

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty

(98/C 116/10)

(Text with EEA relevance)

*COM(98) 73 final — 98/0060(CNS)**(Submitted by the Commission on 24 February 1998)*

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

(1) Whereas, for the purpose of applying Articles 77 and 92 of the Treaty, the Commission has specific competence under Article 93 of the Treaty to decide on the compatibility of State aid with the common market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification;

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

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

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

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

(6) Whereas the period within which the Commission is to conclude the preliminary examination of notified aid should be set at two months; whereas, for reasons of legal certainty, that examination should be closed by a decision;

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

(8) Whereas, after having considered the comments submitted by the interested parties, the Commission should conclude its examination by means of a final decision as soon as the doubts have been removed;

(9) Whereas, in order to ensure that the State aid rules are applied correctly and effectively, the Commission should have the opportunity of revoking a decision which was based on incorrect information;

- (10) Whereas, in order to ensure compliance with Article 93 of the Treaty, and in particular with the notification obligation and the standstill clause in Article 93(3), the Commission should examine all cases of unlawful aid; whereas in the interests of transparency and legal certainty, the procedures to be followed in such cases should be laid down; whereas when a Member State has not respected the notification obligation or the standstill clause, the Commission should not be bound by time limits;
- (11) Whereas in cases of unlawful aid, the Commission should have the right to obtain all necessary information enabling it to take a decision and to restore immediately, where appropriate, undistorted competition; whereas it is therefore appropriate to enable the Commission to adopt interim measures addressed to the Member State concerned; whereas the interim measures may take the form of information injunctions, suspension injunctions and recovery injunctions; whereas the Commission should be enabled in the event of non-compliance with an information injunction, to decide on the basis of the information available and, in the event of non-compliance with suspension and recovery injunctions, to refer the matter to the Court of Justice direct, in accordance with the second subparagraph of Article 93(2) of the Treaty;
- (12) Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas the suspensive effect of remedies under national law would render the immediate execution of the decision practically impossible and would allow the recipient to continue to benefit from the unlawful aid; whereas for reasons of equal treatment, a recovery decision should have the same effect in all Member States; whereas therefore it is necessary for the efficient functioning of the entire system of prior notification as provided for by the Treaty and for the effectiveness of the Commission decision, that remedies under national law should not have suspensive effect; whereas this is without prejudice to the possibility for the Court of Justice to order that the application of the Commission decision be suspended pursuant to Article 185 of the Treaty;
- (13) Whereas misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful aid and should thus be treated according to similar procedures; whereas unlike unlawful aid, aid which has possibly been misused is aid which has been previously approved by the Commission; whereas therefore the opening of the formal investigation procedure should have no automatic suspensive effect and the Commission should not be allowed to use a recovery injunction with regard to misuse of aid;
- (14) Whereas in accordance with Article 93(1) of the Treaty, the Commission is under an obligation, in cooperation with the Member States, to keep under constant review all systems of existing aid; whereas in the interests of transparency and legal certainty, it is appropriate to specify the scope of cooperation under that Article;
- (15) Whereas in order to ensure compatibility of existing aid schemes with the common market and in accordance with Article 93(1) of the Treaty, the Commission should propose appropriate measures where an existing aid scheme is not or is no longer compatible with the common market and should initiate the procedure provided for in Article 93(2) of the Treaty if the Member State concerned declines to implement the proposed measures;
- (16) Whereas, in order to allow the Commission to monitor in an effective manner compliance with Commission decisions and to facilitate cooperation between the Commission and Member States for the purpose of the constant review of all existing aid schemes in the Member States in accordance with Article 93(1) of the Treaty, it is necessary to introduce a general reporting obligation with regard to all existing aid schemes;
- (17) Whereas, where the Commission has serious doubts as to whether its decisions are being complied with, it should have at its disposal additional instruments allowing it to obtain the information necessary to verify compliance; whereas for this purpose on-site monitoring visits are an appropriate instrument as far as conditional decisions are concerned; whereas for the same purpose and in accordance with Article 5 of the Treaty as well as with the principle of subsidiarity as laid down in Article 3b of the Treaty, it is appropriate to allow the Commission to request assistance from competent national independent supervisory bodies, which will allow the Commission to establish whether conditional decisions, negative decisions, suspension injunctions and recovery injunctions are being complied with;
- (18) Whereas in the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while, at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned; whereas it is therefore appropriate to publish summaries of all decisions which might affect the interests of interested parties and to make

copies of such decisions available to interested parties; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty;

- (19) Whereas the Commission, in close liaison with the Member States, should be able to adopt implementing provisions laying down detailed rules concerning the procedures under this Regulation; whereas, in order to provide for cooperation between the Commission and the competent authorities of the Member States, it is appropriate to create an advisory committee on State aid to be consulted before the Commission adopts provisions pursuant to this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL

Article 1

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) 'aid': any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;
- (b) 'existing aid':
- (i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, all aid which existed prior to the entry into force of the Treaty in the respective Member State, that is to say, aid schemes and individual aid which were put into effect before, and provide for payments after, the entry into force of the Treaty,
 - (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council,
 - (iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation;
- (c) 'new aid': all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;
- (d) 'aid scheme': any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner;

- (e) 'individual aid': aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;
- (f) 'unlawful aid': new aid put into effect in contravention of Article 93(3) of the Treaty;
- (g) 'misuse of aid': aid put into effect, awarded or used in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation and which does not constitute unlawful aid;
- (h) 'interested party': any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations;
- (i) 'complete notification': notification satisfying the requirements of Article 2(2) of this Regulation.

CHAPTER II

PROCEDURE REGARDING NOTIFIED AID

Article 2

Notification of new aid

1. Save as otherwise provided in regulations made pursuant to Article 94 of the Treaty or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned.
2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7.

Article 3

Standstill clause

Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken or is deemed to have taken a decision authorising such aid.

Article 4

Preliminary examination of the notification and decisions of the Commission

1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4 of this Article.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 92(1) of the Treaty, it shall decide that the measure is compatible with the common market (decision not to raise objections). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article 93(2) of the Treaty (decision to initiate the formal investigation procedure).

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The period can be extended with the consent of both the Commission and the Member State concerned.

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to paragraph 4 within a period of 15 working days following receipt of the notice.

Article 5

Request for information

1. Where the Commission considers that information provided by the Member State concerned with regard to a measure notified pursuant to Article 2 is incomplete, it shall request all necessary additional information.

2. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period either the period has been extended with the consent of both the Commission and the Member State concerned,

or the Member State concerned, in a duly reasoned request, asks the Commission to consider the notification to be complete because the additional information requested does not exist or has already been provided. Where the Commission, having received such a request, considers the notification to be complete, it shall inform the Member State thereof. In that case, the period referred to in Article 4(5) shall begin on the day following receipt of the request.

Article 6

Formal investigation procedure

1. The decision to initiate proceedings pursuant to Article 4(4) shall summarise the relevant issues of fact and law, shall include a preliminary assessment from the Commission as to the aid character of the proposed measure, and shall set out the doubts as to its compatibility with the common market. The decision shall call on the Member State concerned and on interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, its identity shall not be disclosed to the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

Article 7

Decisions of the Commission to close the formal investigation procedure

1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed, it shall decide that the aid is compatible with the common market (positive decision). That decision shall specify which exception under the Treaty has been applied.

4. The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and lay down obligations to enable compliance with the decision to be monitored (conditional decision).

5. Where the Commission finds that the notified measure is not compatible with the common market, it shall decide that the measure shall not be put into effect (negative decision).

6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed.

Article 8

Withdrawal of notification

1. The Member State concerned may withdraw the notification within the meaning of Article 2 in due time before the Commission has taken a decision pursuant to Article 4(2) or (3) or Article 7.

2. In cases where the Commission has initiated the formal investigation procedure, the Commission shall close that procedure.

Article 9

Revocation of a decision

The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4) or (5), where it was based on incorrect information provided during the procedure which was a determining factor for the decision. The Commission may open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1) and Article 14 shall apply *mutatis mutandis*.

CHAPTER III

PROCEDURE REGARDING UNLAWFUL AID

Article 10

Examination, request for information and injunction for information

1. Where the Commission has in its possession information from whatever source regarding possible unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply *mutatis mutandis*.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (information injunction). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.

Article 11

Injunction to suspend or provisionally recover aid

1. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (suspension injunction).

2. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (recovery injunction). Recovery shall be effected in accordance with the procedure set out in Article 14(2) and (3).

Article 12

Non-compliance with an injunction decision

If the Member State fails to comply with an injunction decision as referred to in Article 11, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.

Article 13

Decisions of the Commission

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions pursuant to Article 4(4), proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid, the Commission shall not be bound by the time limit set out in Article 4(5).
3. Article 9 shall apply *mutatis mutandis*.

Article 14

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (recovery decision).
2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.
3. Without prejudice to any order of the Court of Justice pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. Remedies under national law shall not have suspensive effect.

CHAPTER IV

PROCEDURE REGARDING MISUSE OF AID

Article 15

Misuse of aid

Without prejudice to Article 22, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1) and Article 14 shall apply *mutatis mutandis*.

CHAPTER V

PROCEDURE REGARDING EXISTING AID SCHEMES

Article 16

Cooperation pursuant to Article 93(1) of the Treaty

1. In the review of existing aid schemes pursuant to Article 93(1) of the Treaty, the Commission shall obtain all necessary information from the Member State concerned.

2. Where the Commission considers that an existing aid scheme is not or is no longer compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.

Article 17

Proposal for appropriate measures

Where the Commission, in the light of the information submitted by the Member State pursuant to Article 16, concludes that the existing aid scheme is not or is no longer compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

- (a) substantive amendment of the aid scheme, or
- (b) introduction of procedural requirements, or
- (c) abolition of the aid scheme.

Article 18

Legal consequences of a proposal for appropriate measures

1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding. The Member State shall be bound by its acceptance to implement the appropriate measures.
2. Where the Member State concerned does not accept the proposed measures and the Commission, having taking into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.

CHAPTER VI

MONITORING

Article 19

Annual reports

1. The Member States shall submit to the Commission annual reports on all existing aid schemes with regard to which no specific reporting obligations have been imposed in a conditional decision pursuant to Article 7(4).

2. Where, despite a reminder, the Member State concerned fails to submit an annual report, the Commission may proceed in accordance with Article 17 with regard to the aid scheme concerned.

Article 20

On-site monitoring

1. In cases where the Commission has serious doubts as to whether conditional decisions within the meaning of Article 7(4) are being complied with, the Member State concerned shall allow the Commission to undertake on-site monitoring visits.

2. The officials authorised by the Commission shall be empowered, depending on the conditions of the conditional decision concerned:

- (a) to enter any premises and land of the undertaking concerned;
- (b) to ask for oral explanations on the spot;
- (c) to examine books and other business records and take or demand copies.

The Commission may be assisted if necessary by independent experts.

3. The Commission shall inform the Member State concerned, in good time and in writing, of the on-site monitoring visit and of the identities of the authorised officials and experts. If the Member State has duly justified objections against the Commission's choice of experts, the experts shall be appointed in common agreement with the Member State. The officials of the Commission and the experts authorised to carry out the on-site monitoring shall produce an authorisation in writing specifying the subject-matter and purpose of the visit.

4. Officials authorised by the Member State in whose territory the monitoring visit is to be made may, at the request of the Member State or of the Commission, be present at the monitoring visit.

5. Where an undertaking opposes a monitoring visit ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials and experts authorised by the Commission to enable them to carry out the monitoring visit. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year after the entry into force of this Regulation.

Article 21

Cooperation with national independent supervisory bodies

1. In cases where the Commission has serious doubts as to whether conditional decisions under Article 7(4), negative decisions either under Article 7(5) or under Article 7(5) in conjunction with Article 14(1), suspension injunctions under Article 11(1) and recovery injunctions under Article 11(2) are being complied with, it may invite the competent national independent supervisory body to provide the Commission with a report on the execution of the decision concerned.

2. The Member State shall inform the Commission which national independent supervisory body it has designated for the purpose of this cooperation procedure. To enable the supervisory body to obtain all necessary information and to report to the Commission, the Member State shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 22

Non-compliance

1. Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court of Justice direct in accordance with Article 93(2) of the Treaty.

2. If the Commission considers that the Member State concerned has not complied with a judgment of the Court of Justice, the Commission may pursue the matter in accordance with the provisions of Article 171 of the Treaty.

CHAPTER VII

COMMON PROVISIONS

Article 23

Professional secrecy

The Commission and the Member States, their officials and other servants, including independent experts appointed by the Commission, shall not disclose information which they have acquired through the application of this Regulation and is covered by the obligation of professional secrecy.

*Article 24***Addressee of decisions**

Decisions taken pursuant to Chapters II, III, IV, V and VI of this Regulation shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay.

*Article 25***Information for interested parties and publication of decisions**

1. The Commission shall send a copy of a decision pursuant to Article 7 to any interested party which has submitted comments pursuant to Article 6 and to any beneficiary of individual aid.

2. The Commission shall publish in the *Official Journal of the European Communities* a summary notice of the decisions which it takes pursuant to Article 4(2) and (3), Article 7(2), (3), (4) and (5), and Article 17 in conjunction with Article 18(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

3. The Commission shall publish in the *Official Journal of the European Communities* the decisions which it takes pursuant to Article 4(4) in the authentic language versions. It shall also publish in all the other official languages of the Community a summary notice of those decisions. For the purpose of submitting comments pursuant to Article 6, a copy of the decision may be requested in any official language of the Community within a period of 15 working days following the date of publication of the summary notice.

4. In cases where Article 4(6) or Article 8(2) applies, a short notice shall be published in the *Official Journal of the European Communities*.

5. The Council shall publish decisions pursuant to the third subparagraph of Article 93(2) in the *Official Journal of the European Communities*.

*Article 26***Implementing provisions**

The Commission acting in accordance with the procedure laid down in Article 27 shall have the power to adopt implementing provisions, in particular concerning the form, content and other details of notifications, the form, content and other details of annual reports, time limits and the calculation of time limits, and the interest rate referred to in Article 14(2).

*Article 27***Advisory committee on State aid**

1. The Commission shall be assisted by an advisory committee on State aid, hereinafter referred to as 'the committee', composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken pursuant to Article 26. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee on the manner in which its opinion has been taken into account.

*Article 28***Entry into force**

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

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