure of the ISIS screen for recovery cases (CR), the general modules such as 'Basic characteristics of the case', 'Assessment' and 'Priority settings' correspond to those of the other procedures. However, given the peculiarities of recovery cases, there are additional specific fields in order to follow up the recovery process in an effective manner.

8.1. Recovery procedures

This module summarizes the main procedural events concerning the implementation of the recovery decision.

Name of the field	Definition	Action and by whom
EU courts	Date of legal action, case number, events and comments regarding	Inserted and updated by case handler

	cases related to the CR procedure at the European courts	
National courts	Date of legal action and comments regarding cases related to the CR procedure at the national courts	Inserted and updated by case handler
Recent events	Field for comments for documents related to the CR procedure	Document is put into the system by the Greffe, comments are inserted and updated by case handler

EU courts

Insert date of legal action and case number, select the appropriate procedure from the drop-down list (e.g.: art. 225 ECT – Initiation before CFI) and add comments.

National courts

Insert date of legal action and comments.

Recent events

When a key document (e.g.: MS info submission, Request for information, Note to the Commissioner) is inserted in ISIS by the Greffe, it appears in the list and the case handler is able to add comments.

8.2. Recovery results

This module serves for keeping track of the aid amounts and recovery interest to be reimbursed by the beneficiary (in case of schemes, by the beneficiaries)

Name of the field	Definition	Action and by whom
Total aid to recover	Aid amount (principal excluding recovery interests) to be recovered from the beneficiary (beneficiaries)	Inserted and updated by case handler
Total aid to recover	Aid amount (principal excluding recovery interests) to be recovered from the beneficiary (beneficiaries)	Inserted and updated by case handler
Aid repaid	Aid amount (principal excluding recovery interests) already reimbursed by the beneficiary	Inserted and updated by case handler

	(beneficiaries)	
Interest repaid	Recovery interest already paid by the beneficiary (beneficiaries)	Inserted and updated by case handler
Aid lost in insolvency	Aid amount (principal excluding recovery interests) lost in case of insolvency of the beneficiary (beneficiaries). To be filled in only when the CR is closed.	Inserted and updated by case handler
Aid registered in insolvency	Aid amount (principal excluding recovery interests) registered as claim by the granting authority in case of insolvency of the beneficiary (beneficiaries)	Inserted and updated by case handler
Comments	Comments regarding the aid amount, insolvency and recovery results	Inserted and updated by case handler


In case of individual grants, additional information related to the insolvency procedures (binary data) should be completed by the case handler, such as whether the beneficiary is insolvent and/or active, if the claim has been registered and whether the assets has been transferred upon liquidation of the beneficiary. If appropriate, the date of the closure of insolvency procedures should also be specified.

8.3. Recovery status

This module serves gives information about the recovery status. The status can be chosen from the drop-down list, the respective date can be associated.

Name of the field	Definition	Action and by whom
Status	Status of recovery: 'None', 'Blocked account', 'Closed', 'Company no longer active', 'Open'	Inserted and updated by case handler
Date	Date	Inserted and updated by case handler

9. Query

The query module should cover most of the needs of management and staff. Whenever possible, the module makes use of drop down menus which can be selected with a mouse click and are self-explanatory (see examples below). For some fields (regions, sectors), you'll have to click on the  to open a new window with a list of possible criteria. Just click on a region or a sector to pick it up. Once you have filled in all your search criteria, click on "Execute". NB. The button "Clear" will erase all search criteria from previous queries.



... and the “Results” window will appear



In this window, you can see the number of records found at the bottom of the window and, if you want to have more details on a specific case resulting from your query, just click on “View”. NB. By selecting the relevant tab, you can see the results by cases or by procedures.

Search tips:

- When you do several queries in a row, it is wise to use the “Clear” button at the start of each new query.
- If you look for a specific case/procedure, try to narrow down your criteria as much as possible (use Unit, Member State, date interval when relevant, etc).
- For the “procedure type”, you can select several items from the drop down menu by using the CTRL or SHIFT key. Some boxes, when checked, will give you access to new boxes (see examples below)

State Aid ManProc – ISIS Web

Examples of queries

List of pending Italian priority 1 cases in unit G-1

SECTION 13 HANDLING OF SENSITIVE INFORMATION

<u>Section 13</u>	<u>Handling of sensitive information.....</u>	<u>1</u>
<u>1.</u>	<u>Context</u>	<u>2</u>
<u>2.</u>	<u>Definitions.....</u>	<u>2</u>
<u>3.</u>	<u>Markings</u>	<u>3</u>
<u>3.1.</u>	<u>Scope and designation.....</u>	<u>3</u>
<u>3.2.</u>	<u>Handling instructions for documents marked "COMP operations"</u>	<u>4</u>
<u>3.3.</u>	<u>Specific handling instructions for "COMP special operations" marking</u>	<u>7</u>
<u>4.</u>	<u>other security provisions.....</u>	<u>12</u>
<u>4.1.</u>	<u>Protection of complainants</u>	<u>12</u>
<u>4.2.</u>	<u>Non disclosure of the existence of a (pre-)notification</u>	<u>12</u>
<u>4.3.</u>	<u>Non disclosure of the existence of an <i>ex-officio</i> case</u>	<u>13</u>
<u>4.4.</u>	<u>Handling of information requests.....</u>	<u>13</u>
<u>4.5.</u>	<u>Publication of decisions</u>	<u>13</u>
<u>5.</u>	<u>Reporting in case of incident</u>	<u>13</u>
<u>6.</u>	<u>Summary</u>	<u>15</u>

1. Context

- (1) In line with Article 339 of the TFEU, the members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. The inadvertent disclosure of such information could, depending on the circumstances, expose the Commission to legal, financial and reputational risks.
- (2) Furthermore, according to Article 17 of the Staff regulations¹, an official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public. This obligation continues after the official has left the service. According to Article 22 of the Staff regulations, an official may be required to make good, in whole or in part, any damage suffered by the Communities as a result of serious misconduct on his part in the course of or in connection with the performance of his duties.
- (3) In this context, it is of particular importance for DG COMP staff to ensure sufficient protection of information in its possession.

2. Definitions

- (4) By **sensitive information**, it is meant business secrets and other confidential information within the meaning of paragraph 3 of the Commission notice on professional secrecy in State aid decisions², and, to some extent, internal information related to the Commission internal decision making process (mainly options, orientation, replies to inter-service consultations).
- (5) By **privileged commercially sensitive information**, it is meant a subset of sensitive information consisting of non public information of which the Commission is one of the primary recipients, if not the only one, and of which the disclosure could have a significant impact on the stock exchange, by analogy with certain Merger pre-notifications: financial accounts when not public, business plans, conditions attached to privatisation/nationalisation. In addition, in certain circumstances, information relating to companies which are not listed on the stock market but are active in extremely sensitive sectors, could be also considered as "privileged commercially sensitive information".
- (6) Sensitive information is included in the **documents transmitted by the parties**

¹ REGULATION No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385)

² [Commission communication C\(2003\) 4582 of 1 December 2003 on professional secrecy in State aid decisions, Official Journal C 297, 09.12.2003, p. 6.](#)

and Member States to DG COMP but also reflected in **documents drafted by DG COMP or other DGs** in the context of COMP operations. In addition, sensitive information may be transmitted on **various supports** (electronic, paper, and even orally). It goes without saying that precautions of the same level must be applied in order to protect sensitive information independently of its format.

3. Markings

3.1. Scope and designation

- (7) Two specific markings "COMP operations" and "COMP special handling" have been defined and approved by ADMIN/DS on 25/11/2008:
1. In principle, no marking would be applied for documents relating to aid schemes. Nevertheless, where the assessment of aid schemes by the Commission entails the handling of sensitive information (e.g. recent banking schemes), "COMP operations" would be the most appropriate to deal with these cases in a secured and efficient way.
 2. "COMP operations" marking applies to documents relating to:
 - priority 1 individual aid cases (*e.g. ad hoc*, LIPS, R&D&I and R&R);
 - recovery procedures which combine significant aid amounts, political sensitivity and a complex technical assessment;
 - Article 260 procedures;
 - monitoring of state aid cases (MC);
 - where the Member State requires the existence of a case to be kept confidential with a duly motivated request, which is accepted by the Case Manager.
 3. "COMP special handling" marking would be applied in a limited number of cases for documents containing privileged commercially sensitive information (*e.g.* individual banking cases). A case where such a marking is appropriate is identified upfront by the Director responsible in close cooperation with the Comp Support Unit.
- (8) In practice, the appropriate level of marking for relevant documents pertaining to a case is confirmed by the Case manager, on the basis of the principles defined in paragraph (7), at the time of registration/creation in ISIS or when the preliminary assessment form is drafted. It is communicated to the case team and to COMP State aid Registry by e-mail.
- (9) Appropriate handling instructions are followed accordingly for each document pertaining to the case, which contains sensitive information (see chapter 6). It goes without saying that there is no need to apply a marking to documents not containing any sensitive information.
- (10) The appropriate marking is **affixed by the author of every document** at the top of the first page, placed centrally under the date/reference of the document, using Times New Roman 16 pts italic, starting with a capital letter, but continuing in lower case.

- (11) **Documents received by DG COMP** containing sensitive information (e.g. complaints, documents obtained during inspections, replies received in the course of investigations) are normally labelled (e.g. "confidential", "business secret") by the author/owner of the document. Upon receipt by DG COMP, no additional marking will be added by the Registry or the Case team. **Nonetheless, they will be handled following the pertinent marking instructions.**
- (12) Marking ending is to be decided by the author. If no ending is set, the handling instructions become automatically obsolete after 5 years. In particular, the marking "COMP Special handling" shall be maintained only as long as the information requires stricter protection. The author shall indicate, where possible, a certain date or event (e.g. "until notification" or "until adoption by the College") after which the document is automatically downgraded to the marking "COMP Operations".
- (13) Outside the scope of these specific markings, other markings such as "Commission internal", "Limited" etc may be used where appropriate and in accordance with the rules set in Security notice n°1. These markings should not be used in conjunction with the COMP specific markings.

3.2. Handling instructions for documents marked "COMP operations"

Need to know

- (14) In principle, documents, relating to State aid issues, marked "COMP operations" are accessible only to staff from the State aid network³. Such documents are preferably transmitted electronically using a link to the document in ISIS instead of sending the document itself. Alternatively, these documents have to be transmitted using SECEM (see transmission of documents in electronic format).
- (15) The lists of addressees for Notes to the Commissioner that are marked "COMP operations" are defined in the fiche pratique NCOM.
- (16) Inter-service consultations relating to "COMP operations" documents, usually draft decisions⁴, are performed outside CIS-net using a specific list of addressees. As regards the DGs to be consulted, the list is established by the case team on the basis of the legitimate interests (sector or policy) of the DGs in the case at stake. SG and LS are always consulted on draft decisions.
- (17) In general terms, once a "COMP Operations" document arrives in a functional mail box, its further circulation beyond its original addressee (ISC are usually addressed to the Director General in other DGs) is possible, provided that it is transmitted to a person under his/her responsibility and to the extent that the document is needed to perform a function or a task.

³ State aid network includes staff from State aid units, State aid management, contact people I within DG COMP and Members of the cabinet.

⁴ In certain cases, COMP needs to consult other DGs on the submission of a MS; for instance the notification of large individual R&D&I projects is transmitted to ENTR and RTD. Same channels of transmission as for ISC of a draft decision should be used.

- (18) All draft decisions sent for Inter-service consultation are circulated at the same time to all State aid units using the units' functional mailboxes. Further circulation within the unit is possible.
- (19) Access rights of trainees in ISIS must be limited to the cases to which they have been assigned. Access of trainees to "COMP operations" documents must be justified for linguistic competence or technical expertise reasons.

Internal reference to the case

- (20) No specific requirement exists in this regard.

Tracing of recipients/copies/printing of documents

- (21) No specific requirement exists in this regard.

Storage of documents

- (22) Documents in paper format must not be left unattended in an open office. Offices must be locked in absence of their occupant(s).
- (23) Documents in electronic format must be stored either in ISIS or in the electronic folder of the unit concerned, within the access-controlled network folder structure. These must not be stored permanently on the I: network drive or locally. These may be stored as an encrypted e-mail (e.g. SECCEM). Storage on Commission laptop is authorised either as encrypted file (e.g. SECCEM encrypted e-mail) or on encrypted storage device (e.g. encrypted hard drive). Storage on PDAs or on private equipment is not authorised.

Transmission of documents in paper format

- (24) Inside COMP, a signataire marked "COMP Operations" is used for transmission of documents in paper format. Signataires marked "COMP operations" must not be left unattended in an open office. Copies are handed over in unmarked envelopes.
- (25) For transmissions to other services inside the Commission, an unmarked envelope is used.
- (26) For transmissions outside the Commission, registered mail or approved courier service (e.g. DHL) must be used. These procedures are handled by the Registry on notice by the case team.
- (27) Same precautions apply to CD/DVD-ROMs and USB sticks.

Transmission of documents in electronic format

- (28) Great attention should be paid to always identify the right recipient of a marked document sent to other associated services of the Commission. New checks should be made before sending a new document of the same case.
- (29) Inside COMP, documents must always be sent either using SECCEM or using a hyperlink

to the appropriate folder or to ISIS.

- (30) For electronic transmissions to other services inside the Commission, SECEM must always be used. In case the addressee does not have SECEM, the document must be sent in paper format (see Transmission of documents in paper format).
- (31) Transmissions outside the Commission of documents containing sensitive information must go through the Registry where a PKI will be used. If the size of the document is too big to allow for a transmission with PKI, the document must be transmitted in paper format (see Transmission of documents in paper format). E-mails exchanged informally with Third parties or MS should not contain sensitive information.
- (32) Exceptions may be justified for emergencies, for instance for documents related to a case within the scope of special emergency proceedings (such as special empowerment or accelerated written procedure) and where the handling instructions may prove difficult to comply with. In such a case, the best way to proceed should be agreed with the Director responsible.

Remote access

- (33) Remote access using secure token is authorised. Local copies on private equipment are forbidden. Remote access using Webmail is not authorised. Exceptions may be justified for emergencies, for instance for documents related to a case within the scope of special emergency proceedings (such as special empowerment or accelerated written procedure) and where the handling instructions may prove difficult to comply with. In such a case, the best way to proceed should be agreed with the Director responsible.

Meetings

- (34) Unless they are part of the case team (see (19)), trainees and other external staff are not allowed by the Head of Unit to attend the unit meeting (or part of it) when "COMP operations" documents are discussed. The minutes of unit meetings must not contain sensitive information.

Translations

- (35) The translation of documents marked "COMP operations" can be outsourced by DGT provided that the standard call for interests process is not followed, i.e. that the entire text to be translated is not published on the Web portal of DGT. Instead, when requesting its translation, DG COMP must provide DGT with a description of the document which does not contain sensitive information and which will be published on the Web portal of DGT accessible to translators for them to express their capacity and availability to translate the document. This means that, for the time being, the translation request must not be processed automatically through e-greffe but must be made through the POETRY application.

Formal adoption by the Commission

- (36) In principle, draft decisions marked "COMP operations" should be formally adopted through oral procedure and, hence, not be uploaded into e-greffe.

- (37) In absence of meetings of the College (holiday period), written procedure may be used and in that context, e-greffe may be used. However, it must be clearly indicated in e-greffe that the draft decision falls under the category "Marking"⁵ and that its publication is under indefinite embargo.
- (38) In exceptional cases where an empowerment procedure is used for adoption, same approach should be followed.
- (39) Note that as soon as a procedure of adoption is launched (written or oral procedures) or is finalised (empowerment procedures), the title of the act is published on SG Vista, in the le PV of the Commission meeting (oral procedures), in the daily note of adopted procedures by written procedure or empowerment and in the public registry of Commission's documents. Hence, the title should not contain any sensitive information.
- (40) In particular, the title of decisions relating to individual State aid cases, communicated to the SecGen at the formal adoption stage, should be neutral, i.e. without any mention of the case number, the beneficiary or the type of decision. It is suggested to use the generic title "Projet de décision en vertu du Règlement No 659/1999" throughout the formal adoption procedure.

Publication of decisions

- (41) Only the non-confidential version of decisions can be published on SG Vista and on Europa. To that end, the publication of the decision is delayed until after confidentiality issues have been cleared with the MS.
- (42) :

The non-confidential version of the decision must be forwarded to the Sec Gen as soon as it is established by the Case team, usually 15 working days after notification of the decision to the Member State. (See also 4.5).

Destruction of documents

- (43) Documents in paper format must be shredded. CD/DVD-ROMs, USB sticks and other electronic storage media must be "securely deleted"⁶ or handed over to the Local Security Officer for destruction and disposal.

3.3. Specific handling instructions for "COMP special operations" marking

Need to know

- (44) In principle, access to documents marked "COMP special handling" is limited to the case team, the direct line of hierarchy, the cabinet, identified people in DG COMP and identified correspondents in other services where necessary. Such documents are

⁵ Field "Classification du dossier" in e-greffe.

⁶ A specific shredder is available in R3 unit.

preferably transmitted electronically using a link to the document in ISIS instead of sending the document itself. Alternatively, these documents have to be transmitted using SECEM (see Transmission of documents in electronic format).

- (45) The proposed line to take on a case with a number of "COMP special handling" documents must not be indicated in the Agendas of the meetings with the Commissioner.
- (46) As regards the transmission of Notes to the Commissioner and of draft decisions marked "COMP Special Handling", these documents should not be sent to functional mail boxes but should always be sent to people identified in advance. A "COMP Special Handling" document must be known exclusively by concrete persons and a nominative list of circulation must be used. In such a case, further distribution will be allowed by COMP management only in exceptional circumstances and the traceability must be ensured (see Tracing of recipients).
- (47) Trainees should not have access to "COMP special handling" documents.

Internal reference to the case

- (48) The use of a generic anonymous name for reference to the case is recommended for Agendas and minutes of meetings and internal reports/lists. To that end, the original and the working title of the case in ISIS must be filled in with a generic anonymous name. Original and working titles are entered by the Registry on the basis of the case team proposal.
- (49) As regards the substance, internal reporting should be limited to the minimum, which means that it should not contain privileged commercially sensitive information. To that end, data entries (e.g. socio-economic data, line to take) into ISIS and into CHOPIN must not contain privileged commercially sensitive information.
- (50) It is part of the case team duties, notably for linguistic reasons, to double check the correctness of data entries in ISIS. Errors by the registry should be immediately signalled to COMP STATE AID GREFFE.

Tracing of recipients/copies/printing of documents

- (51) The use of the "Who Knew What and When?" form is required for "COMP Special Handling" documents. Staff involved in the treatment of a case where the Commission is the recipient of privileged commercially sensitive information must be recorded in a Who Knew What and When?" form (see template).
- (52) Copies of documents marked "COMP special handling" must be limited to the people with a need to know (See 3.2 Need to know).
- (53) Printing of documents marked "COMP special handling" can only be performed on secured devices: printers attached to the local computer, pin-code protected printers (photocopiers), network printers situated in secured location (e.g. room under supervision or with limited access).

Storage of documents

- (54) Documents in paper format must be locked in cupboards in absence of the occupant of the office.
- (55) Documents in electronic format must be stored either in ISIS or in the electronic folder of the unit concerned, within the access-controlled network folder structure. These must not be stored permanently on the share network drive or locally. These may be stored as an encrypted e-mail (e.g. SECEM). Storage on Commission laptop is authorised only on encrypted storage device (e.g. encrypted hard drive). Storage on USB memory sticks, external hard drives, etc. is authorised only if encrypted. Storage on PDAs or on private equipment is not authorised.
- (56) The submissions of Member States containing privileged commercially sensitive information must be individually protected in ISIS. The upload of documents is performed by the Registry upon reception. Where there is a need to individually protect such a document, this should be signalled to the Registry by the Case team.
- (57) The documents drafted by the Commission containing privileged commercially sensitive information must be individually protected in ISIS. Where there is a need to individually protect such a document in ISIS, this should be signalled to the Registry on the signataire or by e-mail by the Case team.
- (58) It is part of the case team duties, notably for linguistic reasons, to double check the correctness of data entries in ISIS. Errors by the registry should be immediately signalled to COMP STATE AID GREFFE.
- (59) The upload of password protected documents into ISIS should be avoided as much as possible in order to ensure business continuity.

Transmission of documents in paper format

- (60) Great attention should be paid to always identify the right recipient of a marked document sent to other associated services of the Commission. New checks should be made before sending a new document of the same case.
- (61) Inside COMP, signataires which contain documents marked "COMP special handling" must be delivered by hand. Such signataires cannot be left unattended in an open office. Copies of documents marked "COMP Special handling" are delivered by hand in a double envelope (one envelope marked "COMP special handling" inside an envelope with the addressee).
- (62) For transmissions to other services inside the Commission, documents are delivered by hand in a double envelope (one envelope marked "COMP special handling" inside an envelope with the addressee).
- (63) For transmissions outside the Commission, the document must be collected directly by the addressee or the DHL "pre alert procedure" must be used for sending the document. This latter procedure is handled by the Registry on notice by the case team.
- (64) Same precautions apply to CD/DVD-ROMs and USB sticks.

Transmission of documents in electronic format

- (65) Inside COMP, documents must always be sent using SECEM or using a hyperlink to the document stored in an access-controlled network folder structure or in ISIS if protected.
- (66) For electronic transmissions to other services inside the Commission, SECEM must always be used. In case the addressee does not have SECEM, the document must be delivered by hand in paper format (see Transmission of documents in paper format).
- (67) Transmissions outside the Commission of documents containing privileged commercially sensitive information must go through the Registry where a PKI will be used. If the size of the document is too big to allow for a transmission with PKI, the document must be transmitted in paper format (see Transmission of documents in paper format). E-mails exchanged informally with third parties or MS should not contain sensitive information.
- (68) Exceptions may be justified for emergencies, for instance for documents related to a case within the scope of special emergency proceedings (such as special empowerment or accelerated written procedure) and where the handling instructions may prove difficult to comply with. In such a case, the best way to proceed should be agreed with the Director responsible.

Remote access

- (69) Remote access using secure token is authorised. Local copies on private equipment are forbidden. Remote access using Webmail is not authorised. Exceptions may be justified for emergencies, for instance for documents related to a case within the scope of special emergency proceedings (such as special empowerment or accelerated written procedure) and where the handling instructions may prove difficult to comply with. In such a case, the best way to proceed should be agreed with the Director responsible.

Meetings

- (70) Distribution of documents containing privileged commercially sensitive information should be limited to the minimum necessary to conduct the meeting, i.e. to the elements necessary to the understanding of attendants to the meeting. In addition, the case manager should ensure excess stock of documents or copies not be left behind and destroyed appropriately.
- (71) Trainees and other external staff are not allowed by the Head of Unit to attend the unit meeting (or part of it) when "COMP Special handling" documents are discussed. The minutes of unit meetings must not contain sensitive information.

Translations

- (72) The translation of documents marked "COMP special handling" must not be outsourced by DGT. This must be specified to DGT by COMP when the translation request is made through POETRY.

(73) A generic anonymous name is used for reference to the case in POETRY.

Formal adoption by the Commission

- (74) In principle, draft decisions marked "COMP special handling" should be formally adopted through oral procedure and, hence, not be uploaded into e-greffe.
- (75) In absence of meetings of the College (holiday period), written procedure may be used and in that context, e-greffe may be used. However, the text of the draft decision must be classified "EU restricted" and may not be uploaded into e-greffe and Security notice 02 for handling instructions applicable subsequent to the classification).
- (76) Exceptions (upload of the draft decision) may be justified for emergencies, where special empowerment or accelerated written procedures are used. In that case, use the "marking" category in e-greffe. See paragraphs (37) and (38).
- (77) Note that as soon as a procedure of adoption is launched (written or oral procedures) or is finalised (empowerment procedures), the title of the act is published on SG Vista, in the le PV of the Commission meeting (oral procedures), in the daily note of adopted procedures by written procedure or empowerment and in the public registry of Commission's documents. Hence, the title should not contain any sensitive information.
- (78) In particular, the title of decisions relating to individual State aid cases, communicated to the SecGen at the formal adoption stage, should be neutral, i.e. without any mention of the case number, the beneficiary or the type of decision. It is suggested to use the generic title "Projet de décision en vertu du Règlement No 659/1999" throughout the formal adoption procedure.

Publication of decisions

- (79) Only the non-confidential version of decisions can be published on SG Vista and on Europa. To that end, the publication of the decision is delayed until after confidentiality issues have been cleared with the MS.
1. The non-confidential version of the decision must be forwarded to the Sec Gen as soon as it is established by the Case team, usually 15 working days after notification of the decision to the Member State. (See also 4.5).

Destruction of documents

- (80) Documents in paper format must be shredded (the new security consoles can be used to that end). CD/DVD-ROMs, USB sticks and other electronic storage media must be "securely deleted"⁷ or handed over to the LISO for destruction and disposal.

⁷ A specific shredder is available in the IR unit.

4. other security provisions

- (81) Other security provisions may apply jointly or independently from the marking (see Chapter 6 for articulation). These are detailed below:

4.1. Protection of complainants

- (82) The identity of a complainant may have to be kept confidential in order to prevent any harm to its interests. To that end:
1. Never mention the name of the complainant in the original title or in the working title of the case in ISIS. Original and working titles are entered by the Registry on the basis of the case team proposal.
 2. Always request from the complainant a non-confidential version of the complaint for transmission to the Member State.
 3. The confidential version of the complaint should be clearly labelled as such in ISIS, this to avoid the inadvertent transmission of the confidential version. The registry is in charge of the uploading and of the labelling of documents in ISIS.
 4. The confidential version of the complaint should be individually protected in ISIS. The registry is in charge of the uploading of documents in ISIS and, hence of individual protection of documents in ISIS.
 5. It is part of the case team duties, notably for linguistic reasons, to double check the correctness of data entries in ISIS. Errors by the registry should be immediately signalled to COMP STATE AID GREFFE.
 6. The upload of password protected documents into ISIS should be avoided as much as possible in order to ensure business continuity.

4.2. Non disclosure of the existence of a (pre-)notification

- (83) In State aid generally, the existence of a notification is not to be kept confidential. Nevertheless, in some cases, the Member State may ask the Commission not to make public the existence of a pre-notification or of a notification. This may for instance be the case for Rescue aid, for aid to large R&D&I projects or for regional aid to large investment projects. To that end, where the Member State requires the existence of a case to be kept confidential with a duly motivated request, which is accepted by the Case Manager:
1. Use a generic anonymous name (e.g. LIP in the car sector) for the registration of the case in ISIS and internal reporting. Original and working titles are entered by the Registry on the basis of the case team proposal. It is part of the case team duties, notably for linguistic reasons, to double check the correctness of data entries in ISIS. Errors by the registry should be immediately signalled to COMP STATE AID GREFFE.
 2. The use of such a generic anonymous name should be limited in time until the operation concerned is known to the public.
 3. Use "COMP operations" marking for all documents of the file. Where appropriate, it may be needed to use the marking "COMP Special handling".
- (84) Confidentiality concerns in principle do not arise in cases notified under the Simplified procedure. Under the Simplified procedure, the summary of the notification that is

submitted by the Member State is to be published on DG COMP's website and only includes standardised (non-confidential) information, unless explicitly indication to the contrary of the Member State.

4.3. Non disclosure of the existence of an *ex-officio* case

- (85) It may be in the interest of the Commission not to disclose the existence of an *ex-officio* case before having enough elements as to the importance and the follow-up it wants to give to an alleged case.
- (86) Therefore, *ex-officio* cases are in principle not public until the follow-up to the case is decided by COMP management, i.e. until the follow-up to the case is decided in SAMM or by the Commissioner. Standard reply to questions by the general public, journalists, Third parties with regard to the existence of an *ex-officio* case should be: "the Commission cannot disclose to the public the existence of a preliminary investigation".

4.4. Handling of information requests

- (87) While in State Aid, the practice of sending information requests to competitors of an investigated party is rather limited because of the absence of market investigation powers, such a situation may occur in particular in the context of a formal investigation procedure (outside the decision to open the formal investigation procedure itself, which is covered by the notice on professional secrecy). In that perspective, it is important to recall that:
 - 1. Requests of information should always be based on non-confidential versions of documents submitted by Third parties or MS.
 - 2. It is part of the case team's duties to perform double checks.
 - 3. Non-confidential versions should be provided for by the Third parties or the MS. As to the precautions to safeguard the confidentiality of information, one should refer by analogy to paragraph 21 of the Notice on Professional secrecy in State aid decisions: "a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size".

4.5. Publication of decisions

- (88) A potential risk of inadvertent disclosure of sensitive information exists with the publication of the decision because of improper preparation of the public version by the Case team. To that end, it is important to recall that it is part of the case team's duties to double check the public version of the decision prior to the publication on Europa and in the OJ.

5. Reporting in case of incident

- (89) It should be kept in mind that even when DG COMP takes all precautions, some security risks are inherent to its activities and cannot be fully avoided. No system can be 100% secure or risk free.
- (90) For this reason, it is the responsibility of all DG COMP staff to report all information security incidents occurring within DG COMP. Security incident reporting is essential.

This will help not only to respond appropriately to a particular situation but also to improve our knowledge of DG COMP threats and vulnerabilities and how to resolve or minimize the risk of reoccurrence.

6. Summary

Types of documents documents⁸	Ad hoc measures (may be additional to marking)	COMP Operations	COMP special handling
Incoming documents			
Complaint and subsequent correspondence from complainant⁹	Where identity of complainant must be withheld: no mention in title, clear labelling and individual protection in ISIS of the confidential version.		
Pre-notification, notification	Where the Member State requires the existence of a case to be kept confidential, use of a generic anonymous name for the registration of the	For priority 1 individual aid cases and where the Member State requires the existence of a case	Where the Commission receives privileged commercially sensitive

⁸ Either in paper or electronic format.

⁹ By internal documents, it is meant notes to the files, notes to the Commissioner, minutes of meetings, tables and lists for reporting to management.

	case in ISIS and internal reporting.	to be kept confidential, apply "COMP operations" instructions.	information: apply "COMP special handling" instructions.
Submission of information by MS	Where the Member State requires the existence of a case to be kept confidential, use of a generic anonymous name for the registration of the case in ISIS and internal reporting.	For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	Where the Commission receives privileged commercially sensitive information: apply "COMP special handling" instructions.
Comments from MS in the context of a formal investigation procedure		For priority 1 individual aid cases, apply "COMP operations"	Where the Commission receives privileged

		instructions.	commercially sensitive information: apply "COMP special handling" instructions.
Comments from Third parties in the context of a formal investigation procedure	Where identity of complainant must be withheld: no mention in title, clear labelling and individual protection in ISIS of the confidential version.		
Internal documents			
Minutes of meeting with Third parties	Where identity of complainant must be withheld: individual protection in ISIS.		
Minutes of meeting with MS	Where the Member State requires the existence of a case to be kept	For priority 1 individual aid cases, certain	Where the Commission receives

	confidential, use of a generic anonymous name for the registration of the case in ISIS and internal reporting.	recovery procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	privileged commercially sensitive information: apply "COMP special handling" instructions.
Material collected relating to ex-officio case (until made public)	The existence of an ex-officio case should not be made public		
Minutes of internal meeting	Where the Member State requires the existence of a case to be kept confidential, use of a generic anonymous name for the registration of the case in ISIS and internal	For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases,	Where the Commission receives privileged commercially sensitive information:

	reporting.	and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	apply "COMP special handling" instructions.
Individual internal reporting	Where the Member State requires the existence of a case to be kept confidential, use of a generic anonymous name for the registration of the case in ISIS and internal reporting.	For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	Where the Commission receives privileged commercially sensitive information: apply "COMP special handling" instructions.

Global reporting (lists, minutes of management meetings)	General reporting will be marked "COMP operations" and handled accordingly. Where the Member State requires the existence of a case to be kept confidential: generic anonymous names coupled with written internal reporting limited to the minimum.		
Working documents (notes to the file, worksheets)	Where the Member State requires the existence of a case to be kept confidential, use of a generic anonymous name for the registration of the case in ISIS and internal reporting.	For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	Where the Commission receives privileged commercially sensitive information: apply "COMP special handling" instructions.
Internal consultations	Where the Member State requires the existence of a case to be kept confidential, use of a	For priority 1 individual aid cases, certain recovery	Where the Commission receives privileged

generic anonymous name for the registration of the case in ISIS and internal reporting.	procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	commercially sensitive information: apply "COMP special handling" instructions.
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Outgoing documents

Request for additional information	Requests of information should always be based on non-confidential versions of documents submitted by third parties. It is part of the case team's duty to perform double checks. As to the precautions to safeguard the confidentiality of information, paragraph 21		
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of the Notice on Professional secrecy in State aid decisions may give guidance.

Transmission of documents submitted by MS to other services		For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.	Where the Commission receives privileged commercially sensitive information: apply "COMP special handling" instructions.
NCOM and other related documents (agenda, minutes)		For priority 1 individual aid cases, certain recovery	Where the Commission receives privileged

		<p>procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply "COMP operations" instructions.</p>	<p>commercially sensitive information: apply "COMP special handling" instructions.</p>
Draft decision sent in ISC and replies from other services		<p>For priority 1 individual aid cases, certain recovery procedures, monitoring of state aid cases, and where the Member State requires the existence of a case to be kept confidential, apply</p>	<p>Where the Commission receives privileged commercially sensitive information: apply "COMP special handling" instructions.</p>

**"COMP operations"
instructions.**

Decision	Attention of the staff is drawn to the potential risk of inadvertent disclosure of sensitive information in the the ManProc and their duty to double check prior to the publication on Europa and in the OJ.	Delay and limit the publication of the decision on SG Vista to the publication of the non-confidential version for cases where a marking "COMP operations" or "COMP special handling" has been used.
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SECTION 14 INTERSERVICE CONSULTATION

<u>Section 14</u>	<u>Interservice consultation.....</u>	<u>1</u>
<u>1.</u>	<u>Aim of the Inter service consultation (ISC)</u>	<u>2</u>
<u>2.</u>	<u>Launching an inter service consultation.....</u>	<u>2</u>
<u>2.1.</u>	<i>Selection of services for consultation</i>	<i>2</i>
<u>2.2.</u>	<i>Inter service consultation periods.....</i>	<i>3</i>
<u>2.3.</u>	<i>Cover note</i>	<i>4</i>
<u>2.4.</u>	<i>Distribution – how and when?.....</i>	<i>5</i>
<u>2.5.</u>	<i>Reply to a DG COMP ISC.....</i>	<i>5</i>
<u>3.</u>	<u>DG Comp replies to an ISC.....</u>	<u>6</u>
<u>3.1.</u>	<i>Principles for allocation</i>	<i>6</i>
<u>3.2.</u>	<i>The reply by COMP.....</i>	<i>6</i>
<u>3.3.</u>	<i>Who signs what?</i>	<i>7</i>

1. Aim of the Inter service consultation (ISC)

- (1) Inter service coordination and consultation is the responsibility of the lead service for a given dossier and precedes the formal adoption process. Any service preparing a Commission decision or proposal must take account of the fact that the Commission as a whole will bear responsibility for the measure in question and must act accordingly, i.e. in conjunction with other services as appropriate.
- (2) The purpose of the inter service consultation is to align the positions of the various services and work out a common approach before a proposal is brought before the Commission for adoption. This is a response to the concern for consistency and transparency in the preparation of Commission decisions and proposals.

2. Launching an inter service consultation

2.1. Selection of services for consultation

- (3) Selecting the services to consult is very important since not consulting an interested DG may result in a postponement of the decision even at Chefs de cabinet level.
- (4) Services are consulted on their field of expertise and competence. DG COMP is not obliged to take into account comments made outside a services' field of expertise. Cases which are likely to present major difficulties for other DG's should be informally discussed with them at the earliest possible stage at the initiative of the head of unit responsible.
- (5) Under Article 23(4) of the Commission's Rules of Procedure, the Legal Service must be consulted on all drafts of or proposals for legal instruments and on all documents which may have a legal implication: all decisions, communications, guidelines, directives, and regulations. Their opinion needs to be sought by means of a formal consultation.
- (6) Secretariat General (SG) should receive a copy of ISC on decisions for their information. SG is consulted on all matters subject to approval by oral procedure, with political importance, which are part of the annual work program, institutional issues or which are subject to impact assessment or public consultation and for any joint position or initiative that may commit the Commission vis-à-vis other institutions or bodies. In practice, that means that SG is a consulted DG for all consultations.

Service	Consulted on
DG Enterprise	Always consulted (also for infringement of Article 28 freedom of movement of goods)
DG Ecfm	Always consulted - general economical impact on the market, free movement of capital, financial institutions – only oral procedure, not for empowerments

DG Regio	regional aid – any aid with regional aspects
DG EAC	Article 107.3.d cultural aid, film, training
DG Emploi	employment aid, training, equal opportunities or measures having a social impact
DG CLIMA	environmental aspects
DG Environment	environmental aspects
DG ENER	environmental and energy aspects
DG MOVE	Transport aspects
DG RTD	research and development
DG Trade	WTO aspects
DG CNECT	Information technologies, broadband, broadcasting, film.
DG Taxud	parafiscal taxes ¹ , aid in the form of tax reductions
DG Markt	other Treaty provisions, parafiscal taxes, financial institutions
DG Agri	Production, processing and marketing of agricultural products listed in Annex 1 to the Treaty and forestry
DG Mare	Production, processing and marketing of fisheries products listed in Annex 1 to the Treaty
DG Enlargement	Issues related to accession countries, candidate countries

2.2. Inter service consultation periods

Type of case/text	Number of working days
Notified aid (N-case)	5
Not notified (NN-case)	10

¹ There is no generally accepted definition of parafiscal taxes. The term refers to taxes levied by a public or private body appointed by the state. Instead of these taxes going in the general budget, they go to a fund or organisation entrusted with specific tasks.

Injunction (NN-case)	10
Closing a 108.2 proceeding (C-case)	10
Existing aid (E- case)	10
Reports	10
Guidelines, directives, regulations, communications	10
2 nd consultation – horizontal texts	5-10

- (7) The consultation period applies – regardless of type of procedure and whether the decision is to raise no objections, to open procedure or to propose appropriate measures or whether a final decision is negative or positive.
- (8) However, the formal rule for horizontal papers (guidelines, communications, frameworks) exceeding 20 pages (excluding annexes) is normally 15 working days. The 5-day consultation period for the 2nd consultation for horizontal documents only applies if the amendments are limited. The amendments should be highlighted.

Shortened ISC-period

- (9) If, for various reasons, DG Comp is not respecting the ISC-period, because of extreme urgency, the consulted services should be contacted beforehand and informed of the grounds for this exception, which should also be mentioned in the cover note.

Extended ISC-period

- (10) A consulted service can sometimes request an extended consultation period which depending on the circumstances, may be granted on a case by case basis. However, the request should be made before the deadline expires.

2.3. Cover note

- (11) On the cover note the services must be informed of the following:
- Case N. :
 - Title:
 - Member State:
 - Proposal: (use Procedural Regulation terminology, see ISIS list -for ex. Article 4(3) decision not to raise objections)
 - Procedure: empowerment/oral/written
 - Deadline:

- ISC outside CIS-Net
 - the consultation period 5 or 10 working days,
 - the name and the telephone number of the case handler in charge of the file.
- (12) The cover note is addressed to the Director General of the consulted services and signed by the Director in charge p.o.² the Director General.

2.4. Distribution – how and when?

- (13) In DG Comp, ISC's on cases are currently dealt with by ad hoc rules, outside CIS-net, using a State aid network of correspondents and functional mailboxes.
- (14) ISC's on horizontal texts – frameworks, guidelines, regulations etc, must be transmitted via CIS-NET (If the document is protected with the marking COMP Operation , only the cover page is uploaded in Cis-net) and via e-Grefe when they are likely to be transmitted to the other EU institutions.
- (15) The secretariat of the unit in charge of the file is responsible for the distribution of the ISC.
- (16) The clock starts running from the day on which the consultation is effectively initiated provided the ISC has been sent out by 11.00 to State Aid Registry who should proceed with the Ares sending out before 12.00. The time limit is not determined by the date when the official cover note is signed, but by the date of effective dispatch.

2.5. Reply to a DG COMP ISC

- (17) The consulted DG's and services must respect the consultation period. Failing a reaction within the period, it is considered that the consulted service agrees to the proposal (tacit agreement). This rule applies to all DG's and services including Legal Service (LS). However, in practice the opinion of Legal Service should always be obtained.
- (18) The replies of the services consulted are recorded in the Record of agreement when adopted by oral procedure and in the e-Grefe application for empowerment (blue fiche) and for written procedure (pink fiche). The blue fiche and the pink fiche are generated automatically from the e-Grefe application by the Sec Gen Registry.
- (19) When the reply is "agreement, subject to comments/amendments", it must be recorded in the Record of agreement whether these amendments have been included or not. As regards the LS and if subject to comments it should be clearly indicated that they were taken into account or not.

² p.o. stands for "par ordre" meaning that the note is signed on behalf of

3. DG Comp replies to an ISC

3.1. Principles for allocation

- (20) The State aid Registry carries out all attributions as well as re-attributions.

Policy

- ISC on a policy text of a general and non sector specific nature is attributed to Directorate A.
- Sectoral policy initiatives are attributed to the sectoral units. An agreement of Directorate A and DDG operations is required.

Cases

- (21) The State Aid Registry allocates ISC related to to the competent unit. Other ISCs raising sectoral issues are attributed to the competent Directorate.
- (22) Whenever a Unit receives an ISC with potential relevance for DG COMP which was attributed to it erroneously, it should immediately ask the Registry to re-attribute it to the best suitable Unit.
- (23) Whenever a non-confidential ISC is received outside CIS-Net (for example via ARES) the recipient of this ISC should verify whether the ISC has also been received via CIS-Net (by making a search based on the number of the document or respective subject) and if this is the case to whom it was attributed. This procedure should avoid situations of duplication of work (assessment and reply to incoming ICSs) in case of ISCs received by DG COMP by different means and attributed to different Units.

3.2. The reply by COMP

- (24) Since DG COMP relies heavily on other DG's respecting the time limits for ISC's, it is important that COMP should also respect them. See 2.2 for inter-service consultation period. When it is envisaged that DG COMP will give a negative reply, a draft answer should be prepared early enough to allow the hierarchy time to consider the dossier (at least one full working day).
- (25) In case of very long documents, one can in principle ask for 5 extra days (though again, this should remain an exceptional request).
- (26) There are only three possible replies: "Agreement", "Favourable opinion subject to account being taken of the following comments" or "Unfavourable opinion". We do not give tacit approval by not replying. A negative opinion in reply to an ISC has to be signed by the Director General after approval of the Cabinet.

3.3. *Who signs what?*

Opinion		
Agreement		Head of Unit
Comments		Director
Unfavourable		Director General

All replies should be copied to the Cabinet.

SECTION 15 ORAL PROCEDURE

<u>Section 15</u>	<u>Oral procedure</u>	<u>1</u>
<u>1.</u>	<u>Introduction.....</u>	<u>2</u>
<u>2.</u>	<u>Preparation of the Commission's meeting.....</u>	<u>2</u>
<u>3.</u>	<u>The week(s) before Special Chefs meeting.....</u>	<u>3</u>
3.1.	Planning for adoption of a decision	3
3.2.	Inter service consultation (ISC).....	4
3.3.	Language requirements.....	5
3.3.1.	Request for translations	5
3.3.2.	Revision of final decisions by LS lawyer linguist.....	5
3.4.	Transmission of the complete file	6
3.5.	Formal requirements	7
3.6.	Distribution of files and document no.....	8
<u>4.</u>	<u>The same week as Special Chefs</u>	<u>8</u>
<u>5.</u>	<u>The week(s) after Special Chefs</u>	<u>9</u>

1. Introduction

- (1) Many state aid decisions are taken under the 'oral procedure'. Under this procedure a decision is taken by the college of Commissioners. The procedure is called 'oral' because in theory a case can be discussed during the weekly meeting of the Commission. In practice however, cases are rarely discussed by the Commissioners.
- (2) The Commission's Rules of Procedure of 24.2.2010 (C(2010)1200 final)¹ (hereinafter the 'Rules of Procedure') set out the various procedures for adopting Commission acts, how those decisions are prepared and implemented and how the departments supporting the Commission are to be organized (see section 1: introduction). The Rules giving effect to the Rules of Procedure of the Commission, also adopted on 24.2.2010 (C(2010)1200 final)(hereinafter the 'Rules giving effect') supplement the Rules of procedure and spell out in detail how the latter are to be applied in practice.
- (3) Explanations concerning the rules contained in those two basic documents, as well as useful information on their application in practice are accessible via the Manual of Operating Procedures on the Secretariat General's intranet site.
- (4) The procedure for State aid is set out in Council regulation (EC) No 659/1999 laying down detailed rules for the application of article 88 of the EC Treaty (referred to below as "the procedural regulation"). Some of its provisions were updated on entry into force of chapter II of regulation (EC) 794/2004 of 21 April 2004 and Commission regulation (EC) 271/2008 of 30 January 2008 amending regulation 794/2004.

2. Preparation of the Commission's meeting

- (5) Before any decision is taken other services are consulted on DG COMP's proposals. For it, an inter service consultation has to be launched in order to gather the agreement of the interested services. If after the ISC the services are not in agreement, such an agreement is normally sought in the preparatory or in the subsequent Special State Aid Heads of Cabinet meeting (hereafter Special Chefs meeting), see flowchart.
- (6) Before a decision reaches the Commission most cases are resolved in one of the following meetings (also see flow chart):
 - A **preparatory meeting, between services** –is organised and chaired by Secretariat General after the ISC has been completed and the draft decision has been sent with the services comments to the Sec Gen together with the agenda proposed by the Cabinet. This meeting takes place on Monday one week before the Commission meeting. The SG chairs the preparatory interservice meeting, which is attended by the LS and the services consulted via ISC. The cases on which all the associated services have given their agreement are entered as "A" points in the Agenda. If all cases are A-points there is no preparatory meeting. Should the DG's consulted not reach an agreement the case is entered as "B" point. The B-point cases are referred to the Thursday Special Chefs meeting or when the case is not considered "ripe" and when the legal deadline allows it may be postponed. The SG drafts a summary record of

preparatory interservice meetings, which is circulated, together with any amended version of the examined cases.

- The Special Chefs is a meeting **between all the Commissioners' cabinet staff** in charge of state aid, the Legal Service and the Secretariat General operational staff which takes place on a fortnightly basis, usually on **Thursdays**. The purpose of the meeting is to reach an agreement on the proposals from the services (DGs: Competition, Agriculture and Fisheries) concerning individual cases, schemes and horizontal text.
 - The outcome of Special Chefs meeting is then reported to the weekly meeting of Heads of Cabinet – the “hebdo” (the following Monday) and finally to the Commissioners themselves, at which point the decision is formally adopted (the following Tuesday/Wednesday).
- (7) On all agendas throughout the Commission a case or text is either an A or a B-point. A decision is an A-point when the services consulted have agreed to the proposal – an A-point is therefore not discussed. When a decision is a B-point either one or several services or cabinets do not agree or the topic has to be discussed for legal, policy or political reasons.
 - (8) Even when a case is an A-point following the ISC or the preparatory meeting, the Cabinets can still request until Wednesday noon (before the special Chefs ??) a case to be discussed in the Special Chefs. They are obliged to inform the Presidents cabinet and the Sec Gen and justify their request. If there are no B-point and no request from the Cabinets, the Special Chefs will be cancelled.
 - (9) COMP support unit prepares and co-ordinates the preparatory meetings and the special Chefs' meetings i.e. ensures that procedures are followed, drafts the agenda, supplies the Cabinet and Sec Gen with the complete files, liaise with the competent units, follow up on requested amendments to a text.
 - (10) You must inform COMP support unit if you plan to have any case(s) on the Special Chefs' agenda – normally this is done by updating ISIS/Chopin on every Friday by 15h the latest and the ISC has been started according to the dates distributed by COMP support unit. The first draft agenda is distributed Monday/Tuesday the week before the meeting and the Cabinet decides on the Friday the same week which cases stay on or are taken off the agenda. The cabinet must inform the President's cabinet and Secretariat General not later than 12.00 on Friday. All files are sent by COMP support unit to Secretariat General.
 - (11) For even more information you can also visit Secretariat General's intranet site..

3. The week(s) before Special Chefs meeting

3.1. Planning for adoption of a decision

- (12) Planning adoption of a decision starts with verifying the legal deadline. Quite a few of the decisions taken by oral procedure are on the agenda for the weekly meeting with the Commissioner. Once you have a date for this meeting you can start planning for the inter service consultation and adoption of the decision. The

Timetable for Special Chefs contains all the dates for the meetings and when the ISC has to be launched.

- (13) Apart from legal deadlines, you have the following Commission internal deadlines which must be respected, otherwise the case is likely to be postponed or taken off the agenda:
- date for sending out the case for inter service consultation (ISC) and date when the consultation must be finished (see 3.2).
 - translation of the letter to the Member State or of the final decision (see 3.3).
 - revision of a formal decision (closing 108(2) proceeding) by the lawyer linguist (see 3.3).
 - the complete file to COMP support unit/Secretariat General.
- (14) Make sure that the ISIS/Chopin contains correct information, notably as regards the date of adoption and that your case is on the “Special Chefs” agenda co-ordinated by COMP support unit .

3.2. Inter service consultation (ISC)

- (15) See Section Inter-service consultation section of the Manual of Procedure. The period for Inter-service consultation depends on the type of case and of decision:

Inter service consultation	
Type of case	Number of working days
Notified aid (N-case)	5
Not notified (NN-case)	10
Closing/extending an 108.2 (C-case)	10
Existing aid (E- case)	10
2 nd consultation all cases	5/10/15

- (16) In order to establish the date for launching the ISC, one must take into account that the ISC must expire not later than 18.00 the Thursday the week before the Special Chefs and you must check the timetable for Special Chefs.
- (17) A case is an A-point when the services consulted give their agreement to the DG COMP proposal and a B-point when one or several services disagree. The replies of the services consulted are recorded in the Record of Agreement, standard form. There are only three possible replies: Agreement, Favourable opinion subject to account being taken of the following comments or Unfavourable opinion.
- (18) When the reply is «agreement, subject to comments/amendments» it must be recorded in the Record of agreement whether these amendments have been included or not.
- (19) In the case of disagreement the note from the DG and DG COMP's reply must be

attached to the file. Normally, the DG COMP note is signed by the Director General. However, there are occasions when time is short and the Deputy-Director General will have to sign the note instead.

- (20) Failing a reaction from a service within the ISC-period we may consider it as an agreement to our proposal (accord tacite/silent agreement). This rule applies to all services including Legal Service. However, in practice the opinion of Legal Service should always be obtained (so if necessary do not hesitate to remind the case handler in LS) before the deadline expires. If the Legal Service fails to reply within the deadline, the case is a B-point. If the Legal Service replies favourably before the preparatory meeting on Monday by 12h, the case may become an A-point.

3.3. Language requirements

- (21) Language requirements for the meetings are as follows:

Document	Preparatory meeting and Special chefs	Commission meeting
No objections decision - Letter to MS	working language	authentic language(s)
Existing aid - proposal 108.1	working language	authentic language(s)
Letter to MS 108.2	working language	authentic language(s)
Final decision (closing 108.2)	working language	authentic language(s) revised by lawyer linguist*
108.2 meaningful summary	working language	working language
Fact sheet	working language	working language

3.3.1. Request for translations

- (22) The Commission adopts the letter to the Member State or the final decision in the authentic language. It must be transmitted to COMP Support Unit before 12.00 on Friday following the Special Chefs meeting.
- (23) It is therefore important that the request for translation is made when a case is sent for ISC and translation of the cartouche (if need be) and of the meaningful summary into the other languages. For any changes made during the ISC the case handler or case-secretary should contact the translator as soon as possible to inform it about the changes to be brought. Due to lack of time, the translation service may not be able to help you in time, which means that you have to do the translation of the changes yourself (with help of colleagues).

3.3.2. Revision of final decisions by LS lawyer linguist

- (24) A final decision (closing 108.2 proceedings) in the authentic language must be

revised by the lawyer linguist before it is adopted by the Commission. Otherwise the case will be postponed. The main purpose of revision is to ensure that the legal terminology is correct. The revised version must be transmitted to COMP Support Unit before 12.00 on Friday following the Special Chefs meeting.

- (25) If the revision is requested before the Special Chefs, it must be pointed out to the lawyer linguist and they should also be informed of any amendments after the Special Chefs meeting. Please indicate in the margin where the changes are (use tools Track Changes), do not underline or write in bold. If the decision is an A-point, the revised version can be sent already on the Friday the week before Special Chefs.
- (26) You should always submit the decision in the working language and the authentic language to the lawyer linguist. Depending on the authentic language, the decision in the working language is sometimes also revised and sent to DGT advising them that the working language can also be used as basis for the translations to the other languages.
- (27) Once the decision is adopted and confidential information has been deleted from the revised version in authentic language, you must request translations of the revised text into the other languages. These translations are not revised by the lawyer linguist.

3.4. Transmission of the complete file

- (28) On the Monday the week before the Special Chefs meeting, COMP Support Unit sends the first draft agenda for Special Chefs in the morning to the Cabinet and state aid staff, copy to the Assistants' office and SG AIDES D'ETAT. Any amendments should be reported to COMP Support Unit before 16h30. When you put a case on the agenda, make sure that the ISC period is respected.
- (29) When you have a case on the agenda and you go on holiday or mission the same week as Special Chefs meeting, a colleague or your head of unit must take over the case. The co-ordinator in COMP Support Unit must be informed of who takes over the case from you. Even when the case is an A-point there could still be issues raised by cabinets. Should it become a B-point due to these issues, the Cabinet members in charge of State aid issues will need a briefing for the Special Chefs meeting and the presence of the services is requested at the meeting.
- (30) By Friday 10.00 the week before the Special Chefs meeting, the complete file must be e-mailed to COMP Support Unit also informs the cabinet of which cases are A/B-points on the agenda.
- (31) By Friday 12.00 following the Special Chefs meeting, the letter to the MS/final decision in the authentic language(s) must be transmitted to COMP Support Unit in a separate attachment (not included as a document in the complete file). Note that if the case is a B-point, it is no use to send the letter/decision before the preparatory meeting. If the letter/decision is sent after Friday, it should be transmitted directly to the Sec Gen mailbox "SG Aides d'Etat".

3.5. Formal requirements

- (32) A number of standard forms are provided by the Sec Gen to be used to prepare the file:

Type of decision
<p>N and NN - no objections</p> <p>Fiche d'accord – disagreement/suspended opinion, attach note</p> <p>Memorandum/Communication of the Commissioner to the Commission</p> <p>The Letter to MS in En/Fr addressed to the Minister for Foreign Affairs</p> <p>Fact sheet/Cartouche</p>
<p>E, N and NN cases - open procedure 108(2)</p> <p>Fiche d'accord – disagreement/suspended opinion attach note</p> <p>Communication of the Commissioner to the Commission</p> <p>The letter to the MS, in French/English, addressed to the Minister for Foreign Affairs</p> <p>Notice for the publication in the OJ – C series (summary and letter)</p>
<p>C-case, final decision, closing of 108(2) procedure</p> <p>Fiche d'accord – disagreement/suspended opinion attach note</p> <p>Communication of the commissioner to the Commission</p> <p>Final decision in French/English</p>
<p>Closure of a formal investigation procedure after initiating 108(2) proceedings following withdrawal of the notification¹</p> <p>Notice for publication in OJ – C series</p>

- (33) For E cases, proposal of appropriate measures 108(1), it is suggested to adapt the forms used for N and NN cases.
- (34) For Letters to MS (no objections decisions and opening decisions), introduce the European Commission header and footer in the working language and mention "Brussels, " in the working language for the date and "C(YEAR)" for the reference. The ending of the letter in the working language should mention "For the Commission" and the name of the Commissioner together with "Vice-President of the Commission".
- (35) The name and address of the Minister for Foreign Affairs should be introduced in the footer of the first page of the draft letter in the authentic language(s).

¹ Such an can be adopted by empowerment in accordance with Commission's decision of 19 June 2002 (COM PV (2002)1572).

- (36) Sec Gen will complete after adoption the date and the reference.

3.6. Distribution of files and document no.

- (37) Sec Gen distributes all files to the cabinets and services on Friday afternoon. This is the official document and a specific document number is attributed – C (YEAR) 000. Any amendments to the text, requested by other services or cabinets, results in an amended document number - C (YEAR) 000/2.
- (38) Sec Gen transmits all documents, before and after meetings, to the State aid Greffe. 03 receives all files, minutes and agendas and transmits these to every units.

4. The same week as Special Chefs

- (39) On Monday, the Preparatory meeting between services, chaired by Sec Gen is normally at 14h30. The case handler and HoU/director must be present. Only B-points are discussed. Cases where an agreement is reached become A-points. Cases where an agreement is not reached are referred to the Special Chefs meeting. Sec Gen distributes minutes from the preparatory meeting to the services and the cabinets.
- (40) On Tuesday by 12.00, where applicable, the new text with amendments agreed upon in the preparatory meeting should be e-mailed to the members of COMP cabinet in charge, copy to 03 and to the Director General's assistant. After the approval by cabinet, the new text should be e-mailed to mailbox: SG Aides d'Etat. Only the document(s) of the file which have been modified should be sent, highlighting changes (use Tools track changes).
- (41) On Wednesday, Sec Gen distributes the final agenda to the cabinets and the services – provided there are B-points (cases where an agreement was not reached in the preparatory meeting) and/or cases evoked by cabinets.
- (42) The Special Chefs meeting takes place on Thursday (every two weeks) and usually starts at 10h. The case handler or replacement must be present when his/her case is a B-point. The other cabinets, the Chairperson or Legal Service can ask for **amendments** to the letter to the MS/the final decision before giving their approval (**revised version 1, 2 etc. are referred to as "barre 2, 3 etc"**). The amended text should be e-mailed to mailbox SG Aides d'Etat after the agreement of the COMP cabinet.
- (43) Any cabinet can enter a reservation (waiting/scrutiny/examination) which normally means that they will discuss the case with their Chef de cabinet or Commissioner. When a cabinet enters a reservation the case becomes/remains a B-point for the Heads of Cabinet meeting "hebdo" meeting. If there are no reservations, the case is now an A-point. If not already done, send the final decision for revision to mailbox: SJ lawyer linguists.
- (44) On Friday by 12.00, if the letter to the Member State/decision in the authentic language is not already included in the complete file, it should be e-mailed directly to Sec Gen's mailbox: SG Aides d'Etat. E-mail the final decision revised by the lawyer

linguist to Sec Gen's mailbox: SG Aides d'Etat.

5. The week(s) after Special Chefs

- (45) On the Monday "hebdo" Chefs de Cabinet meeting, the other cabinets, the Chairman or Legal Service can ask for amendments to the text (barre 2,3 etc) before giving their approval or withdraw their reservation. The deadline is at 12.00 the day before the Commission meeting.
- (46) The Commission meets on Tuesdays or Wednesdays. The procès-verbal (PV) and the Sec Gen's Liste récapitulative, from the meeting are sent by COMP Support unit by e-mail on the following day to State aid staff.
- (47) Press releases are published on website:
http://europa.eu/press_room/index_en.htm.
- (48) The adoption of a decision is also published in the State Aid Weekly e-News which is distributed every Friday. If you are not already a subscriber you should contact unit H-3.
- (49) The non confidential version of "no objections" decisions are published in following website (See Section on Publication):
<http://ec.europa.eu/competition/elojade/isef/index.cfm>
- (50) This address is integrated in the clauses of confidentiality in the no objections decisions and in the cartouches.

SECTION 16 WRITTEN PROCEDURE

<u>Section 16</u>	<u>Written procedure</u>	<u>1</u>
<u>1.</u>	<u>Overview.....</u>	<u>2</u>
<u>2.</u>	<u>Steps</u>	<u>3</u>
2.1.	Language requirements.....	3
2.2.	ISC	3
2.3.	Preparing the file	3
2.4.	Comments and reservations made by the cabinets.....	3
2.5.	Extension of the deadline	4
2.6.	Suspension	4
2.7.	Termination.....	4
2.8.	Adoption	5

1. Overview

- (1) The Commission's Rules of Procedure (article 12) which came into effect on 1 January 2006, and its [implementing rules](#) specify the applicable rules. Explanations concerning the rules contained in those two basic documents, as well as useful information on their application in practice are accessible on the Secretariat General's intranet site.
- (2) Written procedure is a means whereby the Commission can adopt decisions on matters which do not require discussions at its weekly meeting but cannot be dealt with by delegation of powers. The initial purpose of the procedure is to relieve the Commission of the need to discuss measures which are not of major political significance. However, in the context of the recent financial crisis, this type of procedure has been extensively used to ensure a swift adoption of decisions.
- (3) Written procedure is used for the following types of decisions:
 - Corrigendum of a text, a letter to a Member State (MS), a decision already adopted by the Commission through oral or written procedure;
 - non-controversial horizontal texts, such as reports;
 - decisions on certain cases where the Commission must react to meet a specific deadline or deal with an extremely serious situation.
- (4) This procedure is also used for decisions on state aid files during holiday periods (August and Christmas) - when there are no Commission meetings. However, whereas business continuity for written procedures is ensured during the summer period, the temporary interruption of the work of the College in the end of year period brings about a modification to the handling of written procedures. Taking into account the inherent obstacles of this period regarding the respect of the collegiality principle, no written procedures are in principle adopted during this period of the year, except in exceptional circumstances and in agreement with the President. Before the end of the year period, an official note to Directors General is prepared in due time by Sec Gen regarding the practical modalities for the handling of the decision-making procedures.
- (5) There are three types of written procedure:
 - The time limit for ordinary (normal) written procedures is 5 working days after distribution of the text to the Members of the Commission.
 - The time limit for expedited (accelerated) procedure is 3 working days after distribution of the text to the Members. It must be demonstrated that a shorter time is needed owing to unforeseen and exceptional circumstances. The procedure may not be used as means of catching up on administrative delay. This procedure is subject to prior agreement from the President's cabinet.
 - The purpose of urgent procedure is to enable urgent measures to be adopted quickly. The rules governing its initiation are the same as those for accelerated procedure, but it has two distinguishing features: the time limit may be less than 3 working days

after distribution of the text and an acknowledgement must be obtained from the Chefs de cabinet if the time limit is less than 24 hours. This procedure is subject to prior agreement from the President's cabinet.

2. Steps

2.1. Language requirements

- (6) As regards the adoption of reports, the communication of the Commissioner to the Commission and the text of the report itself are in the three working languages: English, French and German. For the report the other languages should be transmitted to Sec Gen as soon as possible.
- (7) There is an exception regarding the language requirements for the adoption of State aid decisions: only the letter to the Member State or decision in one of the working languages and in the authentic language¹ are necessary, the communication of the Commissioner must be drafted in French or English.
- (8) Always request the translation of the text when it is sent for ISC.

2.2. ISC

- (9) A written procedure is initiated by the Secretariat General, at the request of one or more Members of the Commission, to obtain the Commission's agreement to a proposal on a matter within their area of responsibility. Prior agreement from the President's cabinet must be sought for accelerated and urgent procedures.
- (10) Prior agreement of the associated services is required before the formal adoption through written procedure can be launched. The normal rules for inter service consultations apply. The services consulted must give their agreement within the ISC-period. Failing a reaction we are obliged to consider it as an agreement to the proposal - tacit (silent) agreement – except for Legal Service.

2.3. Preparing the file

- (11) The file for adoption should be prepared in the e-Greffe application. The "fiche de suivi" (pink fiche) is signed by the Director p.o the Director General after the ISC.
- (12) The Sec Gen ensures the follow-up of the adoption procedure through the e-Greffe application.

2.4. Comments and reservations made by the cabinets

- (13) Until the time limit expires, the Members of the Commission may make comments or reservations. These should be addressed to Sec Gen in writing before the prescribed deadline.
- (14) If comments or reservations are made:

¹ On the question of official languages, see Section Introduction.

- the text may be amended with the agreement of the Member of the Commission responsible for the proposal – or
 - the time limit may be extended – or
 - the procedure may be temporarily suspended – or
 - the procedure may be terminated and the matter placed on the agenda of a Commission meeting (oral procedure).
- (15) SG informs the Members of the Commission and the services concerned if any of the above steps have been taken and why.

2.5. Extension of the deadline

- (16) The time limit set for expiry of the written procedure may be extended if, for instance:
- a Member of the Commission wishes to amend the text – or
 - distribution of the text has been delayed because of practical difficulties – or
 - some formal defect has been found during the course of the procedure which makes it impossible to approve the measure – or
 - some legal requirements essential to the adoption of the measure have not been satisfied.

2.6. Suspension

- (17) A written procedure is suspended until further notice on presentation by a Member of the Commission of a reasoned application in writing. This is circulated to the other Members.
- (18) It may also be suspended if some legal requirements essential to adoption of the measure has not been satisfied.
- (19) If the Member withdraws the application, or if the reason for suspension ceases to be valid, the written procedure is re-opened and a new time limit (at least 2 working days) is set.

2.7. Termination

- (20) A written procedure is terminated:
- If the Member withdraws his/her proposal.
 - If a Member requests that the matter be discussed at a Commission meeting.
- (21) The rules to give effect to the Commission's Rules of Procedure stipulate that:
- If the procedure remains suspended, or if the requested extension of the time limit is considered undesirable, the Member(s) responsible for the proposal may have the matter placed on the agenda of the next Commission meeting.

- In the case of accelerated or urgent procedures, any Member of the Commission who opposes the proposed measure may request that a special meeting of the Commission be convened at short notice to discuss the matter.

2.8. Adoption

- (22) After the complete file reaches Sec Gen a decision will normally be adopted after 1-2 working days (+ consultation period of 3 or 5 working days) provided there are no comments or reservations from Members.
- (23) The draft measure submitted to the Commission (the cabinets of the Commissioners) is deemed to be adopted if, by the stated deadline, no Member of the Commission has made reservations or any request for the matter to be put on the Commission agenda.
- (24) Certain written procedures may be drawn to the attention of the weekly meeting of the Chefs de cabinet by the Sec Gen either at its own initiative or at the request of the office of the Member responsible.
- (25) The decisions adopted each day are recorded in a memorandum which is referred to in the minutes of the next Commission meeting. This “final” memorandum is available on SG Vista.

SECTION 17 EMPOWERMENT

<u>Section 17</u>	<u>Empowerment</u>	<u>1</u>
<u>1.</u>	<u>Overview</u>	<u>2</u>
<u>2.</u>	<u>Scope</u>	<u>2</u>
2.1.	Legal basis	2
2.2.	Typical application of the empowerment procedure	4
2.3.	Withdrawal of a notification by the MS	5
2.4.	When/how to ask for a specific empowerment?	6
<u>3.</u>	<u>Steps</u>	<u>6</u>
3.1.	Inter service consultation (ISC)	6
3.2.	Formal adoption	6

1. Overview

- (1) The Commission's Rules of Procedure (article 13) which came into effect on 1 January 2006, and its [implementing rules](#) specify the applicable rules. Explanations concerning the rules contained in those two basic documents, as well as useful information on their application in practice are accessible via the Manual of Operating Procedures on the Secretariat General's intranet site.
- (2) Empowerment is where the Commission decides, on the basis of an existing mandate, to give one or more of its Members the authority to act on its behalf and under its responsibility within clearly defined limits. The aim of the empowerment procedure is to relieve the full Commission of the need to take decisions in areas which are not politically sensitive and where there is limited room for discretion. For this reason, the empowerment procedure is usually quicker and easier to use than the alternative procedures.
- (3) Once adopted, a decision under the empowerment procedure has the same legal status and effect as any other Commission decision. There is no hierarchy of norms between these and other types of Commission decision.
- (4) Empowerment can be used only when the Commission has previously specifically empowered ("habilitated") the Commissioner responsible to take decisions in its name. If such an empowerment decision is not available, then the decision must be taken either by the written or the oral procedure.
- (5) The Court of Justice has ruled that the Commission is bound to respect its own rules of procedure. Misuse of the empowerment procedure will make a decision liable to annulment on that ground alone. The documents accompanying the draft decision must always identify the previous Commission decision which provides the legal basis for the exercise of the empowerment.
- (6) In-house, the empowerment procedure is frequently referred to as the "habilitation" procedure and sometimes "delegation of powers". Habilitation is, of course, the French term for empowerment. Delegation of powers is however not a synonym for empowerment. Empowerment is where the full Commission confers powers on one of its Members, delegation is where the full Commission confers powers on a Director-General or Head of Service in technical matters where the room for discretion is very limited.

2. Scope

2.1. Legal basis

- (7) The empowerment procedure can only be used:
 - when the Commission has previously specifically empowered the Commissioner responsible to take decisions in its name.

- when there is a prior agreement of associated DG's and the Legal Service before the empowerment procedure is launched.
- (8) If a service withholds its agreement and a solution cannot be found, the decision must be adopted by oral procedure.
- (9) Article 13 provides that the Commission may, provided that the principle of collegiate responsibility is fully respected, empower one or more of its Members to take management or administrative measures on its behalf subject to such restrictions and conditions it may impose. The Commission may also instruct one or more of its Members, in agreement with the President, to adopt the definitive text of any instrument, the substance of which has already been determined in discussion.
- (10) In fact, there are two types of empowerment:
- general empowerment allow a Commissioner to adopt certain types of decisions concerning non-controversial and routine cases on a continuing basis.;
 - specific or ad hoc empowerments which allow the Commissioner to adopt a single decision and expire once they are exercised. For example, the Commission may decide to adopt a legislative proposal in principle in three languages and empower the Commissioner responsible to adopt the formal proposal in all the other languages when the translations are complete.
- (11) The Commissioner (in charge) takes the decision on behalf and in the name of the Commission. According to the Commission decision of 27 July 1977 (PV 440)¹, as last amended on 16 December 1981 (PV 630), and pursuant to the Rules of procedures of the Commission, Art. 13, can be subject to empowerment:
- Decisions not to raise objections to notified aid which is manifestly compatible “de toute évidence compatible” with Article 107 TFEU (Article 13(1) and 4(3) of Regulation 659/1999). This would normally also comprise decisions not to raise objections under the simplified procedure provided for by Article 4 of Regulation 794/2004, and point 30 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2).
 - Decisions to consider that planned measures do not fall in the scope of Article 107(1) TFEU.
- (12) This has been widened in accordance with the Commission's decision of 19 June 2002 (COM PV (2002)1572)²:
- decisions not to raise objections to not notified aid which is manifestly compatible “de toute évidence compatible” with Article 107 TFEU (Article 13(1) and 4(3) of Regulation 659/1999).

¹ PV : 440 modifié par 442, 481, 539, 564, 630, décision d'octroi : SEC(77)2746et /2; SEC(78)2886; SEC(79)1928; SEC(80)891; SEC(81)2003

² SEC(2002) 664

- information injunctions (Article 10 (3) of Regulation 659/1999).
 - on site inspections (Article 22(6) of Regulation 659/1999).
 - closure of a formal investigation procedure after initiating 108(2) proceedings following withdrawal of the notification (Article 8(2) of Regulation 659/1999).
- (13) An empowerment also exists for rejecting requests to consider that certain information in the initiation of the formal investigation procedure or in the final decision is covered by the obligation of professional secrecy. (COM PV(2004)1652, of 30.3.2004)³
- (14) "Ad hoc" empowerment: "Ad hoc powers may be conferred by empowerment on the Members responsible for the purposes of:
- taking the final decision on the basis of the Commission's deliberations (implementing powers);
 - finalising instruments which have been submitted to the Commission for approval, in the light of its deliberations (finalising powers);
 - taking a specific measure."
- (15) There is a general empowerment with a view to the adoption of decisions not to object to aid measures that will be regarded as existing aid from the date of accession under the procedure provided for in Annex IV, Chapter 2, paragraph 1(c) (under Article 16 of the Treaty of accession of Croatia to the European Union, PV: 1998, décision d'octroi : C(2012)2498, date de la décision : 18.04.2012.

2.2. Typical application of the empowerment procedure

- (16) The procedure empowers the competition Commissioner to adopt certain types of decisions, but does not require the Commissioner to do so. It is always possible to ask for a decision to be taken by oral procedure. In particular, the conditions of the empowerment require the Commissioner to consult the President in order to decide whether a decision of the college is required due to the importance of the case or its political implications.
- (17) In the past, DG COMP has adopted a rather cautious approach to the use of empowerment, so that a number of decisions which currently meet the formal criteria for the empowerment are adopted by oral procedure. Thus for example, subject to occasional exceptions necessary to meet deadlines falling in vacation periods, practically all decisions on individual research and development aid and restructuring cases, multi-sectoral framework cases and sensitive sector cases are in fact adopted by oral procedure, even if there is no doubt about their compatibility

³ SEC(2004) 335

with the Treaty.

- (18) In the case of decisions not to raise objections, the aid concerned must be 'manifestly' ("de toute évidence") compatible, it should always be preferred choice in routine cases. Factors such as the size of the budget, the number of potential beneficiaries or the wide range of eligible expenses should not prevent the use of the empowerment procedure where the aid is manifestly compatible.
- (19) In cases where an individual aid or an aid scheme clearly meets the conditions laid down by a Regulation or in a framework or guidelines, and provided the facts are clear, there can be no real doubt that the aid is manifestly compatible, and the empowerment can be used. In principle, this applies irrespective of the Regulation or soft law text concerned and irrespective of the nature or amount of aid.
- (20) From time to time, however, cases occur which involve novel interpretations of the provisions of Regulations or guidelines, or their application by analogy to situations which were not foreseen at the time the text was drafted. In such cases, it would seem appropriate to use the oral procedure to obtain confirmation from the Commission of the interpretation proposed. However, once the Commission has endorsed that interpretation, there would appear to be no reason why the empowerment should not be used in subsequent cases.
- (21) Where the legal basis for approval of the aid is the Treaty itself, this means that the Commission has not yet codified its decisional practice into a secondary text such as a framework. In such cases it would appear necessary to assess whether there is a sufficiently clear and constant Commission decisional practice to make it possible to consider that the aid is manifestly compatible. For example, it is clear that the Commission accepts that aid to make good physical losses caused by a major earthquake is manifestly compatible with Article 107(2)b, and in such cases the empowerment could properly be used, notwithstanding the absence of any guidelines concerning the application of Article 107(2)b. One benchmark is the existence of three previous Commission decisions finding similar aid measures to be compatible with Article 107.

2.3. Withdrawal of a notification by the MS

- (22) A Member State can withdraw its notification at any time before, during and after a formal investigation procedure (Article 8 of Regulation 659/99). If the formal procedure has been opened, the Commission closes the formal investigation procedure since it has become without object. It is however, still necessary to adopt a decision which has to take the form of a motivated decision with articles, in the official language of the Member State. The decision is adopted by empowerment. In addition, regardless of whether or not the 108(2) opening decision has been published, a standard notice is always published in the Official Journal.

2.4. When/how to ask for a specific empowerment?

- (23) A specific empowerment is useful when a procedure consists of several routine stages as it avoids the need to return to the full Commission through the oral procedure at each stage of the process.

For example, if the Commission considers that an existing aid is incompatible with the common market it must first propose appropriate measures to the Member State concerned. If the Member State does not accept the appropriate measures, the Commission must then open the procedure. Since the proposal for appropriate measures⁴ must in any case be approved by the Commission, the proposal could be accompanied by a request for an empowerment, empowering the Commissioner either to accept the reply from the Member State, or, if no satisfactory reply is received, to open the formal investigation procedure. This is done by including the request for the ad hoc empowerment in the Communication to the Commission.

3. Steps

3.1. Inter service consultation (ISC)

- (24) As already noted above, the empowerment procedure can only be launched when there is a prior agreement of associated DG's and of the Legal Service. If a service withholds its agreement and a solution cannot be found, the decision must be adopted by oral procedure.
- (25) The draft decision should be sent for inter-service consultation to DGs to be consulted (depending on the nature of the case). The choice of procedure should be indicated in the cover note. The normal rules for inter service consultations apply. The DG's consulted must give their agreement within the ISC-period. Failing a reaction (no reply) has to be regarded as an agreement to our proposal (tacit agreement).
- (26) The translation of the Letter to Member State into the authentic language(s) must be requested when the case is sent for ISC. The translation might have to be corrected depending on the outcome of the ISC.

3.2. Formal adoption

- (27) The file for adoption should be prepared in the e-Greffe application. The "fiche d'auto-certification" (blue fiche) is signed by the Director after the ISC. Since the entry into force of e-Greffe, it does not need to be printed on blue paper any longer. The file (the signataire with a signed paper copy) is brought to the COMP cabinet by the unit responsible.
- (28) The adoption of a file by empowerment can only be guaranteed on the same day if

⁴ Article 18 of Regulation 659/1999

the file arrives at Sec Gen (approved by Cabinet and if needed by Cabinet of the President) before 16.00. Exceptions on this rule have to be agreed with the Sec Gen well in advance and be approved by the Assistant of COMP's Director general.

- (29) The decision is adopted when the empowered Commissioner has signed and it takes effect when the Member State has been notified. The Sec Gen ensures the follow-up of the adoption procedure through the e-Greffe application. The Sec Gen registers and assigns an empowerment number to the file and sends the letter to the Member State. A copy of the notified letter to the Member State together with the Permanent Representation's acknowledgement of receipt of which copies are sent to COMP's State Aid Registry.
- (30) Although a decision adopted by empowerment is not on the Commission agenda, it is recorded in the procès-verbal (PV) of the Commission meeting with a reference to the Summary list of Sec Gen. This list is available on SG Vista. In the PV it reads "The Commission takes note...". In case of a corrigendum a reference must be made to the decision that is being corrected.

SECTION 18 CORRIGENDUM

<u>Section 18</u>	<u>Corrigendum.....</u>	<u>1</u>
<u>1.</u>	<u>Foreword.....</u>	<u>1</u>
<u>2.</u>	<u>ISC?.....</u>	<u>1</u>
<u>3.</u>	<u>Which procedure? General rule</u>	<u>1</u>
<u>4.</u>	<u>Exception 1: Clerical mistakes</u>	<u>2</u>
<u>5.</u>	<u>Exception 2: Translation mistakes.....</u>	<u>2</u>
<u>6.</u>	<u>Other</u>	<u>3</u>

1. Foreword

- (1) In principle, once a decision has been adopted by the Commission no amendments can be made to the text without a corrigendum which means that a new decision for the amended text has to be prepared and adopted by the Commission (or Commissioner). The corrigendum corrects the previous decision.

2. ISC?

- (2) The corrigendum should be the subject of an ISC. The LS and SG have to be consulted as well as all other DGs concerned by the corrigendum itself (so not necessarily the same DGs that were consulted on the original decision).
- (3) Only SG and Legal Service are consulted for corrigendum on material/clerical errors. For substantive errors, the ISC-period is the same as for the original text and it is common practice to consult again the services initially consulted.

3. Which procedure? General rule

- (4) There needs to be a parallelism of the procedure:
 - A corrigendum should be introduced via a written procedure if the original decision has been adopted by written procedure or oral procedure.
 - A corrigendum should be introduced by empowerment procedure if the original decision was adopted by empowerment procedure. The corrigendum is signed by the Commissioner in charge.
- (5) This means that when the special empowerment procedure is used to adopt the original decision then the corrigendum should also use this empowerment. If the original decision was adopted through urgent written procedure, then the corrigendum needs to be adopted through written procedure as well (depending on the urgency of the corrigendum the urgent written procedure could be used).
- (6) If necessary, the SG might be consulted regarding the choice of procedure.

4. Exception 1: Clerical mistakes

- (7) The corrigendum can be adopted using the empowerment to Catherine Day PV 438 (SEC(1977) 2532/1). A member of the COMP cabinet initials the letter and forwards it to SG. The Secretary General signs the letter to the Member State.
- (8) What is a clerical mistake: an evident mistake such as: faute d'orthographe, de frappe, d'impression, erreur de calcul, blanc dans le texte, texte n'ayant pas de sens. It is important that the mistake has to be evident from the language version that needs to be corrected. So, if for example, translation mistakes are made which are only visible when you compare the two different linguistic versions are not covered by the empowerment decision.
- (9) It is irrelevant whether or not the decision has been published.

5. Exception 2: Translation mistakes

- (10) The corrigendum can be adopted using the empowerment SEC (20085) 2397. Note that the initial decision must have been adopted by the Commission and not by the Commissioner in charge of competition under an empowerment procedure. In the latter case, The Director general of DGT cannot sign for the corrigendum; it must be done by the Commissioner who signed the adoption of the original act.
- (11) The following information must be sent to the functional mailbox DGT-TELLUS in order for DGT, which is Chef de file on these matters, to proceed with the corrigendum:
 - Notification of the mistake (either the letter from the MS who noticed the mistake or an explanatory e-mail);

- Type of the adoption procedure: written/oral/empowerment;
- Number of the procedure;
- Cote;
- Date of adoption;
- Publication in the OJ;
- Original language;
- Number of the translation request (Poetry).

6. Other

- (12) Minor clerical errors such as citing incorrect § or calculation error which does not effect the result, misspelling - may be corrected in the publication by using an asterisk indicating clerical errors and “Should read...”

SECTION 19 ADOPTION OF LEGISLATION

Section 19 Adoption of legislation	1
<u>1.</u> <u>Introduction.....</u>	<u>2</u>
<u>2.</u> <u>Commission proposals to the Council</u>	<u>2</u>
<u>3.</u> <u>Commission regulations, decisions and directives</u>	<u>3</u>
<u>4.</u> <u>Frameworks and guidelines.....</u>	<u>5</u>
<u>5.</u> <u>Reports, scoreboards, etc</u>	<u>6</u>
<u>6.</u> <u>Formal adoption.....</u>	<u>7</u>
6.1. Language requirements.....	7
6.2. Formal requirements	7
6.3. Inter service consultation (ISC)	8
6.4. Planning the adoption.....	9
6.4.1. Option 1: adoption of a legislative act by oral procedure only	9
6.4.2. Option 2: adoption of a legislative act by oral procedure followed by empowerment	9
6.4.3. Adopting a report.....	10
6.5. Meetings	10

1. Introduction

- (1) This chapter summarises the key procedures for the adoption of State aid legislation, reports and other policy documents.
- (2) For guidance on the drafting of legislation see A Commission Manual on LEGISLATIVE DRAFTING:
- (3) <http://www.cc.cec/sj/jurrev/rtl/en.pdf>
- (4) and the Joint Practical Guide for the drafting of Community legislation¹:
- (5) <http://www.cc.cec/sj/jurrev/gpc/en.pdf>
- (6) A Horizontal Task (HT) project should be created in ISIS for all documents relating to the adoption of a new legislation.

2. Commission proposals to the Council

- (7) In accordance with Article 109 TFEU, 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 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.
- (8) This provision constitutes the legal basis for the State aid procedural regulation ([Regulation \(EC\) 659/1999](#)) and for the enabling regulation which empowers the Commission to adopt block exemptions ([Regulation \(EC\) 994/1998](#)). An amendment to the Council Regulation would be necessary to extend the range of aids which the Commission could exempt under that regulation.
- (9) In addition Article 107(3)(e) of the TFEU provides that such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission may be considered compatible with the common market. This constitutes the legal basis of the Council Decision on State aid to facilitate the closure of uncompetitive coal mines, adopted on 10.12.2010 (Official Journal L 336, 21.12.2010, p. 24-29).
- (10) The key steps leading up to the Commission proposal are:
 - conception and drafting;
 - COMP internal consultation. Sufficient time should be foreseen to enable those concerned to make their comments. If necessary, a meeting must be organised.

¹ Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions

- discussion with the Commissioner;
 - inter service consultation (10 working days, 15 if the proposal exceeds 20 pages). In case of a proposal for a modification of the procedural or enabling regulation there may be further steps. For example, it is possible that a wider consultation of interested parties takes place, or that even a green/white paper precedes the process.
 - adoption of the proposal by the Commission (usually by oral procedure).
- (11) It is to be noted that as well as the proposal itself, an explanatory memorandum is always required. An impact assessment may also be necessary (for further info, see http://ec.europa.eu/governance/impact/index_en.htm). For a proposal for a modification of the enabling regulation, an impact assessment is in principle not necessary, since that regulation only provides the legal basis for future block exemptions. The impact can only be assessed at the stage of drafting the (Commission) block exemption regulation.

3. Commission regulations, decisions and directives

- (12) Article 106(3) TFEU confers on the Commission an autonomous power to adopt directives and decisions for implementing Articles 106(1) and (2).
- (13) In addition, the Commission benefits from a delegation of power from the Council to adopt block exemption regulations as well as certain implementing provisions for the procedural regulation (see Article 27 of Council Regulation (EC) No 659/1999 of 22 March 1999,). These powers are subject to consultation of the advisory Committee for State aid.
- (14) The ‘committology’ rules do not apply to these procedures and to the consultation of the advisory committee. Nevertheless, as a matter of policy, the Commission always informs the Economic and Monetary Affairs Committee of Parliament to get its view before adopting new block exemption regulations or exercising its powers under Article 106(3).
- (15) The precise modalities for doing this should be discussed with the Parliamentary liaison Officer in CPI, the cabinet and the State aid policy unit should also be informed.
- (16) The Advisory Committee is composed of representatives of the Member States. A preliminary draft text by the Commission is submitted to and discussed with the Advisory Committee. For matters pursuant to Article 27 of the procedural regulation (implementing provisions), the Committee is consulted once. For exemption regulations a double consultation is required (see Art.8 of Council Regulation (EC) No 994/98 of 7 May 1998). Members of ESA and EFTA are also invited to meetings.
- (17) NB: In principle, consultation of the advisory committee requires translations of the draft into all Community languages.
- (18) The full procedure for exemption regulations is as follows (for the implementing regulation, the steps in italics do not apply because there is only 1 consultation of the Advisory Committee:

- (1) It is good practice to start the procedure with a public consultation on a questionnaire. While the standard time for consultation is 12 weeks, a shorter period might be possible if the project implies several public consultations, one of which is open for 12 weeks. For consultations *on questionnaires*, CPI should be informed and they will inform the ECON secretariat at service level. The web team should be contacted 2 weeks before the launch of *any* publication.
- (2) Preparation of a draft for consultation of relevant internal directions/units.
- (3) Approval by the Commissioner (further discussions with the Commissioner may also be necessary at later stages of the procedure).
- (4) 1st inter-service consultation (10 working days unless the length of the document requires a longer consultation). It is to be noted that the text does not have to go through the college at this stage. The cabinet may decide to hold an informal session at cabinet level. However, in case of negative opinion(s) by other DG(s), an agreement will have to be sought with SG and the DG concerned in order to be allowed to proceed with the next step (consult the Advisory Committee).
- (5) The preparation for Advisory Committee implies:
 - The translation into all community languages. It is recommended to have a revision by the legal revisers of the original working language version before the translation into all languages.
 - The transmission of the draft to the Member States with a 2-month notice. This notice can be shortened in case of urgency or of prolongation of existing Regulations.
 - The invitation to the meeting.
 - The information of/invitation for comments from the Economic and Monetary Affairs Committee of the Parliament also takes place at this stage.
 - It is good practice to publish the draft on DG COMP's website for consultation in all languages.
- (6) Consultation of the experts of Member States at the Advisory Committee must in principle take place no less than 2 months after that the Member States have received the draft.
- (7) *2nd inter-service consultation following the Advisory Committee and/or written comments from the Member States, as well as comments from the public consultation.*

Adoption of a draft by the College in all languages for publication in the Official Journal for comments. Interested parties have 1 month after the OJ publication to submit their comments. At the same time preparation for the 2nd consultation of the Advisory Committee (as step (5)).

- (8) Review and finalisation of the draft.

- (9) Final inter-service consultation
- (10) Fortnightly meeting on State aid of Heads of Cabinet Heads of Cabinet (Thursday morning).
- (11) Review of all the language versions by the lawyer linguists.
- (12) Final adoption by the Commission.
- (13) Publication in the Official Journal, L-series.
- (14) Entry into force in principle on the 20th day following the publication.

4. Frameworks and guidelines

- (19) The basic procedures are similar to those for legislation. Note that consultation of Member States must always be envisaged. Note however the difference between the procedure for regulations and the procedure for frameworks. For regulations, the Commission consults the representatives of Member States at an advisory committee meeting. For frameworks, the services of DG COMP consult experts from Member States at a multilateral meeting.
- (20) It is also good practice to place drafts on the internet for comments from interested parties (While the standard time for consultation is 12 weeks, a shorter timeframe might be possible if the project implies several public consultations, one of which is open for 12 weeks.)
- (21) The full procedure is as follows:
 - (1) It is good practice to start the procedure with a public consultation on a questionnaire. While the standard time for consultation is 12 weeks, a shorter period might be possible if the project implies several public consultations, one of which is open for 12 weeks. For consultations *on questionnaires*, CPI should be informed and they will inform the ECON secretariat at service level. The web team should be contacted 2 weeks before the launch of *any* publication.
 - (2) Preparation of a draft for consultation of relevant internal directions/units.
 - (3) Approval by the Commissioner.
 - (4) 1st inter-service consultation. Note the text does not have to go through the college at this stage, but will be sent to the Member States as a staff paper of DG COMP. The cabinet may decide to hold an informal session at cabinet level.
 - (5) Preparation for consulting the Member States:
 - translation of the text into the official languages;
 - transmission of draft to the Member States minimum 1 month in advance;
 - cover letter containing invitation to the multilateral meeting.

- (6) Once the documents have been transmitted to Member States it is good practice to place them on the DG COMP web site for comments by interested parties, allowing a reasonable time-frame for comment (While the standard time for consultation is 12 weeks, a shorter period might be possible if the project implies several public consultations, one of which is open for 12 weeks.) A disclaimer should always make it clear that these are working documents of DG COMP and do not represent an official position of the Commission. The EP has to be informed about all public consultations *on a draft text* by a letter from the Commissioner to the chair of the ECON committee to be sent on the day the consultation is launched (for details contact CPI). The web team should be contacted 2 weeks before the launch of *any* publication.
- (7) Consultation of the experts of Member States at a multi-lateral meeting which is always held in Brussels. Observers from EFTA and ESA should be invited to the meeting.
- (8) 2nd inter-service consultation – on the amended text following the multi-lateral meeting.
- (9) Fortnightly meeting on State aid of Heads of Cabinet Heads of Cabinet (Thursday morning).
- (10) Discussion by the Heads of Cabinet (hebdo).
- (11) Review of all the language versions by the lawyer linguists. An alternative is to adopt the text “in principle subject to revision by the lawyer linguists”.
- (12) Adoption by the Commission. Or as referred to in point (27) adopt, in principle, the attached draft guidelines, and empower the Commissioner in charge of competition to finalise the text, after revision by the Legal revisers, in the official languages and decide to publish the guidelines in the Official Journal of the European Union. Note that in the case of such an empowerment, no changes should be made to the text, except grammatical or linguistic corrections.
- (13) Publication in the Official Journal, C-series.
- (14) Entry into force on the date of publication or as specified in the text.
- (22) As necessary, each of these steps can be repeated. Thus important comments from associated services or Member States may be referred to the Commissioner for a decision. A second multilateral may be organised in sensitive cases.

5. Reports, scoreboards, etc

- (23) Normally after preparation of a draft, and agreement by the Commissioner, a single inter service consultation is followed directly by the special meeting of the Heads of Cabinet and adoption by the Commission.

6. Formal adoption

6.1. Language requirements

- (24) In order to be formally adopted, horizontal documents intended for all Member States must be available in all Community languages.
- (25) Normally oral procedure is used. On the rare occasions where a translation into all Community languages is available and there are no outstanding reserves from the services, a written procedure can be envisaged.
- (26) In order to avoid a delay in the adoption of a decision, a double adoption procedure is sometimes used:
- the Commission adopts the decision in principle in three working languages (EN/FR/DE), and
 - empowers the Commissioner responsible to definitively adopt the final decision on its behalf in all Community languages.
- (27) In the case of reports, etc, consideration can also be given to using a working document of the services of the Commission, instead of an official Commission document, in which case only three language versions are required.
- (28) Languages requirements for documents for the meetings:

Document	Special Chefs	Commission meeting
Reports	EN, FR, D	EN, FR and D
Guidelines	EN, FR, D	All languages; revised by lawyer linguist ²
Proposal for a Council Regulation	EN, FR, D	EN, FR, D
Commission Directive and Regulation	EN, FR, D	All languages; revised by lawyer linguist

- (29) For the Communication of the Commissioner to the Commission : only FR, DE and EN are required.

6.2. Formal requirements

- (30) For the formal adoption of all horizontal files of DG COMP (legislative acts going to the Council and Commission guidelines and frameworks), e-greffe ³ is used.
- (31) The use of Legiswrite format is compulsory for all horizontal texts. Hence, the format of the text must be compliant with Legiswrite; otherwise DGT will refuse to

² Whereas the linguistic revision is recommended, it is not obligatory.

³ The request is automatically generated by the e-greffe application.

translate the texts.

- (32) Revision of legislative acts by the lawyer linguists, in all community languages, is not compulsory. The main purpose of revision is to ensure that the legal terminology is correct. The request must be performed through e-greffe⁴. The deadline depends on the date foreseen for the adoption.
- (33) Legislative acts are published in the Official Journal the L-series.
- (34) You can also visit Secretariat Generals website:
<http://www.cc.cec/home/dgserv/sg/procdec/index.cfm?lang=fr>

6.3. Inter service consultation (ISC)

- (35) ISCs on legislative acts and reports must be transmitted via CIS-NET. CIS-net is the only entry point for all documents relating to the ISC. Originals must be kept by the service launching the ISC.

Inter service consultation periods	
Document	Number of working days
Reports	10
Guidelines, directives, regulations, communications	10 or 15, depending on the length of the document

- (36) The formal rule for horizontal papers exceeding 20 pages (excluding annexes) is 15 working days, although it is not always applied.
- (37) In any case, the ISC must expire not later than 12.00 the Thursday the week before the special State aid Chefs.
- (38) E-mail copy to:
- The cabinet
 - SG - Mailbox: SG Aides d'Etat
 - Support unit
- (39) Failing a reaction from a service within the ISC-period we may consider it as an agreement to the proposal (accord tacite/silent agreement). This rule applies to all services including Legal Service. However, in practice the opinion of Legal Service should always be obtained before the deadline expires.
- (40) A text/report is an A-point when the services consulted give their agreement to the DG COMP proposal and a B-point when one or several services disagree. The replies of the services consulted are recorded in the [Record of Agreement standard form](#).
- (41) When the reply is «comments», it must be recorded in the Record of agreement

⁴ On the identification page of the file in e-greffe, check "Révision juridique nécessaire".

whether these comments have been included or not.

6.4. Planning the adoption

- (42) A horizontal text can be adopted in different ways. Legislative acts (regulations, directives, guidelines and communications) are usually adopted by oral procedure. Reports of a non-controversial character can also be adopted by written procedure. Before deciding on which of the option described below you should contact the Support unit.
- (43) Two or three months before adoption, the Head of Unit in charge should send an e-mail a request is sent to the President's cabinet for the inscription in the agenda planning system.
- (44) In order to request the insertion of items into the "liste des points prévus" (LPP), a political memo (1 page) has to be drafted by the Cabinet for all horizontal files. It should be noted that the Cabinet may ask DG COMP's assistance to prepare a first draft of the memo. The memo should explain the political rational of an initiative and highlight its key political messages. It has to be sent to SG by Tuesday cob the week before the meeting of Heads of Cabinet (Hebdo, normally Monday afternoon).

6.4.1. Option 1: adoption of a legislative act by oral procedure only

- (45) A pre-requisite for this option is that all language versions have been revised by the lawyer linguist in time for the Commission meeting the week after Chefs.

How to proceed

- (46) The formal deadline for submitting a horizontal text to SG is 48 hours before the fortnightly meeting on State aid of Heads of Cabinet which would normally be Tuesday morning not later than 10.00. Provided that the consultation period has expired and the documents are finalized, the procedure below should be followed:
 - Fill in the fiche and upload the document in e-Greffe. When it is ready, send the file through e-greffe to the legislative coordinator who will submit the file for adoption.
 - Fill in ISIS accordingly (Chopin core data).

6.4.2. Option 2: adoption of a legislative act by oral procedure followed by empowerment

- (47) If the translations are not ready on time and/or have not been revised by the lawyer linguist, the Commission adopts the texts "in principle" in English, French and German before the revision and empowers the Commissioner in charge to formally adopt the revised texts in all languages. This only remains a possibility though; for politically sensitive texts, it cannot be the rule.
- (48) In the Communication of from the Commissioner to the Commission it should read as follows :

Proposal to the Commission

It is proposed that the Commission:

- approve in principle the attached [name document] and empower to [Name of the Commissioner] to formally adopt this [document] in the all the authentic language versions of the Community.
 - inform the Member States and interested parties by means of publication in the Official Journal of the European Communities
 - inform the EFTA Surveillance Authority by means of the normal procedure.
- (49) The PV of the Commission meeting in question is the legal basis for this type of empowerment.

How to proceed

- (50) Same steps as for “oral procedure only” – except for the last point:
- After the adoption “in principle”, the blue fiche should be prepared in e-greffé and the –revised text in all languages attached – do not attach anything else.
 - The blue fiche and the texts should be generated by the Sec Gen for signature by the Commissioner.
- (51) See also Section on Empowerment.

6.4.3. Adopting a report

- (52) Steps:
- Prepare the file in e-Greffé. The file should contain: record of agreement, communication of the Commissioner, the report in one of the working languages; English or French. The text in English/French and German must be uploaded 12.00 Wednesday, the day before the fortnightly meeting on State aid of Heads of Cabinet (Thursday morning).
 - Non controversial reports can also be adopted by **written procedure**.

6.5. Meetings

- (53) Legislative acts are normally not discussed in the Monday preparatory meeting between services but discussed directly in the bi-monthly special Heads of Cabinet meeting. You must inform the support unit of your plans to have a horizontal text/report on the agenda. The first DG COMP draft agenda is distributed Monday/Tuesday the week before the Special Heads of Cabinet meeting. The Cabinet decides on the Friday the same week whether it stays on or is taken off the agenda. The cabinet must inform the President's cabinet and Secretariat General not later than 12.00.
- (54) The special Chefs is normally held on Thursdays. It takes place in the morning and usually starts at 9.30. The case handler or replacement must be present when her/his text is discussed. The other cabinets, the Chairman or Legal Service can ask for amendments to the text before giving their agreement. E-mail the amended text to mailbox SG Aides d'Etat (after the approval of the cabinet). Any cabinet can enter a reservation (waiting/scrutiny/examination) which means that they will discuss the

case with their Chef de cabinet or Commissioner. When a cabinet enters a reservation the case becomes/remains a B-point for the weekly meeting of Heads of Cabinet “hebdo”. If there are no reservations the point becomes an A-point.

- (55) Occasionally separate meetings, outside the normal timetable, are held to discuss a legislative act. For a meeting held outside the normal timetable a request must be made by COMP cabinet to the president's cabinet. For more information see Section on formal adoption by oral procedure.
- (56) Reports are not always discussed in the fortnightly meeting on State aid of Heads of Cabinet .
- (57) In the Monday Chefs de Cabinet meeting “hebdo” the other cabinets, the Chairman or Legal Service can ask for amendments to the text before giving their approval or withdraw their reservation or enter a reservation. In the case of the latter or when a reservation is not withdrawn, the text will be discussed in the Commission meeting.
- (58) The Commission meets on Tuesdays/Wednesdays. The procès-verbal (PV), and the SG Liste récapitulative, from the meeting are sent by the support unit by e-mail the following day to the case handlers concerned.

SECTION 20 LITIGATION

Section 20	Litigation	1
1.	Overview of the EU Court system	3
1.1.	EU Courts.....	3
1.2.	Main types of legal actions.....	3
1.2.1.	Action for annulment (Article 263 TFEU / ex-article 230) ("recours en annulation")	3
1.2.2.	Preliminary ruling request (Article 267 TFEU – ex-article 234) ("question préjudicielle")	4
1.2.3.	Failure to act (Article 265 TFEU – ex-article 232) ("recours en carence").....	4
1.2.4.	Damage claims (Article 268 TFEU – ex-article 235) ("action en dommages et intérêts")	4
1.2.5.	Appeals (Article 256 TFEU – ex-article 225) ("pourvoi").....	4
1.2.6.	Interventions	4
1.2.7.	Interim measures ("référé")	5
1.2.8.	Article 108(2) TFEU.....	5
1.3.	Basic elements of EU Court procedures	5
1.3.1.	Language	5
1.3.2.	Chambers	5
1.3.3.	Procedure	5
1.3.3.1.	Written procedure	6
1.3.3.2.	Oral procedure	6
1.3.4.	Outcome.....	7
1.3.5.	Deadlines.....	7
2.	Internal procedure within the Commission in case of litigation	8
2.1.	Features common to all types of legal actions.....	8
2.1.1.	Relations with LS	8
2.1.2.	ISIS	8
2.1.3.	Preparation of DG COMP's contribution	9
2.1.4.	Confidentiality issues.....	9

2.2.	Specific remarks applicable to some types of legal actions	9
2.2.1.	Appeals before the CJ against judgments of the General Court	10
2.2.1.1.	Note to the Commissioner on a proposal to appeal or not to appeal.....	10
2.2.1.2.	Meeting with the Commissioner and follow-up.....	11
2.2.2.	Failure to act (Article 265 TFEU – ex-article 232)	11
2.2.2.1.	Formal request to act	12
2.2.2.2.	Application for Failure to act before the Court.....	14

1. Overview of the EU Court system

- (1) The present section gives an overview (on purpose, in non technical and non legal terms!) of the EU judicial system. More information can be found at [Curia site](#).

1.1. EU Courts

- (2) The Court of Justice of the European Union is one of the European institutions. It is based in Luxembourg. It is now composed of three different courts: the Court of Justice ("CJ") (this wording therefore refers to both the European institution as a whole and to one of the Courts of that institution!), the General Court (previously called European Court of First Instance) and the European Civil Service Tribunal. In relation to COMP activities, only the first two are relevant.
- (3) To keep it simple, for State Aid activities, the General Court is generally competent. Judgments of the General Court can be appealed before the CJ.
- (4) The General Court and the CJ are composed of a similar number of judges (i.e. one per Member State). The CJ also includes a few Advocates General, that do not decide on the case (only the judges do), but provide the Court with their opinion of the case and the solution in law that, in their view, should be applied; Opinions of Advocates General are made public. The General Court does not have permanent Advocates General but may appoint one in a given case of particular complexity, although it has not used that possibility for years.

1.2. Main types of legal actions

- (5) The Treaty on the Functioning of the European Union (TFEU) provides for a number of possible legal actions before the European Courts. The following paragraphs give an idea of the most relevant ones in relation to a State Aid case (once again, in voluntarily non technical terms).

1.2.1. Action for annulment (Article 263 TFEU / ex-article 230) ("recours en annulation")

- (6) This is by far the most frequent type of appeals. In such a case, an applicant is asking the General Court to annul an act of the EU institutions (in general either because of a procedural irregularity or because of an incorrect assessment of the substance of the case). For DG COMP's State Aid activities, this can be for instance the Member State or the aid beneficiary in case of a negative decision challenging the validity of that decision; or a complainant asking for the annulment of a Commission decision authorising aid.¹ On average, in the area of State Aid, there

¹ All State Aid decisions pursuant to Art. 4 and 7 of Reg 659/1999 can be subject to an action for annulment. Note that letters to complainants should only contain a preliminary assessment and not a definite position, otherwise they risk to be qualified by the Courts as constituting a decision and therefore a challengeable act (ECJ, C-521/06 P, ECR 2008, I-5829 – *Athinaiki Techniki/Commission*).

are around 30-50 new actions for annulment every year (sometimes several actions against the same decision).

1.2.2. Preliminary ruling request (Article 267 TFEU – ex-article 234) ("question préjudicielle")

- (7) National courts frequently deal with questions involving EU law. They may then face difficult questions of interpretation of the relevant EU law or even have doubts as to the validity of that legislation. In order to have a uniform interpretation of EU law all over Europe, the Treaty allows national courts to raise such questions to the CJ. Such requests by a national court to the CJ are the "preliminary ruling requests". With regard to COMP activities, this may be for instance a question on the interpretation of a Block Exemption Regulation. On average, in the State Aid area, there are around 5 preliminary ruling requests every year.

1.2.3. Failure to act (Article 265 TFEU – ex-article 232) ("recours en carence")

- (8) By such an action, the applicant blames an EU institution for not having adopted a decision. For COMP activities, this may for instance be the case where a complainant finds that the Commission does not act on its complaint. Such actions are rare in relation to COMP activities (and should be avoided!).

1.2.4. Damage claims (Article 268 TFEU – ex-article 235) ("action en dommages et intérêts")

- (9) The applicant requests the Court to find that it has suffered damage as a result of an illegal action of an EU institution and therefore asks the Court to allocate damages. In relation to COMP activities, this can only be exceptional.

1.2.5. Appeals (Article 256 TFEU – ex-article 225) ("pourvoi")

- (10) Judgments of the General Court can in turn be appealed before the CJ by the party that was unsuccessful, in whole or in part, before the General Court. The Commission may be the applicant if it has been unsuccessful before the General Court.
- (11) Such appeals are limited to questions of law (the CJ does not decide on the facts of the case again). A significant number of General Court judgments in the competition field are appealed before the CJ every year.

1.2.6. Interventions

- (12) This is not a distinct legal action in itself. With such a procedure, a party having an interest in a pending case can intervene in the case in support of the applicant or the defendant. For example, in a State Aid case, another Member State than the Member State concerned may want to intervene, either in support of the Commission or in support of the Member State concerned. The intervention must first be authorized by the Court.

1.2.7. Interim measures ("référé")

- (13) This is not a distinct legal action in itself. An applicant can only ask for interim measures in parallel to its main appeal. For instance, with regard to DG COMP's State Aid activities, an applicant can introduce an action for annulment of a recovery decision (main appeal) and, in parallel, ask the Court to suspend the recovery order while the main appeal is pending. The reason for such an interim measure request is that the main appeal as such does not suspend the effects of the Commission's decision (so the Member State has to recover the aid even if it brings an action for annulment before the Court).

1.2.8. Article 108(2) TFEU

- (14) This is not a distinct legal action in itself. Article 23(1) of the Procedural Regulation provides that, where the Member State concerned does not comply with a recovery decision, the Commission may refer the matter directly to the Court of Justice of the EU in accordance with Article 108(2) TFEU. (see section on Recovery). In this case the Commission has the role of the applicant (not defendant as in other State aid cases).

1.3. Basic elements of EU Court procedures

- (15) The Court procedures are managed by the Legal Service, whose agents represent the Commission. Therefore, the following paragraphs only provide very general information that can be of interest for COMP case-teams.

1.3.1. Language

- (16) The language of the Court case is the EU official language in which the application before the Court is written. The Commission must respond to the application in that language. Subsequently, the LS normally provides the Court with a translation of the defence and the rejoinder into French. The LS handles the translation request but COMP might be asked to review the translation.

1.3.2. Chambers

- (17) Although it is legally possible that a judgment is delivered by the full Court (the 27 judges), it has become exceptional in practice. Both the General Court and the CJ generally decide cases in Chambers, composed of a more limited number of judges (frequently 3 or 5). Before the General Court, State Aid cases are commonly decided by a 3-judge Chamber. One of the judges is appointed "*judge rapporteur*" by the Chamber (she/he will be mainly responsible for the case, notably for the drafting of the Report for the Hearing – see below – or the judgment).
- (18) Interim measures are in principle decided by the President of the relevant Court.

1.3.3. Procedure

- (19) The procedure before the General Court and the CJ is written and (possibly) oral.

1.3.3.1. Written procedure

- (20) The written procedure is by far the most important part.
- (21) In direct legal actions (action for annulment, damage claim, failure to act), the written procedure includes a number of successive written pleadings ("*mémoires*"):
 - Application ("*requête*"): starting point of the procedure, the application is the basis of the legal action;
 - Defence ("*défense*"): Commission's reply to the application (prepared and sent by the LS with the assistance of DG COMP)
 - Reply ("*réplique*"): applicant's reply to the Commission's arguments
 - Rejoinder ("*duplique*"): Commission's final reply to the applicant.
- (22) It is to be noted however that the General Court and the CJ try to limit the number of written pleadings (and therefore the volume and length of the procedure). For instance, in appeal cases before the CJ, there is normally only one round of written pleadings (so no reply and no rejoinder, unless decided otherwise by the Court). Similarly, the General Court has created an expedited or "fast track procedure" for cases that need to be decided in a speedy way (for COMP activities, this may be the case for mergers)²; one feature of this expedited procedure is that there will normally be only one round of written pleadings.
- (23) If a party intervenes in the case, it will lodge a "*mémoire en intervention*", to which the applicant and the defendant will be able to reply.
- (24) In indirect legal actions (preliminary ruling request), the starting point of the case (and accordingly of the written procedure) is the request of the national Court itself. All parties to the national court case are asked by the CJ to deliver a ruling. In addition all EU institutions and Member States receive a copy of the preliminary ruling request and can send written contributions to the CJ. The Commission always sends a contribution to the CJ (so notably in State Aid cases).

1.3.3.2. Oral procedure

- (25) The second part of the procedure before the General Court and CJ is the oral procedure, which takes the form of an oral hearing. A few weeks before the hearing, the General Court provides the parties with a so-called "Report for the Hearing" (please note that the CJ does not provide any Report for the hearing any more); this Report, drafted by the *Judge Rapporteur*, is a summary of the parties' arguments. As the case may be, the Court may also send written questions to the parties, to be replied in writing in advance of the Hearing or orally at the Hearing. During the Hearing, each party presents oral pleadings before the relevant Court (a time slot – 15 to 30 minutes in general – is allocated in advance by the Court to

2 Article 76a of the Rules of Procedure of the Court of First Instance (CFI). Note that the rules of procedure for the General Court are still those of the Court of First Instance.

each party); parties may then be asked a series of questions by the judges (frequent and often very detailed before the General Court, rather rare before the CJ).

1.3.4. Outcome

- (26) The normal outcome of a Court case is the delivery of a judgment after the written and oral procedure.
- (27) In particular situations, the outcome may however take the form of a so-called "order" ("*ordonnance*"), adopted without an oral procedure. There are a variety of possible orders that put an end to a case, such as: orders by which the Court finds that the legal action is inadmissible; orders by which the Court takes note of the withdrawal of the legal action; orders by which the Court finds that there is no more reason to decide on the substance of the case, etc. Note that the Court may also adopt different sorts of orders during the lifetime of the case, orders by which the Court decides on incidental issues (such orders do not put an end to the case): orders by which the Court accepts the intervention of a third party; orders dealing with confidentiality issues; orders deciding on an interim measure request, etc.

1.3.5. Deadlines

- (28) Deadlines to lodge a legal action (including, for instance, rules on the starting point of such deadlines), are governed by the TFEU, the Statute of the Court of Justice, the Rules of procedure of the CJ and those of the General Court. Such deadlines are mandatory and any late application will be inadmissible. It is not the purpose of this Manual of Procedures to describe those rules (whether an application is late or not is a question for the LS to assess), especially since the Commission is almost always a defendant.
- (29) A situation where the Commission may be an applicant is an appeal before the CJ against a judgment of the General Court. Such an appeal must be lodged within two months³ of the notification of the General Court judgment/order to the Commission (that date should be checked with the LS – it may be a few days after the date of the judgment), plus ten days on account of distance⁴. Special rules apply when the deadline ends on a holiday or a week-end (deadline extended to the end of the first following working day). All in all, in practice, this means that an appeal must be lodged before the Court, on average, 2 ½ to 3 months after the date of the judgment.
- (30) Deadlines during the Court procedure are governed by the Statute of the Court of Justice, the Rules of Procedure of the CJ and those of the General Court. Most of them are at the discretion of the Courts themselves (for instance: deadline for the Commission to lodge its defence or its rejoinder), which gives the possibility to the Commission (via the LS) to ask for extension. It must be noted however that, in order to speed up the Court process, the General Court has become more reluctant

3 Article 56 of the Statute of the CJ of the EU

4 Article 81(2) of the Rules of Procedure of the CJ and Article 102(2) of the Rules of procedure of the CFI

to grant extensions. In addition, some deadlines are fixed in the relevant rules and cannot be extended. This is the case before the CJ in preliminary ruling cases (the deadline to lodge observations on the request of the national court is two months, running from the date of notification to the parties)⁵ or in appeals against judgments of the General Court (the deadline to reply to such an appeal is two months and cannot be extended)⁶.

- (31) The overall duration of a Court case varies depending on the nature of the legal action, the volume of the pleadings, the number of parties, etc. On average, one can say that preliminary ruling cases are decided within 18 to 30 months; actions for annulment/failure to act/damages are decided generally within 24 to 36 months, sometimes even longer.

2. Internal procedure within the Commission in case of litigation

2.1. Features common to all types of legal actions

2.1.1. Relations with LS

- (32) For all Court cases, the Legal Service represents the Commission. It is therefore the responsibility of the LS to draft the various written pleadings in a case and to notify them to the Court, to present the oral arguments of the Commission at the hearing or to reply to the questions of the Courts.
- (33) Since this empowerment is to be exercised with the assistance of the relevant DG, the LS sends every document they receive from the Court to DG COMP (more precisely: to the Director General, copy to the case-team and to Directorate A) and asks for comments, within a deadline that they set. DG COMP sends written contributions to the LS and must dedicate significant efforts and time in such contributions (it is COMP's duty to provide as good an input as possible to the LS to defend its own decisions). Within DG COMP, the main responsibility for following the court case and providing the input to the LS lies in principle with the original unit and preferably the original case-team, if still available. Whenever issues concerning the recovery of aid are at stake, the Recovery unit in DG COMP should also be involved. Furthermore, each **court case is also followed by a member of the DG COMP's Court Cellule who is** available for support and advice and should be consulted on any contribution to the LS.
- (34) The LS also sends its draft written pleadings to DG COMP, for comments, before notifying them to the Court.

2.1.2. SIS

- (35) As soon as it receives the text of the application from the LS, the case-team should inform the State Aid Registry who will create a new case with a "CC" number, that

5 Article 23 of the Statute of the Court of Justice

6 Article 115 of the Rules of Procedure of the Court of Justice

will be linked to the decision concerned. The case-team should fill in the *ISIS* database with the appropriate information.

- (36) Similarly, if an appeal is lodged before the CJ against the judgment/order of the General Court, or if LS asks for our comments on a request for a preliminary ruling, case-teams should inform the State Aid Registry.
- (37) Subsequent documents (contributions of COMP to the LS, written pleadings sent to the Court, Report for the Hearing, etc) must also be introduced in *ISIS* by the State Aid Registry at the request of the case-team.

2.1.3. Preparation of DG COMP's contribution

- (38) Since the original case-team obviously has the best possible knowledge of the case which is the subject of an appeal, it belongs to that team to prepare a draft contribution for the LS, within the deadline set by the LS (if extensions are necessary, the case-team should get in touch with the LS as soon as possible, notably to check whether an extension can also be asked to the Court). Directorate A is available for any information or question the case-team may have in the preparation of that contribution.
- (39) The Court Cellule should be consulted on the draft contribution before it is sent to the LS. Where a specific case raises horizontal issues that are directly relevant for competition policy as a whole (this may be the case in preliminary ruling requests), Directorate A/the Court Cellule may take the lead and draft the contribution to the LS, in close cooperation with the relevant sectoral Unit.
- (40) The Court Cellule and the Assistant of the Director-general should also receive a copy of the final contribution sent to the LS.

2.1.4. Confidentiality issues

- (41) The Defence and the Rejoinder will be made available as such to the Applicant. Hence, it is important to check that these, including the annexes, do not contain any business secrets or other confidential information that should not be disclosed to the Applicant.
- (42) Where a third party intervenes, the Court will ask the Commission and the Applicant to identify any confidential information vis-à-vis the intervening party. If need be, the Commission must prepare a non-confidential version and justify the non-disclosure of every element suppressed. A non-confidential version (vis-à-vis the intervening party) of all submissions subsequent to the intervention should be submitted.

2.2. Specific remarks applicable to some types of legal actions

- (43) The two most frequent types of legal actions before the Court that are relevant for COMP State Aid activities (action for annulment and preliminary ruling case) are governed by the common features described above [see points (32) to (40)]. Two more specific types of actions however deserve some particular attention, since they imply additional internal steps: the appeals against judgments of the General Court and failure to act actions.

2.2.1. Appeals before the CJ against judgments of the General Court

- (44) If the Commission is unsuccessful before the General Court (for instance, the General Court annuls a decision, or considers that the Commission failed to act in a given case, or finds that the Commission is liable for the harm suffered by an undertaking), the Commission must decide whether to appeal or not that judgment.
- (45) As explained above [see point (29)], the appeal will have to be lodged 2 ½ to 3 months after the date of the judgment (the exact deadline for appeal should be checked with LS). A decision to appeal or not should therefore be taken as quickly as possible, in order to leave sufficient time for the drafting of the appeal itself.
- (46) The decision to appeal is adopted by the College, on request of the LS or, if the LS disagrees with the proposal to appeal, at the request of the relevant DG. The decision to appeal should not be confused with the appeal itself. The decision is the necessary preliminary step, by which the Commission accepts the principle of an appeal. The appeal itself is the written pleading sent by the LS (on behalf of the Commission) to the CJ, which contains a full description of the Commission's arguments and grounds for appeal to the Court.
- (47) The paragraphs below set out an internal procedure for deciding whether to appeal or not an adverse judgment / order of the General Court.

2.2.1.1. Note to the Commissioner on a proposal to appeal or not to appeal

- (48) After a negative judgment / order of the General Court, the relevant Unit of DG COMP (in association with Directorate A and the Court Cellule where general policy concerns are involved) should prepare a note to the Commissioner, containing:
 - A clear indication of the deadline for appeal;
 - A brief background on the case;
 - A summary of the key relevant points of the judgment and their possible consequences on competition policy in general;
 - A proposal to appeal or not to appeal the judgment.
- (49) Deadline: a draft note should normally be ready 15 days after the date of the judgment.
- (50) It is recommended to also get in touch with the LS to see what their views are on the judgment / order and, as the case may be, on possible grounds for an appeal. This may help reinforcing the note to the Commissioner. If necessary, a meeting between the case team, Directorate A, DDG State Aid, the Court Cellule and the LS can be organized. Where appropriate the draft note can be discussed in the State Aid Management Meeting.
- (51) The LS will express its views on the judgment and on a possible appeal during the meeting before the Commissioner. They may also prepare a written note in advance of the meeting.

2.2.1.2. Meeting with the Commissioner and follow-up

- (52) This meeting should take place at the latest 4 weeks after the date of the judgment. If necessary, an ad hoc meeting with the Commissioner may be asked.
- (53) ***If the Commissioner and the LS agree with COMP's proposal not to appeal***, the case is closed as far as court litigation is concerned (except if another party appeals). However, in order to implement the Court judgment it will often be necessary to adopt a new decision which will replace the annulled decision. In principle, the annulment brings the case back to the stage before the contested decision. For example, in the case of a final decision this would be the formal investigation procedure. While it is possible that a new final decision can immediately be taken, it will often be necessary to first extend the opening decision in order to give third parties the right to comment on the issues concerned by the annulment. The new decision should normally be drafted by the same unit as the original decision, and preferably the same case-team. Where recovery issues are concerned, involvement of DG COMP's Recovery unit should be ensured.
- (54) ***If the Commissioner and the LS agree with COMP's proposal to appeal***, the follow-up will include two distinct steps:
- one is to obtain a decision to appeal by the College (this notably implies an InterService Consultation of the relevant DGs). This procedure is of the responsibility of the LS only, which will have to prepare the file for adoption;
 - the preparation of the appeal itself. To that end, COMP will provide the LS with a contribution on possible grounds for the appeal. The LS will then draft the appeal, which they will submit for comments to COMP before notification to the CJ (the notification to the CJ is the responsibility of the LS).
- (55) ***If the Commissioner agrees with COMP's proposal to appeal, but the LS disagrees***, the follow-up will include two distinct steps:
- one is to obtain a decision to appeal by the College (this notably implies an InterService Consultation of the relevant DGs). This procedure is of the responsibility of DG COMP, which will have to prepare the file for adoption; to that end, contact should be taken with the President's Cabinet;
 - the preparation of the appeal itself. To that end, COMP will provide the LS with a contribution on possible grounds for the appeal. The LS will then draft the appeal, which they will submit for comments to COMP before notification to the CJ (the notification to the CJ is the responsibility of the LS). Since, in such a scenario, the LS was against the appeal, DG COMP has an interest in providing the LS with the best and most finalized contribution as possible!

2.2.2. Failure to act (Article 265 TFEU – ex-article 232)

- (56) A failure to act action can only be validly brought before the Court if the applicant has first followed a pre-litigation procedure. This pre-litigation procedure is therefore the last possibility for the Commission to remedy its failure (if there is indeed one) and to avoid an action before the Court. Since it is obviously in the

interest of the Commission to avoid Court litigation, it is important to understand how and when the pre-litigation procedure starts and what the case-team should do from that moment on.

2.2.2.1. Formal request to act

- (57) A party can only bring a failure to act action before the Court if it has first sent a formal request to act to the Commission (Article 265(2) TFEU), which opens a two-months deadline during which the Commission is invited to put an end to the alleged failure.

1. What constitutes a formal request to act?

- (58) A formal request to act within the meaning of Article 265 TFEU must:
- be sufficiently explicit and precise to enable the Commission to know the nature of the act which it is being asked to take, and
 - make understood that the invitation is intended to compel the Commission to take a position.⁷
- (59) We typically receive formal requests to act in the context of complaints. The responsibility for identifying a formal request to act lies on the relevant Unit.
- (60) In many cases it will be clear that a letter does constitute a formal request to act (for example, a letter expressly referring to Article 265 TFEU and threatening an action for failure to act if no position is taken within 2 months). However, there are also borderline cases (for example, complainants who request that action be taken on their complaint and suggest vaguely that they will take further steps in the absence of any action). In case of doubt, advice should urgently be sought from the Court Cellule and the Recovery unit. If necessary, the complainant should without delay be asked to clarify its request.

2. What action can put an end to the failure to act?

- (61) Assuming that there is indeed a failure to act⁸, the act ending the failure to act must normally be a formal act defining the Commission's position.
- (62) With regard to State aid complaints, it should be noted that a letter setting out the preliminary views of DG COMP services will not be sufficient to end the failure to act, since it does not constitute a formal act defining the Commission's position. A formal decision pursuant to Article 4 of Regulation 659/1999 will normally be required, even if it is considered that the complaint is unfounded (on the handling of complaints in general, see the Section on Complaint in the State Aid Manual of Procedures).

7 Case C-249/99 *Pescados Congelados v. Commission* [1999] ECR I-8333

8 Case T-127/98, *UPS Europe / Commission*, ECR [1999] p. II-2633, points 34 to 41

- (63) The case-team should therefore react to the complainant in one of the following ways :
- (a) Provided the investigation is completed or should reasonably have been completed) the decision pursuant to Article 4 of Regulation 659/1999 should be sent to the complainant (i.e. a non confidential version of the decision); or
 - (b) If the complainant is ready to allow some additional delay, or if it can be justified that the investigation is still ongoing, a letter explaining the steps taken by the Commission and showing that the Commission has not been inactive might be sufficient to convince the complainant not to go to Court⁹. However, if such a letter is considered appropriate, all further necessary actions (e.g. an opening of the procedure) should be prepared in parallel and without delay.
- (64) If the complainant continues correspondence with the Commission after the formal request for the Commission to act, then the Commission is entitled to regard the formal request to act as having been withdrawn. The Commission should then write to the complainant informing it of this.

3. Checklist of immediate steps

- (65) Once a letter is identified as a formal request to act and the action that will remedy the failure has been identified, the case-handler/case-team should, as soon as possible and in any event within 3 days of receipt of the letter:
- (a) **Inform the Legal Service and Secretariat-General** including a **timetable** on the steps envisaged to remedy the alleged failure;
 - (b) **Acknowledge receipt of the letter.** In accordance with the Code of Good Administrative Conduct, the acknowledgement of receipt should identify the Head of Unit and her/his telephone number, and should indicate a date by which the addressee can expect to be sent a reply. The date indicated should normally be the date of expiry of the 2-month period; the precise nature of the act that it is envisaged to take should normally not be identified (so as not to raise expectations that would be let down if we change position in the course of the 2-month period).

9 Legally speaking, such a letter does not put an end to the failure to act (see Case T-95/96, *Gestevisión Telecinco / Commission*, [1998] ECR p. II-3407, point 88: "A letter from an institution called upon to act under Article 175 of the Treaty stating that the questions raised are being examined does not in fact amount to the defining of a position such as to release it from its duty to act"). But such a letter can be enough to convince the complainant that the Commission has (and is still) actively dealing with the case, so that he does not need to go to Court. (judgments in *Snapat v High Authority*, cited above, and Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 25)

2.2.2.2. Application for Failure to act before the Court

- (66) If no act has been adopted within the deadline, the applicant can immediately bring a case before the Court. If it does so, the general procedure describes above will apply [see points (32) to (40)].
- (67) If the Commission acts after the applicant has brought the case before the Court but before the Court decides on substance, the Court will close the case since there will be no reason to decide anymore on the failure; the Court's practice is however that the Commission will have to pay for the applicant's lawyers' fees.

European Commission

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