

EUROPEAN COMMISSION

Competition law in the European Communities

Volume IIB

Explanation of the rules applicable to State aid

BRUSSELS • LUXEMBOURG, 1997

Text prepared by Massimo Merola, of Studio Legale Pappalardo & Associati
Updated to December 1996

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1997

ISBN : 92-827-9664-7

© ECSC-EC-EAEC, Brussels • Luxembourg, 1997

Reproduction is authorized, except for commercial purposes, provided the source is acknowledged

Printed in Luxembourg.

Contents

I. Introduction	5
II. Questions of substance	
1. <i>The concept of State aid</i>	7
2. <i>The principle of the incompatibility of State aid and exemption from it ...</i>	10
3. <i>Application of the exemptions in Article 92(3)(a) and (c)</i>	13
a. Basic principles.....	13
b. Regional aid	14
c. The cross-industry rules.....	16
d. The industry-specific rules.....	18
e. Industries subject concurrently to the Treaty rules on State aid and other provisions of the Treaty	21
III. Questions of procedure	
1. <i>The obligation to notify new aid measures</i>	27
2. <i>Existing aid</i>	28
3. <i>The procedures</i>	30
a. Notification	30
b. Investigation of measures which have not been notified	33
c. Constant review	36
d. Publicizing Commission decisions	37
e. The rights of third parties.....	38
IV. The treatment of State aid under the ECSC Treaty	
1. <i>Basic principles</i>	41
2. <i>The Coal and Steel Aid Codes</i>	42
3. <i>Procedure</i>	43
Annexes	
1. Main documents regarding State aid approved or published by the Commission since finalization of Volume IIA (31 December 1994).....	45
2. Information on European competition policy.....	48

I. INTRODUCTION

Measures taken by Member States can distort the operation of the common market; paradoxically enough, progress towards European integration actually amplifies the distorting effect. One of the major sources of such distortion is State aid, which discriminates between companies that receive assistance and others that do not, and thus obstructs the free interplay of competition which ought to characterize the common market in accordance with the principles of the Treaty establishing the European Community, and particularly Article 3(g).¹

The authors of the EC Treaty avoided imposing a more or less total ban on State aid, in the light especially of experience with the earlier ECSC Treaty; instead they designed a system which, while it is still centred on the principle that State aid is incompatible with the common market, nevertheless provides for the exemption of aid granted for specific purposes.

In a system of this kind there has to be a mechanism to ensure that aid is monitored and controlled. The mechanism established by the EC Treaty is a system of advance vetting: Member States are required to inform the European Commission of any plans to grant aid, and to obtain the Commission's authorization before putting the plan into effect. The system is different in this respect from that operated by the World Trade Organization, which allows some State aid and provides for examination *ex post* rather than vetting in advance.²

In exercising its supervisory powers the Commission has built up an extensive body of precedent, and has developed specific approaches depending on the size of the recipient firm, its location, the industry concerned, the purpose of the aid, and other criteria. In the interests of openness the Commission has published guidelines setting out its practice on most of these points, for the benefit of the Member States, the firms concerned, and any other interested parties.

¹ Formerly Article 3(f) of the EEC Treaty; this became Article 3(g) of the EC Treaty, in a slightly simplified wording, after amendment by the Maastricht Treaty. It states that one of the objectives of the Community is the institution of "a system ensuring that competition in the internal market is not distorted."

² The State aid measures authorized in the WTO framework are those on the "green list" of non-actionable subsidies.

This booklet does not aim at an exhaustive discussion of the subject of State aid; it is intended only as a guide to the reader of the legislation in the companion volume, *Competition law in the European Communities: Volume IIA: Rules applicable to State aid*. The booklet will be considering the following subjects:

- a) Article 92 of the EC Treaty;
 - b) the way in which the exemptions in Article 92(2) and (3) are applied;
 - c) areas where the Treaty rules on State aid apply in conjunction with other Treaty provisions;
 - d) the vetting procedure laid down in Article 93 of the Treaty; and
 - e) the special features of the rules on State aid laid down by the ECSC Treaty.
-

II. QUESTIONS OF SUBSTANCE

1. The concept of State aid

Article 92(1) of the EC Treaty states that “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”³

The provision speaks of the source of the aid and the effect of the aid, but it does not supply a definition what it means by “aid”, or a list of the types of measure which it prohibits. The bounds of the concept have, however, been mapped out by the Commission and the Court of Justice.

The Court has consistently taken the view that “aid” means any advantage conferred on a firm by the public authorities, without payment, or against a payment which corresponds only to a minimal extent to the figure at which the advantage can be valued. A definition of this kind covers both the allocation of resources and the grant of relief on charges which the firm would otherwise have to bear, enabling it to make a saving.⁴ A State contribution confined strictly to offsetting an objective disadvantage imposed on the recipient is not caught by Article 92.

As for the way in which the advantage conferred on the firm is to be financed, the Commission for a long time took the view that a State measure did not have to be financed out of public funds in order to be considered State aid. It argued that Article 92(1) set out an alternative: the aid might be granted “by a Member State” or “through State resources”. Furthermore, the Article served to spell out how the general principle in Article 3(g) was to apply in the field of State aid, so that it had to be interpreted broadly.

More recently, however, the Court of Justice has tempered the Commission’s position. It has held that the words of Article 92(1) and the procedural rules in Article 93 make it clear that advantages conferred out of resources other than State resources are not caught by these provisions; the distinction in Article 92(1) between aid granted “by a Member State” and aid granted “through State resources” is intended only to include aid which may be granted by a public or private body established or appointed by the State.⁵ To constitute State aid, according to the Court, the aid must necessarily be financed out of State resources, but it may actually be granted by the State itself or by an intermediary body acting by virtue of powers conferred on it.

³ Article 92(1) declares the principle that State aid is incompatible with the common market. It does not impose an express prohibition, unlike other provisions in the chapter on competition, such as Article 85 for example. But the principle of incompatibility amounts to much the same thing as a prohibition, except with regard to the question of direct effect, since a finding that a measure is incompatible with the common market requires an economic assessment in the light of the Community interest (judgment of the Court of Justice in *Case 77/72 Capolongo* [1973] ECR 611).

⁴ Judgments of the Court of Justice in *Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1 and *Case 61/79 Denkavit Italiana* [1980] ECR 1205.

⁵ Judgments of the Court of Justice in *Case C-189/91 Kirsammer-Hack* [1993] ECR I-6185 and *Joined Cases C-72 and 73/91 Sloman Neptun* [1993] ECR I-887.

The provision thus covers advantages conferred directly, by the authorities themselves, or indirectly, through bodies outside the structure of government proper. In the first case the “State” is to be understood in the broadest possible sense, including central government and all levels of regional and local government.⁶ In the second case the job of paying out aid is given to a separate public body, or perhaps indeed to a private body. The body may be a credit institution, a trade association, a holding company or even an ordinary commercial company; what is important is that the aid measure must be “attributable to” the State and must be financed by it. The first of these tests, the attributability test, seeks to determine whether the body in question acts independently or whether its conduct is dictated by the State by virtue of a power of supervision or a determining influence which it exercises over it.⁷ The financing test seeks to determine whether the aid is in fact being financed out of State resources, directly or even indirectly.⁸ On the basis of the Court’s judgments a measure which originates directly or indirectly with the State, and which confers an advantage on one or more specific firms, falls outside the scope of Article 92 if it imposes no extra burden on the State budget.

The form which the advantage takes, and the objective which the State is pursuing, are completely irrelevant here: Article 92(1) specifically refers to aid “in any form whatsoever”. Aid may consist for example of subsidies, interest-free loans, low-interest loans, interest rate subsidies, guarantees on preferential terms,⁹ relief from taxes or parafiscal charges, the supply of goods or services on preferential terms, or indeed capital injections on terms which would not be acceptable to a private investor.

To be caught by the words of Article 92(1) the measure must not only be a State measure, but must also be selective: it must “favour certain undertakings or the production of certain goods”, and thus affect the balance between the recipient firm and its competitors. It is this selective character which distinguishes State aid measures from what can be termed general economic support measures, which apply across the board to all firms in all sectors of economic activity in a Member State.¹⁰ As long as they do not favour a particular area of activity, such general measures are an exercise of the Member State’s power to choose the economic policy it considers most appropriate, and do not constitute State aid for purposes of Article 92(1).

The scope of the Article is nevertheless very broad: the potential recipients of the aid which it prohibits may be operating in any of the activities and economic sectors covered by the Treaty, excluding the coal and steel industries, which are subject to the ECSC Treaty, and nuclear energy, which is subject to the Euratom Treaty. The Treaty rules, including the competition rules and Article 92 in particular, apply to all gainful activity, without exception, whether commercial,

⁶ Judgments of the Court of Justice in Case 323/82 *Intermills v Commission* [1984] ECR 3809 and Case 248/84 *Germany v Commission* [1987] ECR 4013.

⁷ Judgments of the Court of Justice in Case 290/83 *Commission v France* [1985] ECR 439, Joined Cases 67, 68 and 70/85 *Van der Kooy* [1988] ECR 219, and Case C-305/89 *Italy v Commission* [1991] ECR I-1603.

⁸ Judgments of the Court of Justice in Case 82/77 *Van Tiggele* [1978] ECR 25 and in *Sloman Neptun*, cited above. In Case 290/83 *Commission v France*, cited above, the Court accepted that aid did not necessarily have to be financed from State resources. But it returned to its established case-law in the more recent *Sloman Neptun* judgment.

⁹ Commission letters of 5 April and 12 October 1989 on State guarantees.

¹⁰ While they do fall outside Articles 92 to 94, such measures may be caught by other provisions of the Treaty, such as Articles 101 and 102.

cultural or of any other kind, and whether in production, services or distribution. It is accepted that the recipients of the aid referred to may be public as well as private enterprises, though Article 90(2) may apply here.¹¹

Once it has been established that a measure confers an advantage, is State -financed, and is selective in character, it can be concluded that it constitutes State aid for purposes of Article 92. For Article 92 to apply, however, it must also distort competition and affect trade between Member States. It is now acknowledged that the effect on competition must be appreciable: after long hesitation, the Commission has finally accepted that the principle *de minimis non curat lex* does apply to State aid. Aid which does not amount to more than ECU 100 000 over three years is not caught by Article 92(1).¹² Even above that threshold the fact that the effect on competition is appreciable has to be shown in every case.

Aid to firms supplying goods or services in which there is no cross -border trade in the Community, which are intended for a local market only, likewise falls outside the scope of Article 92.¹³ But exports to countries outside the Community may have effects on trade inside it.¹⁴

The question of the definition of State aid has arisen with particular force in cases where a Member State or a publicly-owned holding corporation wanted to take a holding in the capital of a company, or to take some other action in respect of a company in which it had already acquired a holding. The State is here acting as a public investor, a role which in itself is perfectly legitimate under the Treaty.¹⁵

But State aid has to be assessed on the basis of its effects, and not of its declared aims or the form it takes;¹⁶ the choice of this particular form of public intervention cannot be allowed to frustrate Article 92. It has to be established in each case whether the public holding in the capital of the company is intended to earn a return, and has consequently been acquired by the State or holding corporation in the same way as it might have been acquired by a private business, or whether it has been acquired in the public interest, so that the acquisition has to be considered a form of intervention by the State in its capacity as public authority. The very thin dividing line between these two categories has occasioned a refinement of the definition of State aid,¹⁷ or rather the

¹¹ Article 90(2) provides that “Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.”

¹² Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9); see also point II.3.c below.

¹³ Judgments of the Court of Justice in Case 40/75 *Produits Bertrand v Commission* [1976] ECR 1 and Case 52/76 *Benedetti v Munari* [1977] ECR 163.

¹⁴ Judgment of the Court of Justice in Case C-142/87 *Tubemeuse* [1990] ECR I-959.

¹⁵ Article 222 of the Treaty states that “This Treaty shall in no way prejudice the rules in member States governing the system of property ownership.” It follows that Member States are free to acquire shareholdings, just as they are free to acquire other goods and services.

¹⁶ Judgment of the Court of Justice in Case 173/73 *Italian textiles* [1974] ECR 709.

¹⁷ This situation has also led to the introduction of a system of supervision of the financial relations between Member States and companies they own. In the case of manufacturing firms, financial information has to be supplied to the Commission in the form of annual reports. In the case of other firms Member States are required only to keep this information at the Commission’s disposal for five

introduction of a test for distinguishing between the two types of measure: this is the concept of the private investor in a market economy.¹⁸

When public capital is to be injected into a business, therefore, the question has to be asked whether a private investor would do the same. The test is satisfied in particular where the capital invested can be expected to produce a normal return on investment, in the form of dividends or capital gains. If the conclusion is that a private investor would not act as the Member State is doing, on the other hand, the transaction will have to be looked at under Article 92(1).

On this point the Court of Justice has held that Member States differ from some private investors in that their interests lie not so much in immediate profitability as in the prospect of more long-term profitability. This means that their behaviour as public investors has to be compared not with that of private investors taking only a short-term view, but rather with that of private holding companies or groups taking a longer view of profitability, based in particular on a general or industry-specific policy guiding their operations.¹⁹

2. The principle of the incompatibility of State aid and exemption from it

Aid measures which match the criteria just outlined are within the scope of Article 92(1). They are consequently caught by the principle of incompatibility laid down there. The provision is fundamentally hostile to State aid, on the grounds that it is liable to interfere with the normal interplay of competition and to distort trade between Member States, whereas the Treaty aims to establish a common market based among other things on free competition.

There is no formal, absolute ban, as there is in the ECSC Treaty, which is considered below.²⁰ But the underlying principle does ultimately amount to a full-scale prohibition, because Article 93(2) expressly gives the Commission power “to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.”

The ban on State aid is not absolute: Article 92(2) and (3) provide for exemptions, listing circumstances in which a category of aid is automatically to be considered compatible with the

years. See Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35), Directive 85/413/EEC of 24 July 1985 amending Directive 80/723/EEC (OJ L 229, 28.8.1985, p. 20), and Directive 93/84/EEC of 30 September 1993 amending Directive 80/723/EEC (OJ L 254, 12.10.1993, p. 16).

¹⁸ This test has developed over a long period, the main steps in the process being: the Commission notice on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings in company capital (Bull. EC 9-1984); the judgments of the Court of Justice in *Inter Mills*, cited above, Joined Cases 296 and 318/82 *Leeuwarder Papierwarenfabriek* [1985] ECR 809, Case 234/84 *Meura* [1986] ECR 2263, Case 40/85 *Boch* [1986] ECR 2321, Case C-303/88 *ENI-Lanerossi* [1991] ECR I-1433, Case C-305/89 *Alfa Romeo* [1991] ECR I-1603 and Case C-261/89 *Alumina and Comsal* [1991] ECR I-4437; and the Commission Communication on the application of Articles 92 and 93 of the EEC Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

¹⁹ Judgment of the Court of Justice in *Alfa Romeo*, cited above.

²⁰ See below, Chapter IV.

common market, or may at the very least be declared compatible. It is the existence of these exemption clauses that justifies the vetting of State aid which is provided for in the Treaty. Member States which want to grant State aid must notify the Commission of their intentions before putting them into effect. The aid can be granted only after a procedure intended to allow the Commission to check whether the conditions in Article 92(2) and (3) are met and the measure accordingly qualifies for one of the exemptions laid down by the Treaty.²¹

The general rule, nevertheless, is that State aid is not compatible with the common market; Article 92(2) and (3) are exceptions to this general rule, and consequently have to be interpreted strictly. In principle, therefore, their scope cannot be broadened, by analogy or some other form of reasoning, so as to apply to aid measures for which they do not expressly provide.

The exceptions to the principle of incompatibility are broader or narrower depending on whether it is paragraph 2 or paragraph 3 - Article 92(2) or Article 92(3) - which is being invoked. Paragraph 2 states that certain types of aid are always compatible with the common market, so that the Commission has no discretion to decide whether or not exemption ought to be granted. Exemption is automatic, although it does not dispense the Member State from its obligation to notify its plans to the Commission. This enables the Commission to establish that the measure does indeed fall within the terms of paragraph 2.

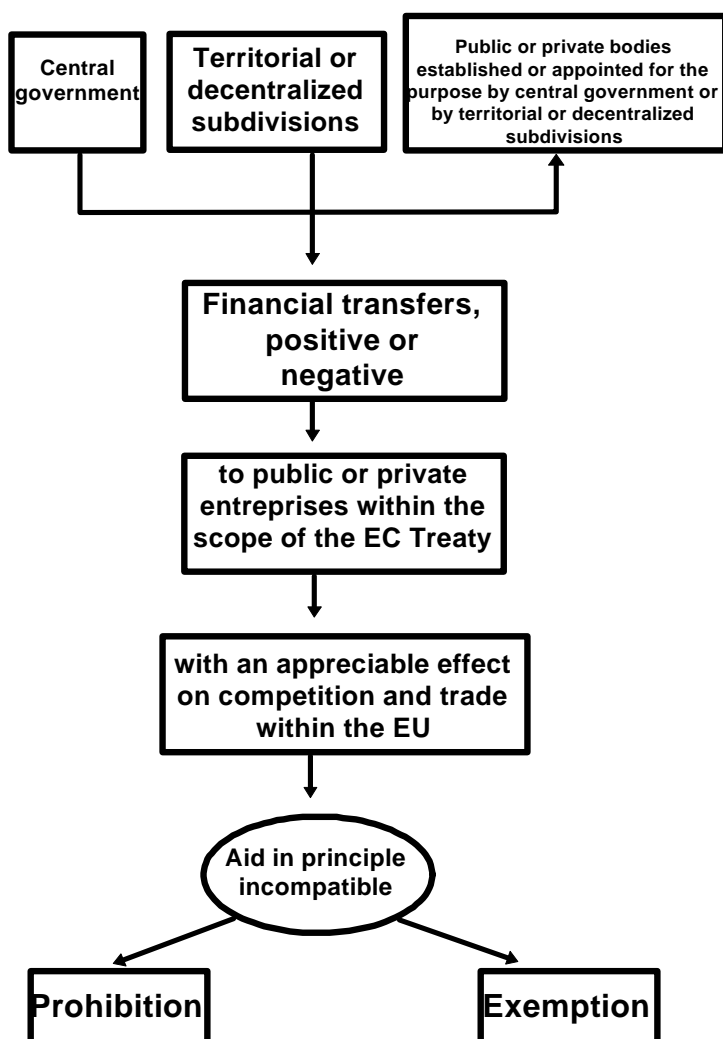
There are three categories of State aid which qualify for automatic exemption under paragraph 2. The first is "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned".²² The second is "aid to make good the damage caused by natural disasters or exceptional occurrences". The last category contemplated is that of aid justified by the division of Germany. This provision has been obsolete since October 1990, when Germany was reunited. Of course aid measures might still be proposed in order to remedy the present-day effects of the division of Germany in the past, but any such measures would now have to be assessed under paragraph 3 rather than paragraph 2, with consequences which will be made clear at once.

The exemption clauses in paragraph 3 are quite different in scope. They are not automatic: they apply only when the Commission, after considering a planned aid measure, decides that in its judgment the measure ought to be exempted. Thus they give the Commission a discretion to allow aid for certain well-defined purposes.

The categories of allowable aid in paragraph 3 are frequently referred to by the point numbers under which they are listed. Point (a) - Article 92(3)(a) - refers to "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment". Point (b) refers to "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". Point (c) covers "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." Point (d), which was inserted by the Treaty of

²¹ See below, Chapter III.

²² An example of aid of this kind would be the tax relief given in Germany to purchasers of motor cars fitted with catalytic converters, regardless of the make of the vehicle. Such aid is covered by Article 92(2) only if it is granted to individual consumers rather than to firms. See the judgment of the Court of Justice in *Benedetti v Munari*, cited above.



Summary diagram

Maastricht, authorizes the Commission to allow “aid to promote culture and heritage conservation”.

There is also a point (e), which does not itself define a category of aid that may be exempted from the principle of incompatibility, but which instead empowers the Council, acting on a proposal from the Commission and after consulting the European Parliament, to specify further categories which may be exempted. This clause has been invoked only once so far, in order to regulate the grant of aid to the shipbuilding industry.²³

Of the various categories of aid which may be exempted under paragraph 3, the most important in terms of cases and implementing legislation are without any doubt those in points (a)

and (c); these exemptions and the way in which they are applied merit particular attention, and will be considered further below.²⁴

As we have seen, the main difference between paragraph 2 and paragraph 3 is that paragraph 3 gives the Commission discretion to determine whether a State aid measure qualifies for exemption and should therefore be declared compatible with the common market.

The limits to the Commission’s discretion in the application of paragraph 3 have been clarified somewhat in the judgments of the Court of Justice.²⁵

²³ See below, point II.3.d. At the time the rules on state aid to the shipbuilding industry were enacted this point was numbered (d) rather than (e).

²⁴ See below, point II.3.

²⁵ Judgments of the Court of Justice in Case 730/79 *Philip Morris* [1980] ECR 2671 and Case C-301/87 *France v Commission* [1990] ECR I-307.

The Court has confirmed that the Commission's power to assess the compatibility with the common market of aid which might qualify for exemption under paragraph 3 is a discretionary one. In exercising this power the Commission is to assess the effects of the measure from the point of view of the Community, rather than in a strictly national context, so as to ensure that the aid does not simply transfer economic difficulties from one Member State to another rather than resolving them.

The aid must be effective: it must enable the recipient firm to resolve once and for all the economic difficulties which motivate the grant of aid, and to compete on its own merits thereafter. In conjunction with the general principle of proportionality, this principle of effectiveness requires that the aid be limited, in terms both of volume and of duration, to what is strictly necessary to enable the recipients to find their place on the market. The Commission also generally applies the principle of the *quid pro quo*, requiring the recipient itself to contribute to the solution of its difficulties, especially by means of restructuring and self-financing.

3. Application of the exemptions in Article 92(3)(a) and (c)

a. Basic principles

The Commission has sought to publicize the criteria it applies when it exercises its discretionary power under Article 92(3) in respect of certain forms of aid in the categories listed there, more especially in points (a) and (c).

Because its power is a discretionary one whose limits are only sketched out in the Treaty, the Commission has taken the view that it ought to make its approach public in order to ensure that its discretion is exercised with the proper openness and that public authorities and businesses are clear about their legal position.

From a formal point of view the acts in which the Commission has set out these criteria differ depending on the type of aid envisaged. Regional schemes, general schemes and industry schemes which may be dealt with under Article 92(3) have been variously treated in regulations, directives, notices, communications, "guidelines", "frameworks", "codes", and letters to Member States.

The implications of this diversity of acts are considerable, particularly as regards the procedure followed for their adoption and the binding force they have. On the question of binding force it will be remembered that under Article 189 of the Treaty, regulations are binding in their entirety, while directives are binding as to the result to be achieved. Notices, guidelines, letters and so on are acts *sui generis*: they are not provided for in Article 189, and in principle therefore have no binding force whatever.

It is accepted, however, that these acts *sui generis* may have binding force if they are the subject of a formal agreement between the Commission and all the Member States. To date there have been clear agreements of this kind only in respect of the communication on regional aid and the

Code on aid to the synthetic fibres industry. The other notices, guidelines and letters serve merely to indicate the Commission's likely attitude to the forms of aid they discuss.²⁶

Whether or not they are binding, none of these acts has the object or effect of diluting in any way the Member States' obligation to notify any plans to grant aid, and to refrain from putting the plan into effect until the Commission has authorized it. As we have seen, they are intended only to indicate the criteria the Commission will apply in deciding whether to authorize aid of the kind they describe, by way of exemption from the principle of incompatibility laid down in Article 92(1).

b. Regional aid

Article 92(3)(a) and (c) provide for major exceptions to the general ban on State aid, covering aid to help regions suffering from more or less serious problems of economic underdevelopment by comparison with the Community as a whole (point (a)) or with the rest of the particular country (point (c)).

In a 1988 communication on the method for the application of these provisions to regional aid, the Commission indicated the territorial tests of eligibility which it had developed in the exercise of the discretionary powers vested in it by this provision of the Treaty.²⁷

The regions to be classified as covered by point (a) are NUTS level III regions²⁸ located in a NUTS level II region which has an abnormally low standard of living and serious underemployment (per capita gross domestic product of 75% or less of the Community average).

Before a region can be classified as covered by point (c), a two-stage analysis has to be carried out. In the first place, backward NUTS III regions are defined on the basis of per capita gross domestic product (GDP) or gross value added at factor cost (GVA), on the one hand, and structural unemployment, on the other. If a region is to qualify for aid under point (c), per capita GDP/GVA must be at least 15% below the Member State's average, or structural unemployment must be at least 10% above the Member State's average. That figure is then adjusted by reference to a Community average, in such a way that the better the position of the region under consideration compared with the Community average, the greater the disparity there has to be between it and the national average in order to justify the grant of aid.

²⁶ Judgments of the Court of Justice in Case 310/85 *Deufil* [1987] ECR 901 and Case C-313/90 *CIRFS* [1993] ECR I-1125.

²⁷ Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2). That communication has been amended in certain respects by the Commission communication on the method of application of Article 92(3)(a) to regional aid (OJ C 163, 4 July 1990, p. 2), by the Commission notice concerning an amendment to Part II of the communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 364, 20.12.1994, p. 8), and by the Commission communication on the method of application of Article 92(3)(c) of the EC Treaty to national regional aid (OJ C 186, 26.6.1996, p. 6).

²⁸ The Nomenclature of Statistical Territorial Units, known as "NUTS", divides the Community into regions at three levels: at NUTS level I the Community is divided into 69 regions, at NUTS level II into 173, and at NUTS level III into 1039.

The second stage of analysis follows; the results of the first stage are here corrected, within limits, to take account of other relevant economic indicators such as the trend and structure of unemployment, the development of employment, net migration, geographic situation or population density.

The method the Commission announced in 1988 has been amended particularly in order to take account of the accession of Finland and Sweden. A 1994 communication states that NUTS level III regions with a population density below 12.5 per km² will qualify for regional aid under point (c) at the first stage of analysis.²⁹

The same communication also explains that the Commission will generally give sympathetic consideration to aid intended to offset the additional cost of transport occasioned by the very long distances to be travelled in Finland and Sweden.

The rules which the Commission has made for regional aid limit it not only geographically, as we have seen, but also in terms of volume. A 1979 communication sets limits to the intensity of aid granted under points (a) and (c). In point (a) regions the intensity of the aid envisaged is not to exceed 75% net grant equivalent of initial investment,³⁰ while in point (b) regions the intensity is not to exceed 30%, and depending on the category must often be lower, sometimes indeed a great deal lower.³¹

In principle the rules just outlined allow only aid towards development, such as aid towards initial investment. Aid towards continued operation, known as "operating aid", does not qualify for authorization, except in point (a) regions on conditions set out in the Commission's 1988 communication.

The Community rules on regional aid do not apply to the goods listed in Annex II to the Treaty, that is to say farm produce and fish.

By virtue of the principles of coordination set out in the Commission's 1979 communication,³² a single investment can receive both regional aid and other regionally differentiated aid only provided the sum of the regional aid and the regional component of the other aid does not exceed the ceilings set out in the communication.

²⁹ See footnote 27.

³⁰ The *intensity* of aid is a way of expressing how substantial it is in proportion to the investment being assisted. The benefit to the recipient is calculated in proportion to the costs he would have to bear without the assistance. It is easy to determine the amount of aid where it takes the form of a straightforward grant, but other cases are more difficult. For example, the amount of the aid component in a low-interest loan is the difference between the sum of the loan repayments and the sum of the repayments on a loan of a similar amount at market rates. Where the aid is not granted towards a specified investment, which is the case for example with rescue aid, the amount is calculated *ex post*, on the basis of its effect on the recipient's costs and turnover. The measure which is used in calculating intensity is the "net grant equivalent" (n.g.a.), in which the tax element, which varies from one Member State to another, is deducted from the gross amount so as to obtain the net benefit to the recipient.

³¹ Communication of the Commission on regional aid systems (OJ C 31, 3.2.1979, p. 9), amended by the Commission communication on the reference and discount rates applicable in France, Ireland and Portugal (OJ C 10, 16.1.1990, p. 8).

³² See footnote 31.

The same communication envisages the possibility of special restrictions on the grant of regional aid to firms in sensitive industries. It seems to be accepted that such restrictions are justified where there are binding rules governing aid in the industry, but it remains an open question whether they would be justified where there are guidelines on aid in the industry which are not binding, or in the case of the rules on EAGGF^F intervention in agricultural sectors which are outside the scope of Annex II to the Treaty.

c. The cross-industry rules

The cross-industry, general, or “horizontal” rules are those setting out the Commission’s position on categories of aid which are defined in terms of particular difficulties which may arise in any industry.

To date these general rules consist of a Community “framework” for aid to research and development,³³ and Community “guidelines” on aid for small and medium -sized enterprises,³⁴ aid for environmental protection,³⁵ aid for rescuing and restructuring firms in difficulty,³⁶ and aid to employment.³⁷

All of these sets of rules follow the same pattern:

- each first describes the difficulty which has arisen, and explains why the Commission takes the view that State aid may be exempted under Article 92(3) from the principle of incompatibility in Article 92(1);
- each then defines its scope, usually in terms of the purpose of the aid, the firms which may qualify, and the period for which the rules are to apply.

The rules exclude certain industries which are particularly sensitive, for example because of overcapacity or because they are subject to industry -specific rules which take precedence over the general ones.³⁸

The exemptions provided for in these rules are never unconditional. A detailed review of all the conditions to which they are subject would not be possible in this booklet. To provide some guidance for the reader, however, here follows a summary of the main requirements regarding the purpose of aid which may be authorized and the maximum admissible aid intensities.

³³ Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5).

³⁴ Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ C 213, 23.7.1996, p. 4).

³⁵ Community guidelines on State aid for environmental protection (OJ C 72, 10.3.1994, p. 3).

³⁶ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12).

³⁷ Guidelines on aid to employment (OJ C 334, 12.12.1995, p. 4, and OJ C 218, 27.7.1996, p. 4).

³⁸ See below, point II.3.d.

(i) *Aid for research and development*

- * Aid to fundamental research is caught by Article 92(1) only in exceptional cases.
- * As a general rule aid of up to 50% gross of investment can be allowed for industrial research.
- * The admissible intensity for precompetitive development activities is lower.
- * The admissible intensity is higher where the recipient is a small or medium -sized enterprise, where it is located in an area qualifying for regional aid, etc.

(ii) *Aid for small and medium -sized enterprises*

- * Aid to investment is authorized at an intensity which varies depending on the location of the firm:
 - in areas qualifying for regional aid under Article 92(3)(c), the maximum intensity of regional aid is increased by 15% gross of the investment, which brings it to 75% net;
 - in areas qualifying for regional aid under Article 92(3)(a), the maximum intensity of regional aid is increased by 10% gross of the investment, which brings it to 30% net;
 - in areas which do not qualify for regional aid, the maximum intensity is 7.5% or 15% gross, depending on the size of the firm.
- * Aid for research and development and aid for environmental protection are subject to the guidelines on those categories of aid.
- * Aid of up to 50% gross of the investment, and in exceptional cases more, will be allowed for consultancy services, training and dissemination of knowledge.
- * Other aid to small and medium -sized enterprises may be authorized on a case -by-case basis.

(iii) *Aid for environmental protection*

- * Aid to investment will be allowed if it helps with the adaptation of existing plant (at least two years old) to new environmental standards, or with the improvement of new or existing plant to exceed any standards in force.
- * The maximum aid intensity is 15% gross of the eligible costs in the first case and 30% gross in the second case.
- * Where the recipient is a small or medium -sized enterprise these intensities may be increased by 10 percentage points.
- * If the recipient firm is located in an area qualifying for regional aid, the maximum intensities applying to regional aid are to apply here too, provided they are more favourable.
- * Aid for research and development is subject to the guidelines (“framework”) on that form of aid.
- * Aid of up to 50% gross of the investment may be allowed towards information activities, training and advisory services.
- * Aid for other purposes, such as operating aid and aid for the purchase of environmentally friendly products, may be allowed on a case -by-case basis.

(iv) *Rescue and restructuring aid*

- * The guidelines distinguish between rescue aid and restructuring aid.
-

- * Rescue aid must consist of liquidity help in the form of loan guarantees or loans bearing normal interest rates; must be restricted to the amount needed to keep the firm in business; and must be paid only for the time needed to devise a recovery plan.
- * Restructuring aid must be limited to the strict minimum needed, and must be linked to a restructuring plan authorized by the Commission which provides for any necessary capacity reductions. Regular reports must be made on the implementation of the plan.

(v) *Aid to employment*

- * Aid to employment is not linked to investment.
- * The guidelines distinguish between aid to maintain jobs and aid to create jobs.
- * They do not set a maximum intensity for the allowable aid; aid to maintain jobs is allowable only under Article 92(2)(b) and Article 92(3)(a).

None of these sets of rules dispenses Member States from the obligation to notify aid measures in advance, though in some cases they do simplify the notification procedure to allow accelerated clearance.³⁹

There is a similar document defining measures which, although they do constitute aid, are not caught by Article 92(1). This takes the form of a Commission notice, and for the first time applies the maxim *de minimis non curat lex* to State aid; it states that where only a small amount of aid is involved (not more than ECU 100 000 in three years) Article 92(1) does not apply. The rule has far-reaching implications for procedure, because these *de minimis* aid measures do not need to be notified. The *de minimis* rule applies not only to SMEs but to all firms regardless of size.

d. *The industry-specific rules*

The Commission has also adopted industry-specific or “sectoral” rules defining its approach to State aid in particular industries; just how binding these rules are depends on the legal form chosen. There are rules for textiles and clothing, synthetic fibres, motor vehicles, shipbuilding, and non-ECSC steel.

There are also rules governing aid for transport and for agriculture, but these will be considered later, because in those areas State aid is governed by Articles 92, 93 and 94 in conjunction with other provisions of the Treaty.⁴⁰

The rules governing aid to the coal and steel industries are usually classified with these industry-specific rules. But as they are based on the ECSC Treaty, rather than the EC Treaty, they will be considered in a separate chapter.⁴¹

There are industry-specific rules, under various titles, covering textiles,⁴² textiles and clothing,⁴³ synthetic fibres,⁴⁴ motor vehicles,⁴⁵ and non-ECSC steel.⁴⁶ Shipbuilding is governed by a

³⁹ See below, point II.3.a.

⁴⁰ See below, point II.3.e.

⁴¹ See below, Chapter IV.

⁴² Community framework for aid to the textile industry (SEC(71) 363 final, July 1971).

directive.⁴⁷ The choice of the directive form is worth noting, for a number of reasons. According to Article 189 of the EC Treaty, “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” The Shipbuilding Aid Directive is based on Article 92(3)(e) of the Treaty, which empowers the Council to specify categories of aid which may be declared compatible with the common market.⁴⁸ Shipbuilding is so far the only case in which this provision has been invoked.

The other legal basis of the Directive is Article 113 of the Treaty, on the common trade or “commercial” policy: as Article 92(3)(c) says, “aids granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries”.

In 1994, after several years of negotiation, an “Agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry” was concluded between the Member States of the OECD, with the addition of the Republic of Korea. Regulation No 3094/95 set out to apply that Agreement in the area of State aid.

The Agreement was to enter into force on 1 January 1996, on condition that the signatory countries had ratified it by then. The United States has not yet ratified it, so that it has not yet entered into force, and the Council has accordingly decided that the relevant provisions of the existing Shipbuilding Aid Directive will continue to apply until 31 December 1997 at the latest.

Like the general rules discussed earlier, the industry -specific rules concerned here all follow a similar pattern. They begin by reviewing the main principles of the Community rules on State aid, the special features or difficulties of the industry under consideration, and the objectives of any common policy with regard to the industry. They then set out the various forms of aid which may be admissible, specifying any requirements of form or substance to which they may be subject. To make it easier to read these rules, their main features are summarized below.

(i) *Textiles*

- * In general, aid to the textile industry is not to lead to increases in capacity, and will be assessed in the light of the situation in the Community.
- * The following may be authorized:

⁴³ Examination of the present situation with regard to aid to the textile and clothing industries: Annex to Commission letter to Member States SG(77) D/1190 of 4 February 1977.

⁴⁴ Code on aid to the synthetic fibres industry (OJ C 94, 30.3.1996, p. 11).

⁴⁵ Community framework for State aid in the motor vehicle industry (OJ C 284, 28.10.1995, p. 3).

⁴⁶ Framework for certain steel sectors not covered by the ECSC Treaty (OJ C 320, 13.12.1988, p. 3)..

⁴⁷ Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ L 380, 31.12.1990, p. 27), as amended by Directive 92/68/EEC of 20 July 1992 (OJ L 219, 4.8.1992, p. 54) and by Directive 93/115/EC of 16 December 1993 (OJ L 326, 28.12.1993, p. 62); see also Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (OJ L 332, 30.12.1995, p. 1), as amended by Regulation (EC) No 1904/96 of 27 December 1996 (OJ L 251, 3.10.1996, p. 5).

⁴⁸ At the time of the original Directive this provision was numbered Article 92(3)(d).

- (1) aid towards joint measures taken by public, scientific or trade organizations to develop research or to improve short-term forecasting;
- (2) aid for improving the structure of the industry, facilitating the elimination of surplus capacity, the conversion of marginal activities to activities outside the industry, or horizontal concentration or vertical integration;
- (3) aid towards modernization and conversion in the industry.

(ii) *Textiles and clothing*

- * Aid to create additional capacity in those sectors of the textile and clothing industry where there is structural excess capacity or persistent stagnation of the market must be avoided.
- * Aid to help firms convert out of a sector where prices have collapsed will be given favourable consideration.
- * The same applies to aid towards technological improvements, and on certain conditions aid towards applied research.

(iii) *Synthetic fibres*

- * The Commission will generally authorize aid only if it is accompanied by a significant reduction in the recipient's production capacity and is in the common interest, that is to say that it moves towards a restructuring of the industry.
- * Regional aid will be given favourable consideration.
- * Aid for research and development and aid for environmental protection are subject to the rules on those types of aid.
- * All aid to the industry, even if it is granted under an existing scheme, must be authorized by the Commission in advance, and consequently has to be notified.

(iv) *Motor vehicles*

- * Rescue and restructuring aid will be considered only if linked to a satisfactory restructuring plan, which may require reductions in production capacity; it must be in the Community interest.
 - * Regional aid and aid for vocational training linked to investments will be given favourable consideration.
 - * But the Commission will take a strict attitude to investment aid for innovation, modernization or rationalization, because they cover costs which ought to be borne by the manufacturers themselves.
 - * Operating aid is prohibited, even in areas qualifying for regional aid.
 - * Aid for research and development and aid for environmental protection and energy-saving will be assessed in accordance with the rules on those forms of aid.
 - * Aid granted under an existing scheme must be notified in the same way as new aid measures if the cost of the project exceeds ECU 12 million. Member States are to provide annual reports showing all aid to the industry.
-

(v) Non-ECSC steel

- * The Commission has determined which non-ECSC steel sectors and sub-sectors are most sensitive to competition on the basis of criteria such as integration into the ECSC steel industry, consumption of ECSC steel, degree of concentration and the economic and financial position of the sector.
- * Aid to the most sensitive sub-sectors must be authorized in advance by the Commission, even if they are merely implementing an existing aid scheme.
- * Member States are to supply six-monthly reports to the Commission showing the measures they have taken in a number of sub-sectors.

(vi) Shipbuilding

- * Operating aid in favour of shipbuilding and ship repair may be considered compatible if the amount does not exceed a ceiling set by the Commission on the basis of the difference in costs between the most competitive Community yards and the prices charged by their main international competitors. The Commission reviews the ceiling every year. It is currently 4.5% for the building of small ships and for ship conversions, and 9% for other business.
- * Other forms of operating aid are admissible provided their combined effect, as a percentage of the recipient's annual turnover, does not exceed the ceiling just mentioned.
- * Investment aid may be granted only if it is linked to a restructuring plan which does not involve any increase in capacity in the Member State.
- * Aid towards the cost of partial or total closure of yards must result in genuine and irreversible capacity reductions.
- * Aid for research and development may be considered compatible.
- * There are specific obligations with regard to notification and annual reports.

*e. Industries subject concurrently to the Treaty rules on State aid and other provisions of the Treaty**(i) Transport*Basic principles

Transport has three special features which set it apart from other industries that may qualify for State aid. First, there is an article in the Treaty which at least partially addresses the question of State aid to transport firms.⁴⁹ Article 77 states that "Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the

⁴⁹ Article 80 of the Treaty also raises the possibility of State aid in transport. It speaks of "the imposition by a Member State, in respect of transport operations carried out within the Community, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries"; these may be authorized by the Commission. The Court of Justice has considered this provision on an application for the annulment of a Commission decision prohibiting State aid towards the rail transport of minerals: judgment in Case C-6/92 *Federmineraria* [1993] ECR I-6357.

discharge of certain obligations inherent in the concept of a public service.” The compatibility envisaged here is automatic, and in that respect is comparable to that of Article 92(2). The Court of Justice has held that this does not prevent the concurrent application of Article 77 and the ordinary Treaty rules on State aid, that is to say Articles 92, 93 and 94.⁵⁰

Second, transport is governed not only by the Treaty rules on transport and on State aid, but also by secondary legislation enacted under those provisions, consisting largely of regulations, but also including directives and decisions.

Third, some transport business is nevertheless excluded from the scope of the primary and secondary legislation just referred to. Article 77, and secondary legislation enacted wholly or partly on the basis of the Treaty rules on transport, cover land transport only, that is to say road, rail and inland waterway.⁵¹ For State aid purposes, therefore, sea and air transport are subject only to Articles 92, 93 and 94.⁵²

Land transport

The public service obligations which Member States impose on transport firms generally require them to provide services which they would not provide, or at any rate would not provide in the same way, if they were to take a purely commercial approach.

As we have seen, Article 77 of the Treaty allows compensation to be given for the economic burden of having to provide these public services. Such compensation is State aid; the mechanisms by which it may be granted are laid down in Regulations Nos 1191/69⁵³ and 1192/69.⁵⁴ The Regulations expressly exempt the categories of aid to which they apply from the prior notification requirement in Article 93(3). Member States are merely required to keep information concerning them at the Commission’s disposal, so as to allow checks to be made *ex post*.⁵⁵

But these Regulations are not intended to define and regulate all cases of application of Article 77. They were therefore supplemented by Regulation No 1107/70, which lays down general rules

⁵⁰ Judgment of the Court of Justice in Case 156/78 *Commission v Belgium* [1978] ECR 1881.

⁵¹ Article 84 states that “The provisions of this Title [Title IV, ‘Transport’, of which Article 77 is part] shall apply to transport by rail, road and inland waterway.” It also provides that “The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.” No such provisions have been laid down to date.

⁵² Judgments of the Court of Justice in Case 167/73 *Commission v France* [1974] ECR 359 and Joined Cases 209 to 213/84 *Nouvelles frontières* [1986] ECR 1425.

⁵³ Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 26.6.1969, p. 1), as last amended by Regulation (EEC) No 1893/91 of 20 June 1991 (OJ L 169, 29.6.1991, p. 1).

⁵⁴ Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalization of the accounts of railway undertakings (OJ L 156, 28.6.1969, p. 8).

⁵⁵ Regulation No 1191/69, cited above, Article 17.

governing State aid for land transport granted under Article 77.⁵⁶ In so far as State aid relates specifically to land transport, the Regulation confirms that Articles 92, 93 and 94 do apply.

Regulation No 1107/70 envisages State aid for the following purposes:

1. to compensate for additional financial burdens borne only by railways;
2. to compensate for the cost of infrastructure used by undertakings providing a particular form of transport which other undertakings do not have to bear;
3. to promote research or the development of more economical transport systems and technologies;
4. to eliminate excess capacity which causes serious structural problems;
5. to facilitate the development of combined transport; and
6. to compensate for public service obligations imposed by Member States, where such compensation is not covered by Regulations Nos 1191/69 and 1192/69.

The aid contemplated by Regulation No 1107/70, unlike that referred to in Regulations Nos 1191/69 and 1192/69, is subject to the prior notification requirement in Article 93(3), with the exception of certain aid to railways, for which the Regulation establishes special machinery for information to be supplied to the Commission in advance and *ex post*.

There are other specific forms of assistance which may be given to railways and inland waterways.

Directive 91/440/EEC allows State aid to be given, in accordance with Articles 77, 92 and 93, to help reorganize the finances of public railways.⁵⁷ And Regulation No 1101/89 authorizes Member States to grant scrapping premiums to encourage the scrapping of inland waterway vessels, so as to reduce the overcapacity which is having a serious adverse effect on the sector.⁵⁸

Sea transport

As we have seen, sea transport is outside the scope of the Treaty rules on transport, which apply only to transport by rail, road and inland waterway. For State aid purposes, then, sea transport is subject only to Articles 92 and 93.

The Commission has adopted specific guidelines for aid to shipping companies.⁵⁹ The Commission will give sympathetic consideration to State aid granted in pursuance of the common interest, that is to say tending to maintain a fleet of ships under Community flags and employing crews made up of nationals of Member States.

⁵⁶ Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1), as last amended by Regulation (EEC) No 3578/92 of 7 December 1992 (OJ L 364, 12 December 1992, p. 11).

⁵⁷ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25).

⁵⁸ Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ L 116, 28.4.1989, p. 25).

⁵⁹ Guidelines for the examination of State aid to Community shipping companies, annexed to *Financial and fiscal measures concerning shipping operations with ships registered in the Community* (SEC(89) 921 final, 3.8.1989).

Whether or not such aid may be authorized is determined by reference to a ceiling arrived at by calculating the difference between the operational costs of vessels registered in Member States and vessels registered in developing countries. As well applying this intensity test the Commission must also ensure, when it vets aid to shipping companies, that aid does not maintain excess capacity, and that it is transparent, temporary and on a declining scale. If these conditions are met the following types of measure may be declared compatible.

- * Operating aid may be allowed if it is linked to a restructuring plan approved by the Commission.
- * Aid to investment will be considered, provided it does not constitute indirect aid to shipyards.
- * The market investor principle will be applied where the State contributes new capital to shipping companies.
- * Aid to reduce the costs of social security and seafarer's income tax is allowable, provided it does not reduce their level of social security.
- * Aid for the training of seafarers may be authorized, on condition that trainees do not help with the working of the ship on which they are trained.
- * Aid towards the relief of crews on ships registered in a Community Member State and operating in distant waters may be authorized, provided it does not exceed 50% of the total costs incurred for crew relief.

Air transport

Like aid to shipping companies, State aid to airlines is governed only by the ordinary State aid rules of the Treaty. The application of Articles 92, 93 and 94 in air transport is discussed in specific guidelines laid down by the Commission.⁶⁰ The essential principles can be summarized as follows:

- * Public capital injections will be looked at in the light of the market investor principle.
- * Operating aid will be considered in two cases only:
 - (1) if it is aid of a social character, granted to individual consumers, provided that it is granted without discrimination related to the origin of the services; and
 - (2) if it serves to reimburse a carrier selected by public tender for performing the required public service.
- * The rules on regional aid apply in air transport too, subject to what has just been said about operating aid.
- * Restructuring aid will be allowed only subject to a number of conditions: in particular, the aid must be exceptional and temporary, there must be a comprehensive restructuring programme which provides for capacity reductions where necessary, and the airline must be run on commercial lines, that is to say without State interference.
- * There is no State aid component in a privatization if the airline is sold to the highest bidder following an open and non-discriminatory public invitation to tender.

⁶⁰ Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

(ii) *Agriculture*

Article 42 of the Treaty states the principle that agriculture is subject to the competition rules, including Articles 92, 93 and 94, “only to the extent determined by the Council... account being taken of the objectives [of the common agricultural policy] set out in Article 39.”

Initially the only provisions declared applicable in this way were those calling for constant review of existing aid and the obligation to notify planned aid to the Commission: Article 4 of Regulation No 26 declared those provisions applicable to aid towards production of or trade in the agricultural products listed in Annex II to the Treaty.⁶¹ The Regulation made no mention of the substantive rules in Article 92, or of the rule in the last sentence of Article 93(3) preventing Member States from paying out aid not yet authorized by the Commission, or of the possibility of proceedings being initiated by the Commission under Article 93(2).⁶²

But the adoption of Regulation No 26 did not exhaust the powers conferred on the Council by Article 42 of the Treaty. The Council retains authority to adopt decisions authorizing State aid to agriculture on a case-by-case basis.

To fill out this incomplete legislative framework, the various regulations establishing common organizations of the market generally do make reference to Articles 92, 93 and 94. But the application of those Articles is frequently prevented by contrary provisions in the same regulations.⁶³ The fact that a specific regulation of this kind is a *lex specialis* in relation to the general rules in the Treaty has the consequence that aid which is prohibited as part of the common organization of a market cannot then qualify for exemption under Article 92(2) or (3) unless it meets the additional conditions imposed by the secondary legislation on agriculture.⁶⁴ It must be borne in mind that the rules on regional aid do not apply to the products listed in Annex II to the Treaty.⁶⁵

One special feature of the assessment of State aid in agriculture is that the Commission takes account not only of the general rules already outlined, and of the objectives of the common agricultural policy laid down in Article 39, but also of a specific criterion which has emerged in its own handling of cases: there are sectoral restrictions on the part-financing by the Community itself of investments in the processing and marketing of agricultural products, and the Commission applies these by analogy to State aid. It has chosen to apply the same limitations to Community and State aid in order to secure greater consistency between policy on agricultural structures and State aid policy.⁶⁶

⁶¹ Council Regulation No 26 applying certain rules on competition to production of and trade in agricultural products (OJ 30, 20 April 1962, p. 993), as amended by Regulation No 49 of 29 June 1962 (OJ 53, 1.7.1962, p. 1571).

⁶² For a more detailed account of the procedural obligations imposed by Article 93(3) see Chapter III below.

⁶³ Judgments of the Court of Justice in Case 83/78 *Pigs Marketing Board* [1978] ECR 2347 and Case 177/78 *Pigs and Bacon Commission* [1979] ECR 2161.

⁶⁴ Case 72/79 *Commission v Italy* [1980] ECR 1411.

⁶⁵ See the end of point II.3.b above.

⁶⁶ Commission communication regarding State aid for investments in the processing and marketing of agricultural products (OJ C 189, 12.7.1994, p. 5).

The Commission has adopted a “framework for national aid” for the advertising of agricultural products and allied products, that is to say products which are not listed in Annex II but consist preponderantly of such products.⁶⁷ The framework clarifies the types of aid which may qualify for exemption under Article 92(3)(c). The main points can be summarized as follows:

- * Aid towards a publicity campaign may qualify on certain conditions:
 - (1) it must not interfere with trade between Member States to an extent contrary to the common interest, and in particular must not infringe Article 30 or directly favour specific firms over others;
 - (2) it must facilitate the development of certain regions or of certain economic activities (covering small and medium-sized enterprises, surplus products or high-quality products for example) by promoting the disposal of their specific products;
 - (3) it must not as a rule exceed 50% of the cost of the campaign.

Lastly, at the end of 1995 the Commission sent the Member States a letter on subsidized short-term loans in agriculture.⁶⁸

(iii) *Fisheries and aquaculture*

The products of fisheries and agriculture are listed in Annex II to the Treaty, and are consequently within the scope of Regulation No 26, which is described above. Like most agricultural products they were brought fully within Articles 92, 93 and 94 of the Treaty by the legislation making them subject to a common organization of the market, which in their case is Regulation No 3759/92.⁶⁹

When the Commission assesses aid to fisheries and aquaculture under Articles 92, 93 and 94 it applies specific criteria which it has published in the form of guidelines.⁷⁰ The main principles can be summarized as follows:

- * State aid may be granted only if it is consistent with the objectives of the common fisheries policy, and must, where relevant, be included in the various programming instruments provided for under Community rules.
- * Operating aid is allowable only where it is directly linked to a restructuring plan authorized by the Commission.
- * The Community rules on regional aid schemes do not apply to fisheries and aquaculture.
- * Most of the classes of aid envisaged in the guidelines will qualify only if they comply with Regulation No 3699/93, particularly as regards the intensity of the aid.⁷¹

⁶⁷ Framework for national aid for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products (OJ C 302, 12.11.1987, p. 6).

⁶⁸ OJ C 44, 16.2.1996, p. 2.

⁶⁹ Council Regulation (EC) No 3759/92 of 17 December 1992 on the common organization of the market in fishery and aquaculture products (OJ L 388, 3.12.1992, p. 1; Article 27).

⁷⁰ Guidelines for the examination of State aid to fisheries and aquaculture (OJ C 260, 17.9.1994, p. 3).

⁷¹ Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ L 346, 31.12.1993, p. 1).

III. QUESTIONS OF PROCEDURE

1. The obligation to notify new aid measures

Community supervision of State aid is based on a system of advance vetting, in which the Commission determines whether or not any aid envisaged by a Member State qualifies for exemption under Article 92(2) or (3). If the aid does not fall into one of the categories listed in Article 92(2), and if the Commission does not authorize it under Article 92(3), it is considered incompatible with the common market. A potential recipient of aid will do well to check whether the aid is to be provided under a scheme which the Commission has already authorized, or whether the Commission has cleared the individual case after notification by the responsible authority.

This principle of advance vetting, which is laid down in Article 93(3), requires that the Commission be informed of planned aid measures before the plan is put into effect. Planned aid has to be distinguished from existing aid, which is covered by Article 93(1). The distinction is a fundamental one, given the differences in the treatment of the two categories in terms of procedure, at least at the preliminary stage, and in terms of the powers exercised by the Commission. Any aid which does not qualify as existing aid - and the requirements are very strict - is new aid caught by Article 93(3).⁷²

The Member States are bound to inform the Commission of new aid measures and of changes to existing aid measures.⁷³ Notification has to be made when the measures are at the planning stage, before they are put into effect, when they can still be changed to take account of any observations the Commission may put forward.

To ensure that this vetting system is effective, the obligation to notify is backed up by a prohibition which prevents the Member State from putting the plan into effect before the Commission has authorized it, explicitly or implicitly, following a procedure which will be described below. A potential recipient of aid should be aware, therefore, that any aid granted without first being notified to the Commission, or without awaiting the Commission's authorization, is unlawful, and may have to be repaid when the regular procedure is ultimately completed if it should prove to be incompatible with the common market.⁷⁴ Aid may be "unlawful" or "illegal" in this sense without actually being "incompatible with the common market", which would mean that it did not in fact qualify for any of the possible exemptions from the ban on State aid.⁷⁵

⁷² See point III.2. below.

⁷³ On the alteration of existing aid measures see the judgment of the Court of Justice in Case C-44/93 *Namur-Les Assurances du Cr dit v Belgium* [1994] ECR I-3829.

⁷⁴ Commission communication (OJ C 318, 24.11.1983, p. 3); see point III.3.b below.

⁷⁵ The fact that the aid is "unlawful" does not mean that it is necessarily "incompatible". Only when the aid is unlawful *and* incompatible can the Commission order that it be recovered (judgment of the Court of Justice in Case C-354/90 *F d ration nationale du commerce ext rieur de produits alimentaires v France* [1991] ECR I-5505).

The obligations to notify and to await authorization are of great importance, because the Court of Justice has for many years accepted that they have direct effect.⁷⁶ This means that a domestic or “national” court has to apply them, on application by an interested party or of its own motion, always provided that the case before it involves State aid caught by Article 92(1). The Court has accepted that in order to apply the procedural rules having direct effect in its domestic legal order a national court has power to determine whether or not there is State aid.⁷⁷ The Commission has published a notice on the subject.⁷⁸

Like the Commission, the national courts have jurisdiction to find that State aid has been improperly granted and is consequently unlawful, and to take whatever action is appropriate under their domestic law. But they have no jurisdiction to determine whether or not the aid is compatible with the common market: that is a matter for the Commission only. Article 93(3), which lays down the obligations to notify and to await authorization, has direct effect, but the other provisions, and in particular Article 92, have not, and the national courts cannot apply them directly. Once the Commission has adopted a decision on a planned aid measure, however, that decision may be invoked before the national courts in the event that the Member State should fail to comply with it.

2. Existing aid

The obligation to notify aid and the obligation to await authorization do not apply to what the Treaty calls “systems of aid existing in” the Member States, that is to say aid introduced before the Treaty entered into force, aid which has already been authorized by the Commission, and aid which has been lawfully granted by the Member State after the expiry of the two months available

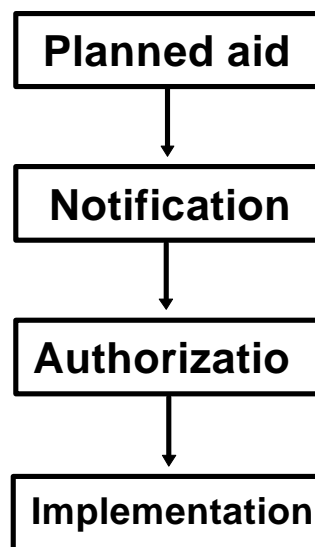


Fig. 1: Advance vetting of new aid measures

⁷⁶ Judgments of the Court of Justice in *Capolongo*, cited above, and in *Fédération nationale du commerce extérieur de produits alimentaires v France*, cited above.

⁷⁷ Judgments of the Court of Justice in Case 78/76 *Steinike & Weinlig v Germany* [1977] ECR 595 and in *Fédération nationale du commerce extérieur de produits alimentaires v France*, cited above.

⁷⁸ Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8).

to the Commission to complete its initial examination of notified measures.⁷⁹ A brief explanation of these possibilities is called for.

- Aid measures introduced before the Treaty entered into force are either on-off measures by which aid was granted before that date, or measures by which aid is granted now under a scheme which was already in existence at that time, provided the scheme has not been changed in the meantime (changes might have been made for example with respect to the ceiling on aid or on the eligible investment, the overall budget originally earmarked, the intensity of the aid, the conditions of eligibility, etc.).⁸⁰
- Where the aid has been approved by the Commission, whether explicitly or implicitly (i.e. by default, the time allowed having passed without a response), there is no particular problem if the measure is a one-off measure rather than a measure granting aid under a scheme.⁸¹ If the aid is being granted under a scheme, however, the Member State and the recipient should check whether what is envisaged is in fact in accordance with the scheme, and in accordance with any conditions imposed by the Commission in the decision authorizing the scheme, and that any notification requirements which the Commission imposed in its authorizing decision have been complied with. If there is such a notification requirement, the measure will be subject to the obligation to notify and the obligation to await authorization laid down in Article 93(3) even though it is not strictly speaking a new aid measure.

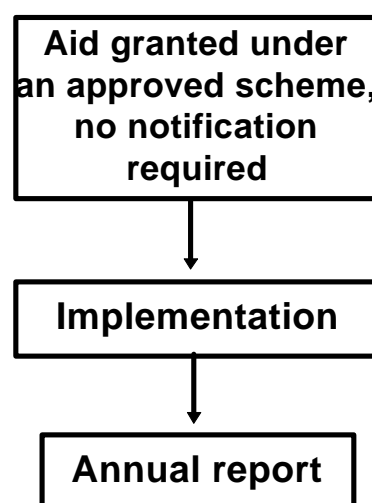


Fig. 2: Ex post supervision of existing aid measures

The category of existing aid measures is a particularly large one, mainly because it includes cases of application of schemes already approved by the Commission. A “scheme” is a measure taken by a Member State, usually in the form of legislation, which lays down conditions of eligibility for aid, the ceilings and intensity of the aid available, and the machinery for payment. A scheme differs from a “one-off”, “ad hoc” or “specific” measure in that it is not aimed at a particular firm,

⁷⁹ See point II.3.a below.

⁸⁰ Obviously it is now very rare for aid to be granted in one of the founding Member States under a scheme which was already in existence when the Treaty entered into force. But it happens fairly often in the new Member States. The Commission has a duty to review the aid schemes existing in new Member States as rapidly as possible, in order to eliminate any discrimination they may involve against businesses from the old Member States.

⁸¹ Always provided the measure implemented does not differ from the plan notified, and that any conditions attached by the Commission to its approval are complied with.

but rather at a class of firms whose identities and number are still undefined. The scheme is said to be “applied” every time a firm is to receive aid under it on the conditions which the Commission set out in the authorizing decision.

Article 93(1) states that “The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States.” Thus existing measures do not have to be notified, and need not await authorization before being applied.⁸² The advance vetting system, which is by definition inconceivable in the case of existing measures, is replaced by a system of retrospective, *ex post* or “*a posteriori*” supervision.

In some circumstances, however, the Commission may make the application of a scheme subject to the notification and authorization obligations even though the scheme itself has been properly approved, so that measures under the scheme are subject to the same procedure as planned new measures. There are general and industry-specific rules, for example, which require measures applying approved schemes to be notified if the recipients operate in sensitive industries, or if the measures pursue stated objectives.⁸³

3. The procedures

Article 94 makes provision for regulations applying Articles 92 and 93, but it has remained a dead letter at least as far as the procedures to be followed are concerned. In the absence of specific legislation the current procedural rules have grown up essentially on the basis of Commission practice and the judgments of the Court of Justice.

a. Notification

It is the Member State concerned which must notify the planned aid measure; it will usually do so using a form which the Commission has drawn up for the purpose.⁸⁴ The Commission has 15 working days from receipt of the notification in which to request any clarification or further information it may need, and the Member State must supply this within 20 days. The Commission then has two months in which to examine the planned aid.⁸⁵ The two-month period runs from the

⁸² Judgments of the Court of Justice in Joined Cases 166 and 220/86 *Irish Cement v Commission* [1988] ECR 6473 and Case C-47/91 *Italgrani* [1994] ECR I-4635.

⁸³ These are the industry-specific rules on aid to the synthetic fibres industry, the motor industry, shipbuilding, fisheries, and non-ECSC steel, and the cross-industry rules on aid for R&D, aid for rescuing and restructuring firms in difficulty, and the combination of different types of aid granted under different schemes: on this latter point see the Commission communication on the cumulation of aids for different purposes (OJ C 3, 5.1.1985, p. 2). In such cases the obligation to notify usually applies only to investments exceeding a specified amount.

⁸⁴ Commission notice on standardized notifications and reports: letter to Member States SG(94) D/2472-2494 of 22.2.1994. Notifications are generally to be sent to the Commission’s Secretariat-General. But individual cases in which aid is granted under a scheme already authorized are to be notified to the responsible Directorate-General at the Commission: Commission letter to Member States SG(81) 12740 of 2.10.1981.

⁸⁵ The two-month period is reduced to 30 days if the aid is to be granted under an authorized scheme, or would constitute a significant case of combination of aid granted for different purposes, and to 20 days if the aid can be handled by the accelerated clearance procedure. This procedure allows rapid

time when the Commission has all the information it needs to assess the case; it follows that if the Commission does request further information within 15 working days of receipt of the notification, the two-month period starts to run when the Commission actually receives the information from the national authorities.

At the end of that period the Commission may decide to raise no objection to the plan notified, or to take no action, or to initiate proceedings under Article 93(2).

(a) Decisions to raise no objection do not call for any particular comment here, except perhaps to say that a brief notice announcing the decision is published in the Official Journal, C series. Any interested party

can obtain the full text of the decision by applying in writing to the Commission's Secretariat-General. Firms which feel they have been injured by a decision of this kind can bring an action for annulment before the Court of First Instance, provided they can show that they are competing directly with the firm receiving the aid.⁸⁶

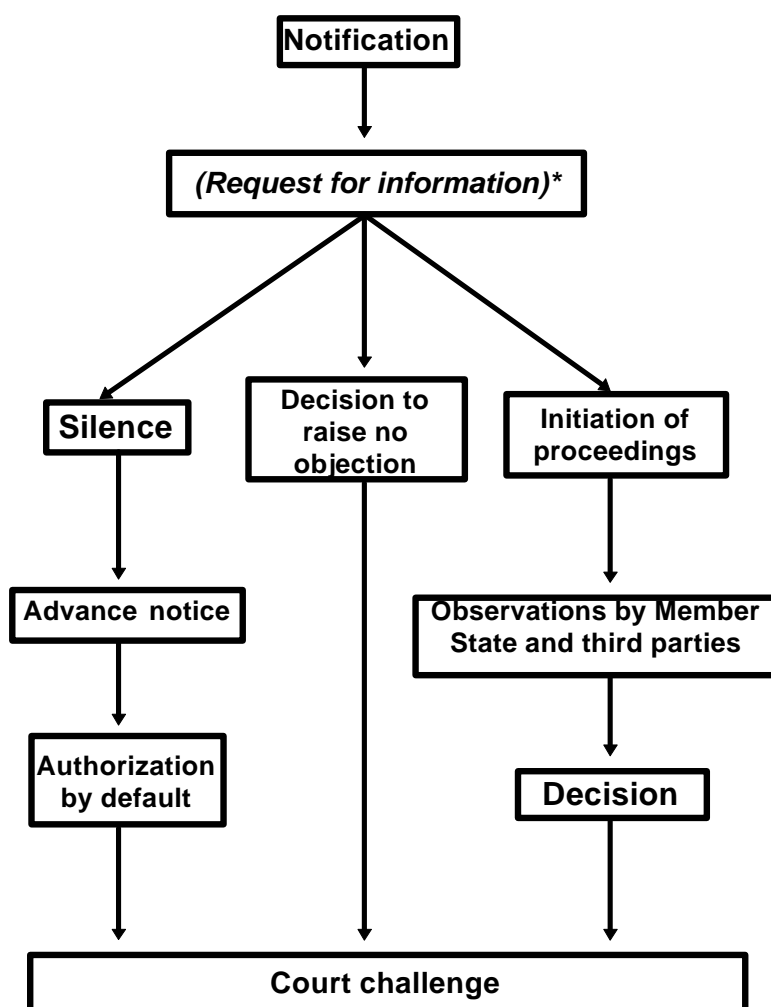


Fig. 3: The notification procedure (* optional)

authorization of low-intensity measures to assist SMEs, and within certain limits of alterations to existing schemes irrespective of the firms which may qualify (see the Community guidelines on State aid for small and medium-sized enterprises (SMEs), cited above). The accelerated procedure has been extended to airlines even where they do not fall within the definition of SMEs (see the notice on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, cited above). This accelerated procedure can be applied to aid to investment of not more than ECU 1 million over three years.

⁸⁶ See point III.3.e below.

- (b) If the Commission takes no action within the time allowed, the Member State is entitled to put its proposed measures into effect.⁸⁷

If the Commission has the slightest doubt as to the compatibility of the aid with the common market, it must set in motion the procedure laid down in Article 93(2).⁸⁸ The purpose is to enable the Commission to obtain opinions and observations which may be relevant to a proper consideration of the case, and to enable parties who feel that they would be injured by the aid to defend their interests.⁸⁹

- (c) To initiate Article 93(2) proceedings the Commission publishes a detailed description of the aid in the Official Journal, C series, and gives the Member State concerned notice to submit its observations, first in writing, and if necessary thereafter at meetings with officials from the Commission departments concerned. The Commission calls for observations from other interested parties, such as other Member States, the recipient firm and its competitors, and trade associations. The time-limit for observations is usually 30 days from the date of the notice published in the Official Journal. In certain circumstances a decision to initiate Article 93(2) proceedings of this kind may be challenged in the Community lawcourts.⁹⁰

The notice publishing the decision to initiate proceedings, which usually reproduces the letter to the Member State concerned, is thus intended to open an inquiry, sometimes referred to as the “formal investigation” or “administrative proceedings”, in which all parties who can show a legitimate interest, be they public or private, can make their views known. There is no time-limit laid down for this inquiry. But the Commission attempts to complete it within six months of publication of the notice.⁹¹

The Commission then adopts a final decision, which may be negative, positive, positive but subject to stated conditions, or positive in respect of some aspects but negative in respect of others. Where necessary the decision will state a time-limit within which the Member State must comply with it. If the Member State fails to take the necessary measures within the time allowed,

⁸⁷ Judgments of the Court of Justice in Case 120/73 *Lorenz* [1973] ECR 1471 and Case 84/82 *Germany v Commission* [1984] ECR 1451.

The Commission interprets the rule developed by the Court of Justice on this point to mean that when the two-month period has passed the Member State must give the Commission notice if it proposes to put the plan into effect, whereupon the Commission has a final two weeks in which to initiate proceedings.

⁸⁸ But this procedure is not available to the Commission in the agricultural sector, since Article 4 of Regulation No 26 does not make Article 93(2) applicable to aid in respect of the products listed in Annex II to the Treaty. In such cases the Commission sends a recommendation to the Member State concerned.

⁸⁹ Judgments of the Court of Justice in Case 84/82 *Germany v Commission*, cited above, and in *Italgrani*, cited above.

⁹⁰ The Court of Justice has accepted that a decision initiating proceedings is an act which may have an adverse effect on a party, and which is consequently actionable, at least in so far as the decision finds that a measure constitutes planned aid caught by Article 93(3). It follows that the Member State and the recipient firm can seek annulment by the Court of Justice or the Court of First Instance respectively if they believe that a measure constitutes existing aid and that the Commission was wrong to classify it as new aid (*Italgrani*, cited above).

⁹¹ Commission letter to Member States SG(87) D/5540 of 30 April 1987..

the Commission may refer the matter to the Court of Justice direct, under the same Article 93(2), seeking a finding that the Member State has failed to fulfil its obligations under the Treaty.⁹²

If the decision is negative, or partly negative, or positive but subject to conditions, the Member State concerned and the firm which is to receive the aid are entitled to bring a court action for its annulment under Article 173 of the Treaty.⁹³ In principle this does not suspend the operation of the decision. In the same way firms competing with the recipient, and in certain circumstances trade associations too, are entitled to challenge a decision which is positive or partly positive, but they must have played an active part in the administrative proceedings.⁹⁴

b. Investigation of measures which have not been notified

If a Member State fails to comply with its obligation to notify and its obligation to await authorization, the Commission may initiate proceedings either at its own initiative or for example in response to complaints from competitors. The procedure that the Commission follows here is different from what has just been described: the stage before the opening of the detailed inquiry is shorter, and consideration has to be given to the fact that the aid was granted prematurely, that is to say in breach of the obligation to await authorization.

The Commission has power to impose injunctions, known as “interim measures” or “provisional measures”, preventing or at least suspending the grant of aid, and can require the Member State to recover from the recipient aid which has already been paid out.⁹⁵

Where it finds that a Member State has failed to comply with its obligations to notify or to await authorization, the Commission asks it to comment within a fixed period; the period is usually fairly short, perhaps two or three weeks, so as to permit the Commission to take effective action to prevent or limit the distortion of competition caused by the aid. If the Member State does not reply, or if its reply is unsatisfactory, the Commission initiates Article 93(2) proceedings. It will usually take interim measures at the same time: it may order the Member State not to put its plan into effect, or, if that is no longer possible, to suspend payment to the recipient firm.

⁹² In Case T-277/94 *AITEC* [1996] ECR II-351 the Court of First Instance rejected a submission that the Commission was under a duty to refer the case to the Court of Justice whenever a Member State failed to comply with anything in a decision.

⁹³ Judgment of the Court of Justice in *Inter Mills*, cited above.

⁹⁴ See point III.3.e below.

⁹⁵ Judgments of the Court of Justice in Case C-301/87 *Boussac* [1990] ECR I-307 and in *Tubemeuse*, cited above.

If the Member State does not supply all the information the Commission needs in order to consider the measure properly, the Commission requires it to do so within a final time-limit, usually 15 days, failing which the Commission is entitled to take a final decision on the basis of whatever information is in its possession.⁹⁶ In that event the Member State is barred from producing fresh evidence at a later stage, for example in an action before the Court of Justice, in addition to the information it submitted in the course of the administrative proceedings.

Once it has completed its examination of the measure the Commission adopts a final decision. If it finds that the aid is not compatible with the rules of the common market, it may order the Member State to recover the sum already paid out to the recipient firm.

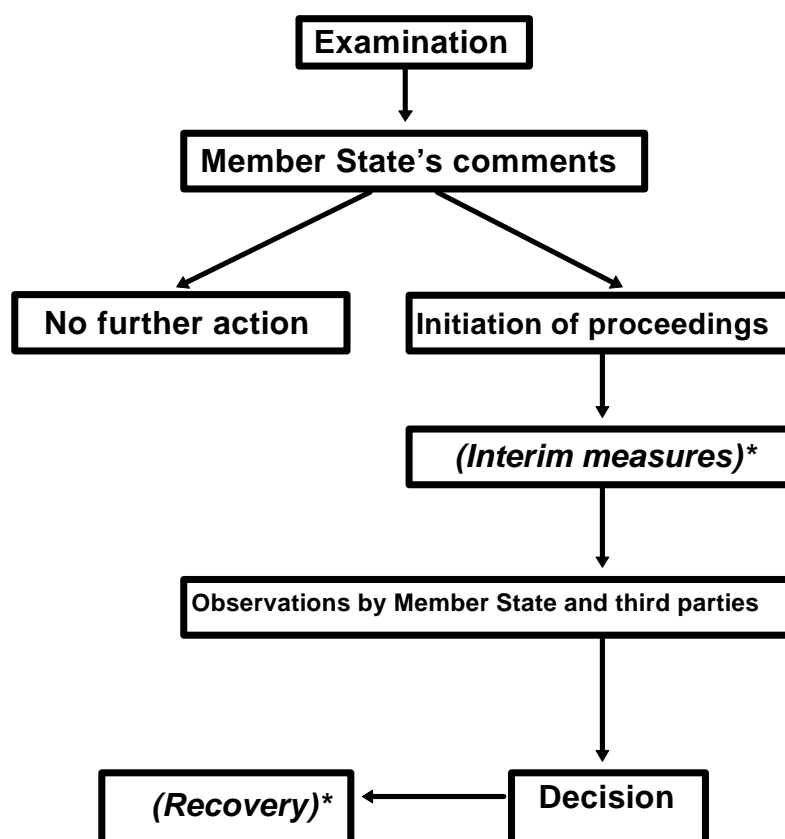


Fig. 4: Procedure for the examination of aid measures which have not been notified (optional)*

There are no Community rules governing the way in which the aid improperly disbursed is to be recovered, and the question is consequently governed by domestic law. The absence of specific Community rules must not prevent the aid from being properly recovered: the Member State is under a duty to use whatever means are available to it in the ordinary way when it has to recover moneys due to it for some other reason.

An argument regularly put forward by Member States and recipient firms in order to avoid recovery or repayment is the appeal to good faith and the principle of the protection of legitimate

⁹⁶ Judgments of the Court of Justice in *Boussac* and *Tubemeuse*, cited above.

expectations. The Commission has gone to great lengths to overcome this obstacle. It has published communications in the Official Journal informing firms of the risks attaching to any aid granted without its authorization, and warning them to check whether any aid they are given is granted in accordance with Community law.⁹⁷ The same warning is given in published decisions initiating Article 93(2) proceedings. In the agricultural sector the Commission may refuse to make EAGGF advance payments, or to charge expenditure relating to national measures that directly affect Community measures to the EAGGF budget.

Against this background the Court of Justice has held that it is only in exceptional circumstances that the Member State concerned or the recipient firm can invoke the principle of the protection of legitimate expectations. Firms which do not check that the aid they are receiving is lawful and compatible with the common market cannot afterwards plead that they were entitled to believe that it complied with Community law.⁹⁸ Firms would be well advised to establish this point before collecting aid; if necessary they can contact the responsible Commission departments.

Even if the recipient repays aid which was improperly granted, it will still have had the use of the money for a certain length of time. The Commission therefore requires that the aid be repaid with interest, running from the date on which it was granted, at a commercial rate rather than a legally-defined one.⁹⁹

If the Member State fails to comply with the Commission decision in the time allowed, the Commission can refer the matter to the Court of Justice direct under Article 93(2). The only valid ground the Member State can invoke is that it was impossible to implement the Commission's decision correctly. If it merely encounters difficulties in applying the decision, the Member State must consult with the Commission in order to resolve the difficulties by agreement.¹⁰⁰

⁹⁷ OJ No C 318, 24.11.1983, and OJ No C 156, 22.6.1995.

⁹⁸ Judgments of the Court of Justice in Case C-5/89 *Commission v Germany* [1990] ECR I-3437 and Case C-183/91 *Commission v Greece* [1993] ECR I-3 131.

⁹⁹ Commission letter to Member States SG(95) D/1971 of 22.2.1995 on the interest rates to be applied when aid granted unlawfully is being recovered. The Court of First Instance has accepted this practice, holding that the interest corresponds to the financial advantage of having the disposal of the aid free of charge for a given period (Case T-459/93 *Siemens v Commission* [1995] ECR II-1675).

¹⁰⁰ Judgment of the Court of Justice in Case C-349/93 *Commission v Italy* [1995] ECR I-343.

The Commission decision ordering recovery can be challenged by the Member State or the recipient in an action brought under Article 173 of the EC Treaty.¹⁰¹

c. Constant review

The Commission keeps existing aid schemes under constant review; the Member States are required to supply it with annual reports for this purpose, and regular multilateral meetings are held.¹⁰² If the Commission feels that an existing aid measure ought to be altered, or indeed ended, it sends the Member State concerned a request for further information.

Once it has studied the information supplied by the Member State, the Commission may conclude that the measure is still fully justified, and decide to take no further action; or it may propose changes, or in the words of Article 93 “appropriate measures”, which may involve anything up to and including the abolition of the scheme.

If the Member State does not take the “appropriate measures” proposed, the Commission initiates Article 93(2) proceedings of the kind already described. But the final decision which closes those proceedings has no retroactive effect, and so cannot require the recovery of aid already disbursed under the scheme.

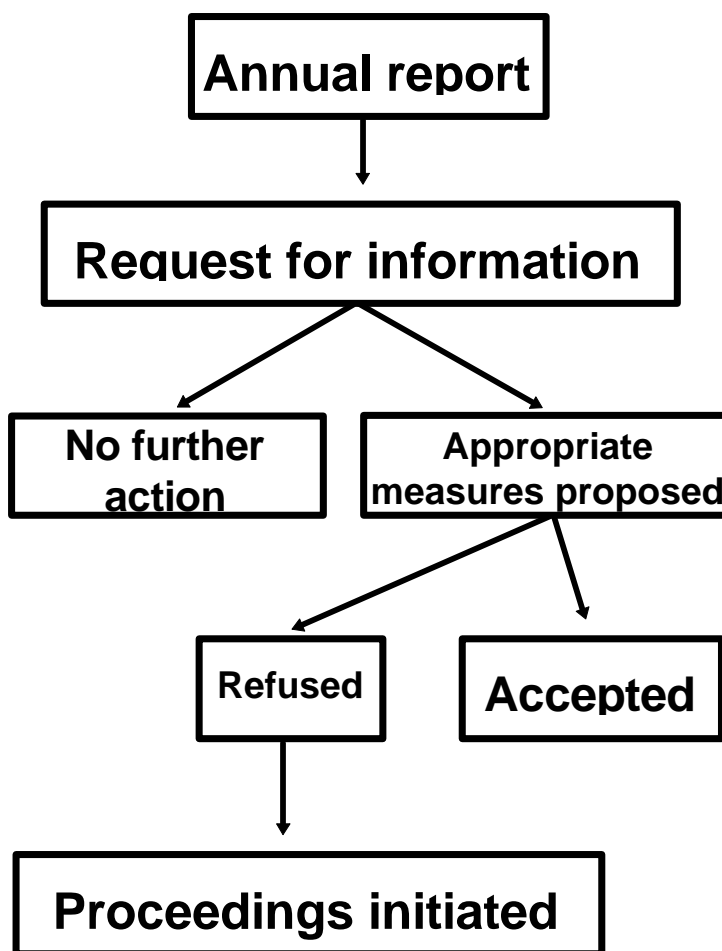


Fig. 5: Constant review

¹⁰¹ See point III.3.e below.

¹⁰² Commission letter to Member States SG(94) D/2472-2494 of 22 February 1994 on notifications and standardized reports.

d. Publicizing Commission decisions

As we have seen, it is important that firms receiving State aid should know whether the aid has been properly notified to the Commission and authorized by it: otherwise they may find they have to repay it with interest. Their own domestic authorities will be their main source of information on the progress of the case. But it is not always easy to establish effective collaboration between such authorities and recipient firms.

The proceedings may also be of great importance to third parties, and these will not generally have the same access to the recipient's authorities, particularly where they themselves come from other Member States and consequently have to look to other channels of information. It is important, therefore, that the Commission itself should act to ensure the greatest possible measure of openness in the proceedings; it does this by publishing news of the measures it takes.

The primary source of information, therefore, is certainly the Official Journal: Commission decisions are published there in full or in summarized form, depending on the type of decision involved.¹⁰³ Where the Commission decides to raise no objection to an aid measure, a brief notice to that effect is published in the Official Journal, C series. Decisions to initiate Article 93(2) proceedings and decisions ordering interim measures are published in full in the same C series, in the form of notices addressed to Member States and other interested parties. Final decisions following

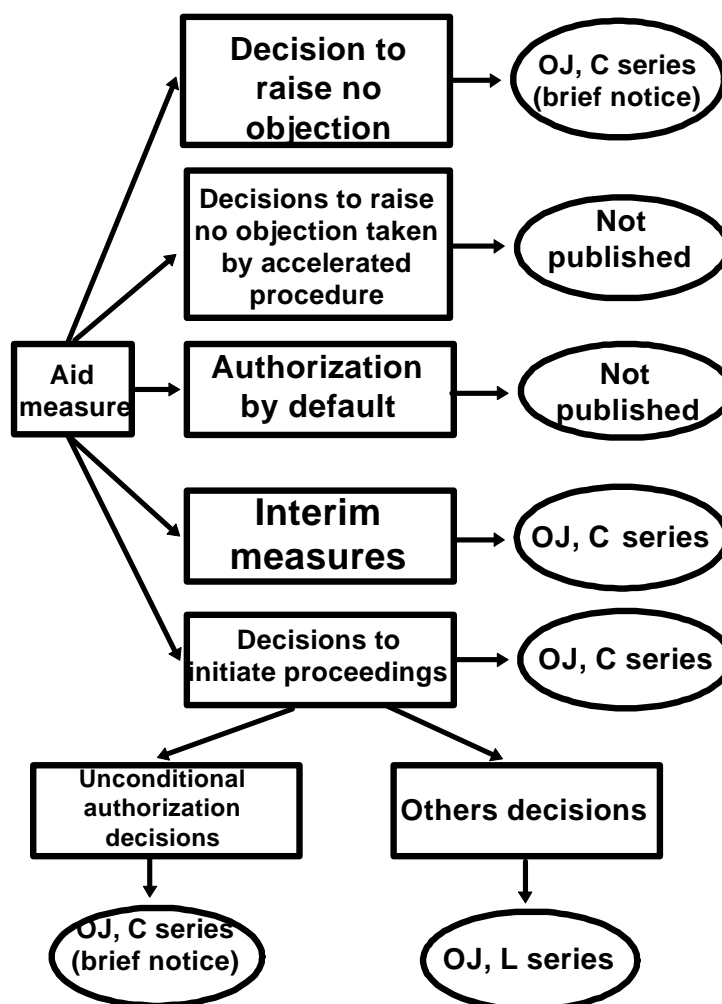


Fig. 6: Types of decision and where published

¹⁰³ The Commission's activities in the State aid field are also described in its annual *Report on Competition Policy*.

Article 93(2) proceedings are published in full in the L series, except for those authorizing the aid unconditionally, which appear in the C series.

Where the Commission is reviewing existing aid schemes, the rules just described apply *mutatis mutandis* to the publication of decisions to propose appropriate measures, decisions to raise no objection, decisions initiating Article 93(2) proceedings, and the final decisions adopted at the end of such proceedings.

The Community rules on State aid do not require the publication of any sort of notice informing interested parties simply that a planned aid measure has been notified, along the lines of what is done in other branches of Community law. If nothing has been published, parties are still free to contact the Commission direct, in order to inquire whether there are any Community proceedings in progress in respect of a specific aid measure, and if so what stage has been reached.

e. The rights of third parties

Before considering the rights of third parties in Community State aid proceedings we must first make it clear what we mean by “third parties”. The recipient firm is not an immediate party to the proceedings between the Commission and the Member State concerned, and strictly speaking this makes it a third party. But its position is different from that of other third parties, and in terms of the judicial protection of its rights it is in fact in the same position as the Member State, except that the court with jurisdiction is the Court of Justice in actions brought by a State and the Court of First Instance in actions brought by a firm. The recipient is entitled to take part throughout the Article 93(2) proceedings.

The Court of Justice has defined the interested parties or “parties concerned” referred to in Article 93(2) as including not only the recipient and the other Member States but also any person, firm or association which might be injured by the grant of aid, and especially the recipient’s competitors and the trade associations concerned.¹⁰⁴

These are the third parties entitled to submit observations when the Commission decides to initiate Article 93(2) proceedings and informs the public accordingly by means of a notice published in the Official Journal, C series. As we have seen, the Commission is under a duty to open proceedings of this kind whenever it has doubts as to the compatibility of an aid measure with the common market, so as to guarantee the rights of third parties, and particularly to give them the opportunity to put forward their views in any case in which they may have an interest.¹⁰⁵ The Commission is not entitled to decide to raise no objection to an aid measure if the measure is not clearly compatible on an initial examination.¹⁰⁶ But the Commission would not be justified in commencing Article 93(2) proceedings if its doubts relate only to the question whether the measure should be classified as a planned aid measure caught by Article 93(3) rather than as an existing measure covered by Article 93(1).¹⁰⁷

¹⁰⁴ Judgment of the Court of Justice in *Inter Mills*, cited above.

¹⁰⁵ Judgment of the Court of Justice in Case 84/82 *Germany v Commission*, cited above.

¹⁰⁶ Judgment of the Court of Justice in Case C-225/91 *Matra* [1993] ECR I-3203.

¹⁰⁷ Judgment of the Court of Justice in *Italgrani*, cited above.

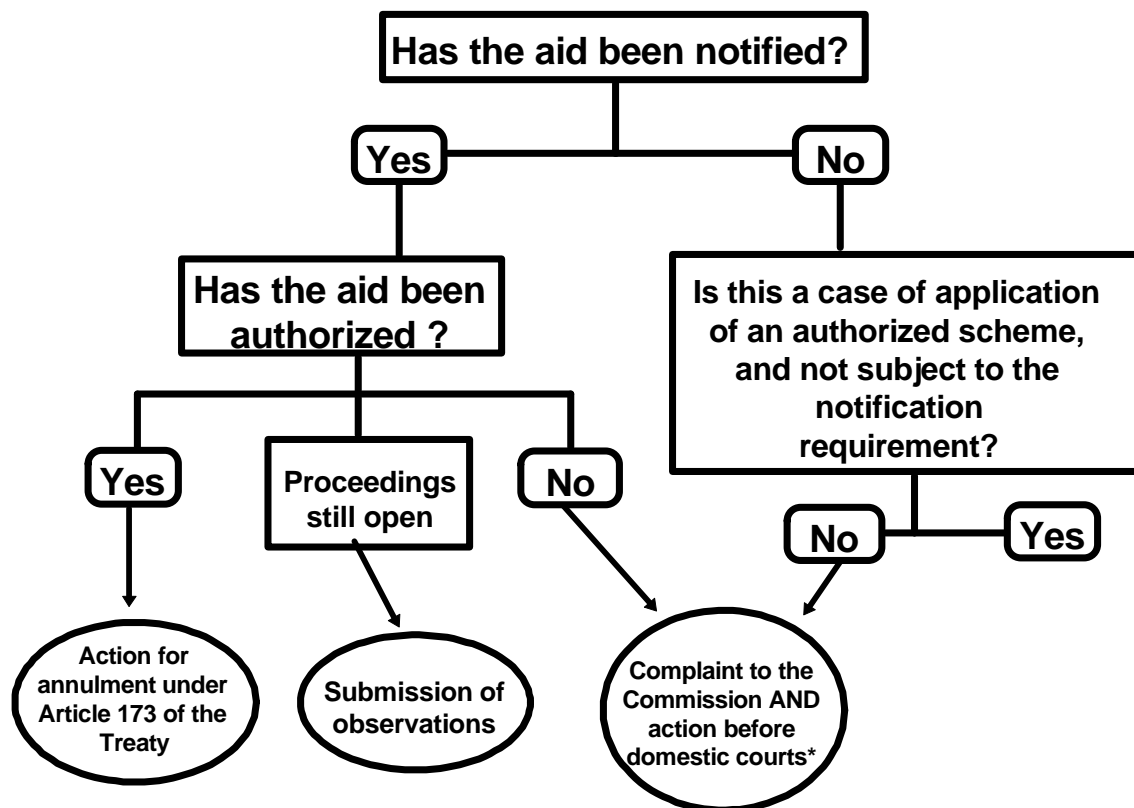


Fig. 7: Remedies open to third parties

(* By virtue of the direct effect of the last sentence of Article 93(3))

If at the end of the Article 93(2) proceedings the Commission takes a decision authorizing the aid, even where the authorization is only conditional or partial, the third parties described here clearly have an interest in having that decision annulled by the courts. But in practice it is difficult for private parties to bring actions of this kind, because the rules governing the admissibility of actions brought by “natural or legal persons”, which are laid down in the fourth paragraph of Article 173 of the Treaty, are very restrictive.¹⁰⁸

The case-law of the Court of Justice has developed slowly to a point where it will now be presumed that a third party is entitled to bring an action for the annulment of a decision authorizing a State aid measure if that third party can show that it took part in the proceedings before the Commission, by lodging a complaint or submitting observations, and that the decision would cause it appreciable competitive damage.¹⁰⁹ If the third party is a trade association which

¹⁰⁸ Article 173 governs the procedure for actions for annulment before the Court of Justice and the Court of First Instance. The fourth paragraph states that “Any natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although... addressed to another person, is of direct and individual concern to the former.”

¹⁰⁹ Judgment of the Court of Justice in Case C-169/84 *Cofaz* [1986] ECR 391. For an idea of the development of Community case-law on this subject see also the Court’s 1963 judgment in Case 25/62 *Plaumann* [1963] ECR 95.

considers itself damaged by the decision, it must in addition be defending its own interests, that is to say interests distinct from those of its members: otherwise it cannot claim to be “individually” concerned by a decision which affects the general interests of the group it represents.¹¹⁰

A particular problem arises where the Commission decides to raise no objection to an aid measure. There are then no Article 93(2) proceedings, so that third parties are not given the opportunity to submit observations and to play their part in the inquiry. But the Court of Justice has provided a remedy. The Court has accepted that the only way open to third parties to ensure that their rights are being respected in such cases is an action for annulment of the decision. In that case, and in that case only, the Court considers that the decision is “of direct and individual concern” to any third party which can show that it is a competitor with the recipient.¹¹¹

¹¹⁰ Judgments of the Court of Justice in *Van der Kooy*, cited above, and *CIRFS*, cited above.

¹¹¹ Judgments of the Court of Justice in Case C-198/91 *Cook* [1993] ECR I-2487 and in *Matra*, cited above.

IV. THE TREATMENT OF STATE AID UNDER THE ECSC TREATY

1. Basic principles

Unlike the EC Treaty, the Treaty establishing the European Coal and Steel Community makes no specific provision for exemption from the principle that State aid is prohibited. Article 4(c) of the ECSC Treaty, which corresponds roughly to Article 92(1) of the EC Treaty, provides that “The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:... subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever”.

The Court of Justice has held, however, that this absolute ban does not apply to direct financial aid from the Community,¹¹² nor to aid authorized in advance by the Community.¹¹³ Two conclusions can be drawn from the case-law. First, Article 4(c) bans only aid which is granted unilaterally and arbitrarily to firms in the industries concerned.¹¹⁴ Second, the Court of Justice’s distinction between aid that the Community grants and aid that the Community authorizes makes it clear that the ECSC Treaty does allow Member States to grant aid to coal and steel firms provided it has been approved by the Community authorities.

This development in thinking has to be seen against the background of the deep structural crisis which from the 1960s onward affected all industries, but especially coal and steel, the two pillars of the ECSC Treaty. At the time the Treaty was signed, these industries were in the best of health, and there was nothing to suggest that a crisis was on the way; but a series of Community measures to support coal and steel firms soon became necessary. In fact it rapidly became evident that the Community’s financial capacity was not going to be sufficient to deal with the situation.

The Community came to the conclusion that the Community aid would have to be financed by the Member States. It invoked Article 95(1), which allows exceptional decisions to be taken on a temporary basis to resolve specific unforeseen difficulties. The decisions which have been taken, often referred to as “Codes”, govern the grant of aid in the coal and steel industries. As provided in Article 14 of the Treaty, these decisions are binding in their entirety.

¹¹² Community aid of this kind is provided for by Article 5 of the Treaty, according to which the Community is to “place financial resources at the disposal of undertakings for their investment and bear part of the cost of readaptation”. Article 54 provides that the High Authority may grant loans to undertakings or guarantee loans which they may contract.

¹¹³ Judgment of the Court of Justice in *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*, cited above.

¹¹⁴ See the opinion of Advocate General Lagrange in *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*, cited above.

2. The Coal and Steel Aid Codes

The rules on State aid under the ECSC Treaty are currently laid down in Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry¹¹⁵ and Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry.¹¹⁶ It should be pointed out that there are some steel products which are not covered by the ECSC Treaty. In those sections of the industry, State aid is regulated not by Decision No 3855/91/ECSC but instead by a specific framework adopted under the EC Treaty.¹¹⁷

The Codes set out circumstances in which certain categories of aid financed by the Member States are deemed to constitute Community aid compatible with the common market. They lay down precise tests in order to provide interested parties with as clear a frame of reference as possible.

The categories of aid contemplated in the Steel Aid Code are aid for closures and regional aid towards investment in Greece, Portugal and the former German Democratic Republic. The Code governing aid to the coal industry envisages operating aid, aid for the reduction of activity, and aid to cover exceptional costs. For aid for research and development and aid for environmental protection both Codes refer to the relevant Community framework and guidelines drawn up under the EC Treaty, or at least base themselves on them.¹¹⁸

It is worth noting that in the Commission's opinion these Codes do not provide an exhaustive definition of admissible aid to firms in these industries: they merely lay down fundamental rules governing the compatibility of certain quite specific categories of aid. They do not prevent decisions which supplement the Codes by allowing aid outside those categories, always provided that the conditions described in Article 95 of the ECSC Treaty are satisfied. This view is shortly to be tested in the Court of First Instance.¹¹⁹

¹¹⁵ OJ L 362, 31.12.1991, p. 57.

¹¹⁶ OJ L 329, 30.12.1993, p. 12.

¹¹⁷ See point II.3.d above.

¹¹⁸ See point II.3.c above.

¹¹⁹ Commission decisions authorizing aid to the steel firms EKO Stahl, Siderurgia Nacional, CSI, ILVA, Sächsische Edelstahlwerke and Sidenor (Decisions 94/256/ECSC to 94/261/ECSC of 12.4.1994 (OJ L 112, 3.5.1994, pp. 45 ff.)) are currently the subject of actions before the Court of First Instance.

3. Procedure

As we have seen, any State aid to an industry within the scope of the ECSC Treaty must be authorized by the Community in advance.

The procedure for the notification of aid to steel firms is governed by Article 6 of the Steel Aid Code. Planned aid measures must be notified to the Commission, and may not be put into effect until the Commission has approved them. In certain cases the Commission must consult all the Member States before deciding its position. If it proposes to prohibit a measure the Commission first calls for observations from interested parties. If the Commission takes no action within two months of the notification of a planned measure, the measure is deemed to have been approved by default.¹²⁰ But the Member State must then inform the Commission of its intention to put the plan into effect.

The Code governing aid to the coal industry requires Member States to inform the Commission, using a specific notification form, of all aid measures they intend to take in the following year.¹²¹ These measures may not be put into effect until the Commission has authorized them.

¹²⁰ The time-limit is extended to three months when the Commission has consulted the Member States.

¹²¹ Commission Decision No 341/94/ECSC of 8 February 1994 implementing Decision No 3632/93/ECSC establishing Community rules for State aid to the coal industry (OJ L 49, 19.2.1994, p. 1). Member States who wished to grant operating aid or aid towards the reduction of activity during the period 1994 to 2002 were required by the Code to submit a modernization, rationalization and restructuring plan or an activity-reduction plan by 31 March 1994.

ANNEXES

1. Main documents regarding State aid approved or published by the Commission since the finalization of Volume IIA (31 December 1994)

Commission letter to Member States SG(95) D/1971 of 22 February 1995 on the interest rates to be applied when aid granted unlawfully is being recovered (unpublished)

Where aid has to be repaid, the rate of interest to be applied is the commercial rate and not a legally-defined one.

Commission communication regarding State aid for investments in the processing and marketing of agricultural products (JO C 71, 23.3.1995, p. 6)

The Commission will continue to apply in the context of State aid the sectoral restrictions set out in point 2 of the Annex to Decision 90/342/EEC, except where less restrictive conditions are established by Decision 94/173/EC.

Notice on the extension of the Code on aid to the synthetic fibres industry (OJ C 142, 8.6.1995, p. 4)

The Code on aid to the synthetic fibres industry is extended until 31 March 1996.

Commission communication to the Member States (OJ C 156, 22.6.1995, p. 5)

Where State aid is disbursed in infringement of the procedural requirements, the Commission intends to adopt provisional decisions ordering its recovery. The aid will have to be recovered in accordance with the requirements of domestic law, and the sum repayable will carry default interest. The interest will run from the time the aid was paid out.

Commission communication on the method of application of Article 92(3)(c) of the EC Treaty to national regional aid (OJ C 186, 26.6.96, p. 6).

The communication updates the threshold indices for assessing the socio-economic situation of a region to reflect changes in each Member State's position.

Framework for State aid in the motor vehicle sector (OJ C 284, 28.10.1995, p. 3); corrigendum (OJ C 307, 18.11.1995, p. 22)

The Commission prolongs the original framework retroactively from 1 January 1995, and proposes "appropriate measures" under Article 93(1) of the Treaty.

Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8)

The notice clarifies some of the implications of the principle of the direct applicability of the last sentence of Article 93(3) of the Treaty, and in particular establishes machinery for

cooperation between the Commission and national courts which are called upon to apply this principle.

Guidelines on aid to employment (OJ C 334, 12.12.1995, p. 4).

These guidelines are described at point II.3.c, on cross-industry rules.

Council Regulation (EC) No 3049/95 of 22 December 1995 on aid to shipbuilding (OJ L 332, 30.12.1995, p. 1), as amended by Regulation (EC) No 1904/96 of 27 September 1996 (OJ L 251, 3.10.1996).

The OECD Agreement, which has been ratified by the Community, has not been ratified by all the necessary parties; the Regulation provides that the Seventh Shipbuilding Directive will continue to apply until the Agreement enters into force, and until 31 December 1997 at the latest.

Agreement respecting normal competitive conditions in the shipbuilding and repair industry (OJ C 355, 30.12.1995, p. 1)

The Agreement sets out to eliminate all existing measures or practices which are inconsistent with normal competitive conditions, and particularly injurious pricing practices.

Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5)

The framework allows higher aid intensities (“bonuses”) for SMEs in general, for firms investing in the less-developed regions of the Union, and for projects in accordance with the framework programme for research and technological development 1994 -98 and its specific priorities. Only projects exceeding a stated threshold need be notified. The new rules replace those published in 1986.

Commission communication on State aids: subsidized short-term loans in agriculture (crédits de gestion) (OJ C 44, 16.2.1996, p. 2)

The Commission has in the past raised no objection to aid of this kind; it will now approve it only if a number of conditions are met.

Commission notice on the de minimis rule for State aid (OJ C 68, 6.3.1996, p. 9)

The Commission here simplifies the operation of the *de minimis* rule and broadens its scope: it replaces the two ECU 50 000 thresholds by a single ECU 100 000 threshold, and removes all restrictions on the combination of *de minimis* aid with other aid notified to and approved by the Commission.

Code on aid to the synthetic fibres industry (OJ C 94, 30.3.1996, p. 11)

This Code is to apply for three years from 1 April 1996; it seeks to refine the control of State aid by allowing the Commission to take account of a shortage or a surplus of the product on the relevant market and by requiring the Member States to notify all planned aid, except aid under authorized schemes for vocational training or retraining, environmental protection, or R&D.

Community guidelines on State aid for small and medium -sized enterprises (OJ C 213, 23.7.1996, p. 4)

These guidelines amend or clarify a number of points in the assessment of the compatibility of aid to SMEs with the common market, notably in respect of intangible investment in the form of transfers of technology, which will now receive the same sympathetic treatment as tangible investment. The new guidelines replace those published in 1992.

2. Information on European competition policy

The European Commission's Directorate-General for Competition Policy ("DG IV") provides public access to information on European competition policy via Europa, the European Union's World Wide Web server (site: <http://europa.eu.int>). Europa contains information on the activities of the Union's institutions, and DG IV's homepages may be accessed through the section on "policies", under "competition" and "European Commission".

DG IV's homepages contain information on the main aspects of competition policy, namely antitrust, mergers, liberalization, state aid and international aspects. Under each of these headings, the user can find sections containing press releases published in the previous two weeks, acts published in the Official Journal in the previous month, the full texts of current legislative provisions and a list, with references, of Commission decisions and of judgments delivered by the Court of Justice and the Court of First Instance.

Separate sections set out speeches given and articles published by the Commission Member with special responsibility for competition policy and the Director-General and staff of DG IV; previous issues of the *EC Competition Policy Newsletter*; the annual *Reports on Competition Policy*; an updated list of Community publications on competition available to the public; plus other documents of interest, links with the websites of other national and international competition authorities, etc.

European Commission

Competition law in the European Communities
Volume IIB: Explanation of the rules applicable to State aid

Luxembourg : Office for Official Publications of the European Communities

1997 - 48 pp. - 16,2 x 22,9 cm

ISBN 92-827-9664-7

Price (excluding VAT) in Luxembourg: ECU